

**Update to the Regulations Implementing the Procedural Provisions
of the National Environmental Policy Act
Final Rule Response to Comments
RIN 0331-AA03
Council on Environmental Quality
June 30, 2020**

This “Final Rule Response to Comments” document, together with the preamble to the final rule titled, “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,” presents the responses of the Council on Environmental Quality (CEQ) to the public comments received on the January 10, 2020, notice of proposed rulemaking¹ (NPRM). CEQ has responded to all substantive issues raised in the public comments.

Many of the comments overlap in various respects. To avoid redundancy, CEQ incorporates by reference all of its responses below, to the extent relevant, to any individual comment response. At certain points, CEQ incorporates by reference other specific comment responses. The fact that a specific comment response is incorporated does not prejudice the general incorporation by reference noted in the previous sentences.

Citation of any case in these comments or in the preamble of the final rule is not intended to endorse the entirety of the analysis in any case. Any given case may include application of the 1978 regulations in ways that the new regulations eliminate or modify.

¹ 85 FR 1684 (Jan. 10, 2020).

Table of Contents

A.	General Comments Regarding the Proposed Rule.....	1
B.	Comments Regarding Changes Throughout Parts 1500–1508.....	38
1.	Addition of “Tribal” Throughout the Rule	40
2.	Changes from Possible to Practicable.....	45
3.	Grammatical Changes	49
4.	Other Changes Recommended Throughout the Rules.....	49
C.	Comments Regarding the Purpose, Policy, and Mandate (Part 1500).....	53
1.	Purpose and Policy (§ 1500.1).....	53
2.	Policy Removed and Reserved (§ 1500.2).....	65
3.	NEPA Compliance (§ 1500.3)	67
i.	Exhaustion.....	67
ii.	Judicial Review.....	78
iii.	Severability	83
4.	Reducing Paperwork and Delay (§§ 1500.4 and 1500.5).....	84
5.	Agency Authority (§ 1500.6).....	85
D.	Comments Regarding NEPA and Agency Planning (Part 1501).....	86
1.	NEPA Thresholds (§ 1501.1).....	86
2.	Apply NEPA Early in the Process (§ 1501.2).....	99
3.	Determine the Appropriate Level of NEPA Review (§ 1501.3).....	104
4.	Categorical Exclusions (CEs) (§ 1501.4).....	126
5.	Environmental Assessments (EAs) (§ 1501.5).....	138
6.	Findings of No Significant Impact (FONSIs) (§ 1501.6).....	151
7.	Lead and Cooperating Agencies (§§ 1501.7 and 1501.8).....	158
8.	Scoping (§ 1501.9).....	186
9.	Time Limits (§ 1501.10).....	200
10.	Tiering (§ 1501.11).....	204
11.	Incorporation by Reference (§ 1501.12).....	214
E.	Comments Regarding Environmental Impact Statements (EISs) (Part 1502).....	219
1.	Purpose of environmental impact statement (§ 1502.1)	219

2.	Implementation (§ 1502.2).....	221
3.	Major Federal Actions Requiring the Preparation of Environmental Impact Statements (§ 1502.4).....	222
4.	Timing (§ 1502.5).....	227
5.	Page Limits (§ 1502.7).....	228
6.	Draft, Final and Supplemental Statements (§ 1502.9).....	230
7.	Recommended Format (§ 1502.10).....	243
8.	Cover (§ 1502.11).....	248
9.	Summary (§ 1502.12).....	253
10.	Purpose and Need (§ 1502.13).....	254
11.	Alternatives Including the Proposed Action (§ 1502.14).....	265
12.	Affected Environment (§ 1502.15).....	274
13.	Environmental Consequences (§ 1502.16).....	278
14.	Submitted Alternatives, Information, and Analyses (§ 1502.17).....	291
15.	List of Preparers (§ 1502.18).....	298
16.	Appendix (§ 1502.19).....	298
17.	Publication of the environmental impact statement (§ 1502.20).....	298
18.	Incomplete or Unavailable Information (§ 1502.21).....	299
19.	Cost-Benefit Analysis (§ 1502.22).....	310
20.	Methodology and Scientific Accuracy (§ 1502.23).....	312
21.	Environmental review and consultation requirements (§ 1502.24).....	319
F.	Comments Regarding Commenting on Environmental Impact Statements (Part 1503)....	321
1.	Inviting Comments and Requesting Information and Analyses (§ 1503.1).....	321
2.	Duty to Comment (§ 1503.2).....	325
3.	Specificity of Comments and Information (§ 1503.3).....	326
4.	Response to Comments (§ 1503.4).....	331
G.	Comments Regarding Pre-Decisional Referrals to the Council of Proposed Federal Actions Determined to Be Environmentally Unsatisfactory (Part 1504).....	335
1.	Purpose (§ 1504.1).....	337
2.	Criteria for Referral (§ 1504.2).....	338

3.	Procedure for Referrals and Response (§ 1504.3)	339
H.	Comments Regarding NEPA and Agency Decision Making (Part 1505)	343
1.	Remove and Reserve Agency Decisionmaking Procedures (§ 1505.1)	343
2.	Record of Decision in Cases Requiring Environmental Impact Statements (§ 1505.2).	343
3.	Implementing the Decision (§ 1505.3)	350
I.	Comments Regarding Other Requirements of NEPA (Part 1506)	353
1.	Limitations on Actions during NEPA Process (§ 1506.1)	353
2.	Elimination of Duplication with State, Tribal, and Local Procedures (§ 1506.2)	363
3.	Adoption (§ 1506.3)	366
4.	Combining Documents (§ 1506.4)	379
5.	Agency Responsibility for Environmental Documents (§ 1506.5)	386
6.	Public Involvement (§ 1506.6)	393
7.	Further Guidance (§ 1506.7)	407
8.	Proposals for Legislation (§ 1506.8)	407
9.	Proposals for Regulations (§ 1506.9)	410
10.	Filing Requirements (§ 1506.10)	413
11.	Timing of Agency Action (§ 1506.11)	413
12.	Emergencies (§ 1506.12)	416
13.	Effective Date (§ 1506.13)	420
J.	Comments Regarding Agency Compliance (Part 1507)	423
1.	Compliance (§ 1507.1)	423
2.	Agency Capability to Comply (§ 1507.2)	423
3.	Agency NEPA Procedures (§ 1507.3)	429
4.	Agency NEPA Program Information (§ 1507.4)	455
K.	Comments Regarding Definitions (Part 1508)	459
1.	Definition of Affecting (§ 1508.1(b))	459
2.	Definition of Authorization (§ 1508.1(c))	461
3.	Definition of Categorical Exclusion (§ 1508.1(d))	462
4.	Definition of Cooperating Agency (§ 1508.1(e))	463
5.	Definition of Effects (§ 1508.1(g))	463

i.	“But for” Causation.....	471
ii.	Indirect Effects.....	479
iii.	Climate Change.....	480
iv.	Segmentation.....	482
v.	Other Comments on Effects.....	483
6.	Definition of Environmental Document (§ 1508.1(i)).....	487
7.	Definition of Federal Agency (§ 1508.1(k)).....	488
8.	Definition of Human Environment (§ 1508.1(m)).....	490
9.	Definition of Jurisdiction by Law (§ 1508.1(n)).....	495
10.	Definition of Major Federal Action (§ 1508.1(q)).....	495
11.	Definition of Mitigation (§ 1508.1(s)).....	556
12.	Definition of Page (§ 1508.1(v)).....	561
13.	Definition of Participating Agency (§ 1508.1(w)).....	561
14.	Definition of Proposal (§ 1508.1(x)).....	562
15.	Definition of Publish and Publication (§ 1508.1(y)).....	563
16.	Reasonable Alternative (§ 1508.1(z)).....	564
17.	Reasonably Foreseeable (§ 1508.1(aa)).....	568
18.	Referring Agency (§ 1508.1(bb)).....	572
19.	Special Expertise (§ 1508.1(ee)).....	573
L.	Comments Regarding CEQ Guidance Documents.....	573
M.	Comments Outside the Scope of the Rulemaking.....	580
N.	Comments Regarding the Rulemaking Process.....	588
O.	Requests for Extension of the Comment Period.....	594

A. General Comments Regarding the Proposed Rule

Comment: Many commenters expressed their support for CEQ's proposal to modernize its National Environmental Policy Act (NEPA) regulations. Commenters stated that the proposal not only would provide for the first comprehensive update to the regulations in over 40 years, but also would provide for an efficient, effective, and timely environmental review and NEPA process. They stated that the proposal would enhance America's economic competitiveness, create jobs, cut red tape, improve the quality of life for Americans, and promote public health and safety, and the environment. They stated that, as the cost and taxpayer expense to comply with NEPA has grown, so too has the need for building, operating, and maintaining critical infrastructure, as well as pursuing a wide variety of other important projects for the public good.

Commenters discussed specific benefits related to the efficient deployment of an array of projects and activities, including the following: broadband and next-generation communications services; water supply and delivery infrastructure, and hydropower projects; stewardship of fish and wildlife resources, and mining minerals essential to traditional, new, and renewable energy technologies. They also discussed the benefits to public transit and public works projects, investment in infrastructure, such as roads, bridges, and railroads, the development of new renewable and cleaner sources of energy, traditional energy projects, habitat restoration projects, forest health and management, the U.S. commercial space industry, conservation measures, construction, manufacturing, and homebuilding. They also discussed benefits to family farmers, ranchers, cattle producers, timber harvesters, landowners, and small businesses. Additionally, commenters stated that CEQ's NEPA modernization proposal assures that environmental concerns are thoroughly examined and addressed. Commenters further stated that the proposal supports economic growth and would improve quality of life. Commenters also expressed that

the proposed changes would help reduce unnecessary NEPA-related litigation and provide more consistent outcomes.

CEQ Response: CEQ acknowledges the support for its proposal. The final rule will modernize the CEQ regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies. The final rule will clarify regulatory requirements, codify certain guidance and case law relevant to the final regulations, revise the regulations to reflect current technologies and agency practices, eliminate obsolete provisions, and improve general readability. A timely process that is focused on significant environmental impacts will benefit not only our economy but also our environment, resulting in less congested roadways, sustainable infrastructure, and large-scale habitat restoration.

Comment: Several commenters expressed support for specific changes including CEQ's efforts to clarify terms, including provisions relating to effects, major Federal action, and reasonable alternatives, as well as clarify the application, and scope of the NEPA process; provisions enhancing coordination with States, Tribes, and localities; provisions related to the Administration's One Federal Decision (OFD) policy and Executive Order (E.O.) 13807, titled "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects;"² provisions on categorical exclusions (CE), environmental assessments (EA), environmental impact statements (EIS), records of decision (ROD), and findings of no significant impacts (FONSI); provisions that limit a NEPA analysis to what is within an agency's regulatory and jurisdictional authority; provisions that codify and reflect case law and agency best practices; provisions related to incorporating the expertise and perspective

² 82 FR 40463 (Aug. 24, 2017).

of local governments into the NEPA process; provisions establishing presumptive time limits of two years for an EIS and one year for an EA; revisions to allow for the use of functionally compliant documents and processes; updates to reflect technological changes; and provisions to ensure more concise, readable documents that enhance transparent decision making and public participation.

Some commenters also stated that the policy rationale that CEQ has articulated in connection with the proposed rule is consistent with the underlying policy rationale of the 1978 regulations. These commenters pointed to *Andrus v. Sierra Club*, 442 U.S. 347 (1979), in which the Supreme Court upheld CEQ's change in position between its 1970 advisory guidelines and 1978 regulations regarding the application of section 102(2)(C) of NEPA to appropriation requests. Commenters stated that CEQ's proposed rulemaking has involved a similar comprehensive and detailed process.

CEQ Response: In this final rule, CEQ revises its regulations consistent with the OFD policy established by E.O. 13807, including development by the lead agency of a joint schedule, procedures to elevate delays or disputes, preparation of a single EIS and a joint ROD, and a two-year presumptive time limit for completion of environmental reviews. In the final rule, CEQ provides direction regarding threshold considerations as to whether NEPA applies to a particular action, clarifications to the terms "effects" and "major Federal action," and adds a definition for the term "reasonable alternatives." CEQ includes provisions in its final rule to modernize, simplify, and accelerate the NEPA process, including through the establishment of presumptive time limits of two years for EISs and one year for EAs. In addition, after *Andrus*, the Supreme Court decided *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), where the Court held that changed agency interpretations control under *Chevron* even over prior

appellate court precedent that is not premised on step one of *Chevron*, so as to avoid the ossification of statutory law.³ For further discussion of the policy rationale and processes relevant to this rulemaking, see sections I and II of the final rule.⁴

Comment: Many commenters were opposed to CEQ's rulemaking for a variety of reasons, stating that the rule will result in more air and water pollution, exacerbate climate change, harm public health, silence the American public, empower corporations, or jeopardize the future environment. Further, commenters stated that the proposal would be detrimental to current and future generations of Americans because it would undermine their ability to breathe clean air, drink clean water, and protect the Nation's public lands and natural resources. A number of commenters requested that CEQ withdraw its proposal and retain the current NEPA regulations because the current regulations effectively and properly implement NEPA. Some commenters requested that CEQ withdraw the entire proposal, with the exception of adding Tribes to references to State and local governments.

CEQ Response: Nothing in the final rule changes any requirements under substantive environmental laws, such as the Clean Air Act, Clean Water Act, or ESA, which Congress has enacted as a substantive matter to protect the environment and public health in the United States. CEQ has not comprehensively updated its NEPA regulations since their promulgation in 1978, more than four decades ago. Notwithstanding the issuance of guidance, presidential directives,

³ *Brand X.*, 545 U.S. at 982 (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself.”)

⁴ In this Final Rule Response to Comments document, CEQ refers to sections I and II when referencing sections I and II of the preamble of CEQ's final rule, “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act.”

and legislation, the implementation of NEPA and the CEQ regulations can be challenging, lengthy, costly, and complex. In some cases, the NEPA process and related litigation have slowed or prevented the development of new infrastructure and other important projects. The final rule builds on past, bipartisan efforts to make the permitting process under NEPA more efficient.

The final rule substantially expands opportunities for public participation. It requires agencies to provide more information to and solicit input from the public earlier in the process. The final rule also codifies expedited procedures and the OFD policy to promote interagency coordination and more timely and efficient reviews. The final rule reduces unnecessary paperwork and delays, and promotes better decision making consistent with NEPA's statutory requirements, which the Supreme Court has stated are essentially procedural. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558. The final rule reflects CEQ's consideration of the public comments received on its June 20, 2018, advanced notice of proposed rulemaking (ANPRM)⁵ and the NPRM. Many commenters noted that overly lengthy documents and the time required for the NEPA process remain legitimate concerns despite the NEPA regulations' explicit direction to reduce paperwork and delays. The final rule will advance the original goals of NEPA and promote better decision making.

Comment: Commenters stated that CEQ has not rationally justified the proposed rule because there is not sufficient data or analysis to support a comprehensive revision. Commenters stated that CEQ incorrectly concludes that the 1997 NEPA Effectiveness Study, other reports,

⁵ 83 FR 28591 (June 20, 2018).

and the provisions of E.O. 13807 and the subsequent 2018 OFD memorandum⁶ supports the proposed rule's sweeping changes. Commenters stated that CEQ has not adequately evaluated the ability of the 1978 regulations and available tools to address concerns about NEPA's implementation.

CEQ Response: Existing sources of data are sufficient to support CEQ's rationale in updating the 1978 regulations. As stated in the preamble to the NPRM, in January 1997, CEQ issued a report, "The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years,"⁷ in which CEQ identified matters of concern to participants in the study. These concerns included overly lengthy documents that may not enhance or improve decision making, the increase in costs and time but not necessarily quality when agencies seek to "litigation proof" their documents, the extensive detail of NEPA analyses, and the sometimes confusing overlay of other laws and regulations."⁸ In 2003, a NEPA task force composed of Federal agency officials, which the Chairman of CEQ established, issued a report⁹ and recommendations to improve and modernize the NEPA process, that led to additional guidance documents and handbooks.

Over the ensuing decades since the NEPA regulations were issued, CEQ has issued over 30 documents to provide guidance and clarifications to assist Federal agencies to implement

⁶ Memorandum of Understanding Implementing One Federal Decision under Executive Order 13807 (2018) ("OFD MOU"), <https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf>.

⁷ <https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf>.

⁸ *Id.*

⁹ *See* The NEPA Task Force Report to the Council on Environmental Quality, Modernizing NEPA Implementation (Sept. 2003) ("NEPA Task Force Report"), <https://ceq.doe.gov/docs/ceq-publications/report/finalreport.pdf>.

NEPA more efficiently and effectively. Despite CEQ guidance and regulations providing for concise, timely documents, the documentation and timelines for completing environmental reviews can be very lengthy, and the process can be complex and costly. In 2018, CEQ and Office of Management and Budget (OMB) issued a memorandum titled “One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects under Executive Order 13807” (OFD Framework Guidance).¹⁰ CEQ and OMB issued this guidance pursuant to E.O. 13807 to improve agency coordination for infrastructure projects requiring an EIS and permits or other authorizations from multiple agencies and to improve the timeliness of the environmental review process. Consistent with the OFD Framework Guidance, Federal agencies signed a memorandum of understanding (MOU) committing to implement the OFD policy for major infrastructure projects, including by committing to establishing a joint schedule for such projects, preparation of a single EIS and joint ROD, elevation of delays and dispute resolution, and setting a goal of completing environmental reviews for such projects within two years.¹¹

Comment: Commenters opposing CEQ’s proposal stated that it negates the intent of NEPA in that agencies will no longer have to look before they leap, undermining the very idea of impact analysis. Commenters also stated that the proposal removes the concept of balancing the management of project development with the cultural and natural environment specifically as it relates to the manner in which Federal agencies assess effects to cultural resources. Other commenters stated that the overall effect of the rule is the weakening of both environmental

¹⁰ M-18-13 (Mar. 20, 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/04/M-18-13.pdf>.

¹¹ OFD MOU, *supra* note 6.

review standards, and proper mitigation of the environmental impacts of Federal projects. Specifically, commenters suggested there will be catastrophic impacts on birds, wildlands, and marine species and their habitats and the economies that depend on them, because of eliminating indirect and cumulative effects, limiting the range of alternatives, undermining sound science and circumventing scientific analysis, and expanding CEs. Commenters also argued that weakening environmental review, which they see the NPRM as accomplishing, would have economic impacts as well, because infrastructure that is not built to be resilient to climate change results in additional costs for the taxpayer.

CEQ Response: For reasons including but not limited to those summarized in the appendix to the Regulatory Impact Analysis for the Final Rule, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act¹² (“RIA Appendix”), the final rule will not have adverse environmental impacts. CEQ’s final rule requires agencies to consider all reasonably foreseeable effects of a proposed action that have a reasonably close causal relationship to the proposed action. The final rule does not eliminate consideration of any particular impacts. Further, NEPA is a procedural statute, and the final rule does not change the duty of any Federal agency to comply with all of the substantive requirements that apply under laws passed by Congress to protect the environment and the American people. CEQ expects that improvements to the NEPA process made by the final rule will promote more informed decision making and the development of modern and resilient infrastructure.

¹² The Regulatory Impact Analysis for the Final Rule, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act is available under “Supporting Documents” in the docket on www.regulations.gov under docket ID CEQ–2019–0003.

Comment: Commenters stated that CEQ's proposed changes would not enhance the efficiency or timeliness of the NEPA process, but rather create confusion among agencies, project proponents, and the public, and lead to increased litigation, increased project costs, and delayed projects.

CEQ Response: CEQ's final rule will modernize the CEQ regulations to facilitate more efficient, effective, and timely NEPA reviews by simplifying and clarifying regulatory requirements, incorporating key elements of the OFD policy, codifying certain case law and CEQ guidance, updating the regulations to reflect current technologies and agency practices, eliminating obsolete provisions, and improving the format and readability of the regulations. These revisions are expected to reduce litigation and project costs and delays.

Comment: Commenters recommended that CEQ reject the majority of the proposed changes because countless countries have adopted NEPA as an international model for environmental protection and the United States would no longer be a world leader in environmental protection.

CEQ Response: The United States is and will continue to be a global leader in environmental protection. The final rule modernizes the implementation of NEPA to make the process of gathering and documenting information on environmental impacts more efficient, effective, and timely while maintaining robust analysis to inform decision making.

Comment: A number of commenters suggested that CEQ's proposal undermines their States' ability to protect and preserve historic, archaeological, and cultural resources. Some commenters stated that the final rule would threaten the interests of States in protecting their residents and environmental resources through public participation and robust, informed decision-making processes for Federal projects under NEPA.

CEQ Response: NEPA is a procedural statute and does not affect the applicability or requirements of other Federal, State, Tribal, and local laws that relate to environmental, historic, or other matters, including the National Historic Preservation Act. CEQ’s final rule will reduce duplication by facilitating the use of documents required by other statutes or prepared by State, Tribal, and local agencies to comply with NEPA. Additionally, under the final rule, an “effect” for purposes of NEPA review can be aesthetic, historic, or cultural provided it otherwise satisfies the applicable definition. In this final rule, CEQ has made changes to facilitate the use of existing studies, analyses, and environmental documents prepared by States, Tribes, and local governments.

Comment: Commenters asserted that CEQ did not adequately document or analyze the cause of alleged excessive permitting delays and the complexity of NEPA reviews. Some commenters noted that, while they support the proposed changes to CEQ’s regulations, it is individual agency policy and practice in conjunction with case law that has led to lengthy and costly NEPA analyses, not CEQ’s regulations. Commenters also noted that inconsistency of application of the regulations among agencies, through various handbooks, manuals, and policy decisions leads to an unpredictable process.

CEQ Response: While many factors can affect the timeline and length of an EIS, CEQ has concluded that revisions to the CEQ regulations to advance more timely reviews and reduce unnecessary paperwork are warranted. CEQ has found that the average length of a final EIS is over 600 pages, and that the average timeline for Federal agencies to conduct these reviews is 4 and a half years and some reviews take much longer. NEPA analyses are frequently challenged in courts, and litigation can unnecessarily delay and increase costs for important projects. The increased costs and complexity of NEPA reviews and litigation make it very challenging for

large and small businesses to plan, finance, and build projects in the United States. The final rule has a number of provisions that will promote consistent implementation of NEPA among Federal agencies. In particular, § 1507.3(b)¹³ provides that, except for agency efficiency or as otherwise required by law, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in the CEQ regulations. Lastly, CEQ notes that the outdated 1978 regulations, which are challenging to navigate and have confusing definitions and provisions, have resulted in inconsistencies in agency practice and have generated extensive litigation, which has been a key element in driving lengthy and costly NEPA analyses.

Comment: One commenter recommended that CEQ provide clear and consistent incentives for improving NEPA compliance practice. In addition, a commenter opined that many opportunities exist for CEQ and Federal agency leadership to develop guidance and training to prioritize impact avoidance and, when this is not possible, to facilitate creative consideration of broad ranges of mitigation approaches, alternatives, and practices, including off-site and compensatory mitigation. Commenters further stated that the adopted regulations, official NEPA guidance, and federally sponsored training should incorporate and build upon best available recommended practice guidance and other principles and materials, as well as the “Polluter Pays” principle, and the public trust doctrine.

CEQ Response: CEQ will develop guidance, as needed, and training to facilitate consistent government-wide implementation of the modernized regulations. However, modernizing the 1978 regulations should be the first step to provide additional clarity and

¹³ In this Final Rule Response to Comments document, CEQ uses the section symbol (§) to refer to the final regulations as set forth in this final rule and 40 CFR to refer to the 1978 CEQ regulations as set forth in 40 CFR parts 1500–1508.

direction to Federal agencies, not the last. For commenters to recommend guidance be issued rather than revisions to the over 40-year-old regulations is contrary to basic principles of administrative law. As E.O. 13891 titled “Promoting the Rule of Law Through Improved Agency Guidance Documents” states, “Americans [should be] subject to only those binding rules imposed through duly enacted statutes or through regulations lawfully promulgated under them, and that Americans have fair notice of their obligations.”¹⁴

Additionally, NEPA is essentially a procedural statute, and does not require impact avoidance, but decision makers can use NEPA review processes to facilitate their efforts to avoid and mitigate significant impacts of their decisions, which in some instances should have the consequence of lessening NEPA review obligations. As described in more detail in section II.J, the final rule makes a number of changes to clarify the term “mitigation” including clarifying that mitigation measures must be designed to mitigate the effects of the proposed action or alternatives. In addition, the final rule clarifies that NEPA does not require adoption of any particular mitigation measures, consistent with *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352–53 (1989); however, it recognizes that different types of mitigation may be effective. The final rule also makes clear that mitigation must have a nexus to the effects of the proposed action, is limited to those actions that have an effect on the environment, and does not include actions that do not have an effect on the environment.

The “Polluter Pays” principle and public trust doctrine are outside the scope of NEPA and this rulemaking, and therefore CEQ declines commenter’s suggestion.

¹⁴ 84 FR 55235 (Oct. 15, 2019).

Comment: Several commenters argued that litigation under NEPA is rare. They also argued that NEPA is often not the sole cause of delay for important infrastructure projects.

CEQ Response: While not all EAs and EISs are challenged, NEPA is the most litigated environmental statute.¹⁵ Trial and appellate courts issue approximately 100 to 140 decisions each year interpreting NEPA. Although Federal agencies ultimately prevail, in many cases litigation can unnecessarily delay and increase costs for important projects such as needed transportation, water, and other important infrastructure that benefit States, Tribes, and local communities. Commenters have noted that the development of infrastructure depends on the existence of predictable and reasonably expeditious schedules for review. Additionally, as several commenters stated, infrastructure projects that are subject to unnecessary delays include those that could promote the development and use of safer, cleaner, and more sustainable forms of energy. While other factors may affect the timing of the reviews for projects, any delay attributable to NEPA contributes to overall delays in the decision-making process.

Comment: Commenters stated that CEQ lacks authority to restrict agency procedures under NEPA or to promulgate any regulations to implement NEPA.

CEQ Response: As the Supreme Court recognized in *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004), “[t]he Council [on] Environmental Quality (CEQ) [was] established by NEPA with authority to issue regulations interpreting it, [and] has promulgated regulations to guide [F]ederal agencies in determining what actions are subject to that statutory requirement.”

See also Methow Valley, 490 U.S. at 351 (noting that the “requirement” that an EIS include a

¹⁵ James E. Salzman and Barton H. Thompson, Jr., *Environmental Law and Policy* 340 (5th ed. 2019) (“Perhaps surprisingly, there have been thousands of NEPA suits. It might seem strange that NEPA’s seemingly innocuous requirement of preparing an EIS has led to more lawsuits than any other environmental statute.”).

specific discussion “flows both from the language of the Act and, more expressly, from CEQ’s implementing regulations”). Since early in the statute’s history, courts have recognized CEQ’s authority to administer NEPA. *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1309–10 (1974) (Douglas, J. Circuit Justice 1974). The President directed CEQ in E.O. 11991, titled “Relating to Protection and Enhancement of Environmental Quality,”¹⁶ which amended section 3(h) of E.O. 11514, titled “Protection and Enhancement of Environmental Quality,”¹⁷ to issue regulations to Federal agencies to implement the procedural provisions of NEPA. The President further directed CEQ in E.O. 13807¹⁸ to use its authority to interpret NEPA to simplify and accelerate the NEPA review process. E.O. 13807, sec. 5(e)(i)(D). It is illogical for commenters to take the position that CEQ possessed the authority in 1978 to issue regulations binding other agencies, but no longer retains the authority to do so and thus must leave the 1978 regulatory approach in place.

Agencies have broad authority to revise their regulations, provided that they give a sufficient justification for doing so. *See Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016). In 1989, the Supreme Court upheld CEQ’s revision of its NEPA implementing regulations in *Methow Valley*, noting that the relevant amendment had a “well-considered basis.” 490 U.S. at 356. In that same case, the Supreme Court also recognized that CEQ’s regulations under NEPA are entitled to “substantial deference.” *Methow Valley*, 490 U.S. at 374 (citing *Andrus*, 442 U.S. at 355).

¹⁶ 42 FR 26967 (May 25, 1977).

¹⁷ 35 FR 4247 (Mar. 7, 1970).

¹⁸ *Supra* note 2.

In addition, CEQ's authority to require government-wide compliance with its regulations has been clear since CEQ first promulgated regulations to implement the statute. *See* 40 CFR 1507.3(b) ("Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements . . ."); E.O. 11991, sec. 2 amending E.O. 11514, sec. 2 (adding a new paragraph (g) requiring Federal agencies to comply with the regulations issued by CEQ, except where it would be inconsistent with statutory requirements).

Comment: One commenter proposed a series of questions CEQ should ask itself before considering changes to its regulations, including whether or not the proposed changes would encourage productive and enjoyable harmony between people and the environment.

CEQ Response: CEQ acknowledges this comment and has concluded that the proposed rule, as modified in the final rule, will advance the original goals of the NEPA regulations while providing for a more efficient, timely, and effective environmental review process.

Comment: Some commenters expressed support for the rulemaking by noting that the NEPA process can be time consuming, citing to CEQ's own finding that the average EIS duration is four-and-a-half years. Commenters noted that while most projects do not require an EIS, those that do can experience delays that result in additional costs.

CEQ Response: CEQ acknowledges the support for the rulemaking and notes that it has updated its EIS Timelines Report, which originally covered EISs prepared in the period of 2010–2017, to include EISs completed in 2018.

Comment: Commenters noted that duplicative environmental reviews can result in wasted time and resources, negatively affecting an agency's ability to study the most significant effects of a proposed action. Commenters also noted that some NEPA reviews become overly expansive by incorporating information that is not truly informative of the environmental

impacts associated with the action. Commenters stated that this can lead to unnecessarily lengthy and detailed analyses of all possible issues, rather than an analysis focused on the significant issues. Some commenters strongly supported CEQ's proposal to update its procedures, noting that improved transparency and predictability to Federal approval processes is critical for many vital projects. Commenters also described numerous examples of how CEQ's proposed rule would benefit the economy.

CEQ Response: The final rule includes a number of provisions aimed at reducing duplication and ensuring NEPA documents are focused on significant environmental impacts. CEQ also notes that the final rule assists agencies in managing limited resources by improving interagency coordination, making the development of NEPA documents more efficient, and facilitating the implementation of the OFD policy (*see, e.g.*, changes to §§ 1501.7 and 1501.8 relating to lead agencies and cooperating agencies).

Comment: Commenters noted that EISs for certain types of projects can often be more than 600 pages long according to CEQ's own findings. Commenters attributed the length of these EISs to agency drafters adding extraneous analyses and legalese in anticipation of legal challenges. Commenters noted that the adoption of numerous environmental laws subsequent to NEPA has provided a modern regulatory regime that renders many NEPA reviews excessive. Commenters discussed "NEPA fatigue" and the challenge of keeping up with the NEPA machine, which produces large documents and includes multiple evening public meetings in small communities.

CEQ Response: CEQ acknowledges the comments and recognizes that environmental reviews and documentation can be lengthy. CEQ notes that it has updated its report on the

length of EISs, which originally covered EISs prepared in the period of 2013–2017, to include EISs completed in 2018.

Comment: Commenters noted that litigation over the sufficiency of NEPA reviews consumes public and private resources, can delay the construction, maintenance, and operation of projects, and leads to uncertainty for communities and project developers. Commenters also noted that, in response to perceived litigation risks, agencies attempt to anticipate every possible legal objection that could be raised, however insignificant and however detached from the original intent of NEPA and its implementing regulations, rather than to inform the agency or the public of truly relevant information. Commenters noted that Federal district and appellate courts issue an average of 100 to 140 decisions annually on NEPA-related claims.

CEQ Response: CEQ acknowledges the comment. As noted above, Federal agencies ultimately prevail in many cases; however, litigation can unnecessarily delay and increase costs for important projects such as needed transportation, water, and other important infrastructure that benefits States, Tribes, and local communities.

Comment: Some commenters noted that the existing environmental review process generates disincentives for coordination among Federal agencies, resulting in limited accountability and delayed analyses.

CEQ Response: CEQ acknowledges the comments and notes that the final rule updates various provisions to improve coordination among agencies.

Comment: Some commenters noted that the current NEPA regulations are vague, unclear, poorly written, and create the opportunity for litigation.

CEQ Response: CEQ acknowledges the commenters' concerns and notes that the final rule makes a number of revisions to improve the NEPA regulations, including revisions to clarify the process and documentation required to comply with NEPA.

Comment: Commenters noted that the uncertainty and delay during the project permitting process can lead to millions of dollars in increased financing costs. Other commenters stated the cost of delay from permitting and review is nearly \$3.7 trillion, citing Howard, P.K., *Two Years Not Ten Years: Redesigning Infrastructure Approvals* (2015).¹⁹ Commenters also expressed their support for presumptive two-year time limits.

CEQ Response: CEQ acknowledges the comments and notes that its updated regulations include a two-year presumptive time limit for EISs and a one-year presumptive time limit for EAs.

Comment: Commenters stated that a major issue negatively impacting the efficiency of NEPA is the outdated nature of Executive orders governing the use of off-highway motor vehicles on public lands citing E.O. 11644²⁰ and E.O. 11989.²¹

CEQ Response: NEPA is a procedural statute that does not address any particular area of substantive policy. It is intended solely to facilitate gathering and documenting specific, timely, and relevant information for purposes of decision making by Federal agencies where their actions may significantly affect the quality of the human environment. CEQ cannot revise or revoke a presidential Executive order.

¹⁹<https://static1.squarespace.com/static/5db4d0each29b173254203d2/t/5ee3a6f2072df850bd9a0aa3/1591977716039/2YearsNot10Years.pdf>.

²⁰ "Use of Off-Road Vehicles on the Public Lands," 37 FR 2877 (Feb. 9, 1972).

²¹ "Off-road Vehicles on Public Lands," 42 FR 26959 (May 25, 1977).

Comment: Some commenters disagreed with the premise that the existing CEQ NEPA regulations are difficult to navigate, noting that they have been cited as some of the best in government.

CEQ Response: CEQ evaluated the implementation of the existing regulations and determined that its regulations needed to be modernized and updated. In the final rule, as discussed in detail in section II, CEQ made a number of changes for easier navigation, including by reorganizing regulatory text to move topics addressed in multiple parts into consolidated sections, moving operative requirements from the definitions to the relevant regulatory provisions, and consolidating provisions and reducing duplication.

Comment: Commenters stated that factors such as inadequate agency funding, public opposition, delays in obtaining other required (often non-Federal) permits, changes to proposals, and competing agency priorities often dictate the duration of NEPA reviews. These commenters recommended that because these multiple non-NEPA factors can cause delay, CEQ should base any regulatory reforms on empirical studies of and representative experience with NEPA procedures. Some commenters highlighted the fact that less than one percent of Federal actions require an EIS; instead, most actions are addressed through CEs or EAs.

CEQ Response: While there can be non-NEPA factors that influence the duration of NEPA reviews, CEQ has provided evidence in support of its rulemaking that demonstrates the NEPA process can be exceedingly long for those major projects with significant impacts, averaging four-and-a-half years in duration and over 600 pages in length, with some projects taking a decade or more to review. This affects a wide variety of projects from important transportation infrastructure projects to environmental restoration projects. As discussed in this final rule, CEQ makes a number of improvements to the NEPA process including procedures

governing environmental reviews involving multiple agencies. For example, the final rule requires the development of and adherence to a schedule for the environmental review and any authorizations required for a proposed action involving multiple agencies. The final rule also includes procedures for the resolution of interagency disputes and other issues that cause delays in the schedule.

Comment: Commenters urged CEQ to consider the findings of a 2016 study²² commissioned by the U.S. Department of Treasury that found there were many other factors that influence the timing of projects much more than compliance with NEPA, and any challenges that may exist concern agency implementation of the CEQ regulations rather than the regulations themselves. Commenters also noted that the report found that a lack of public funding is by far the most common factor hindering the completion of transportation and water infrastructure projects.

CEQ Response: The study prepared for the Department of Treasury examines 40 transportation and water infrastructure projects of major economic significance and identifies 4 primary challenges to completion, including extended program and project review and permitting processes. The study further states that while NEPA helps promote efforts to prevent or eliminate damage to the environment, it has also extended the schedule and generally increased the cost of implementing major infrastructure projects. Further, the study notes that Federal Highway Administration (FHWA) studies show that the average time to complete a NEPA review has increased over several decades from 2.2 years in the 1970s to 6.6 years in

²² AECOM *et. al.* prepared for the Dep't of Treas., 40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance (2016), <https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf>.

2011 and states that implementing process reforms is crucial to addressing extended reviews and permitting processes.²³ Process reforms are crucial for making the environmental review process more efficient and effective, particularly for large projects involving multiple agencies, and the final rule includes a number of provisions to improve interagency coordination and the process overall for those types of projects.

Comment: Some commenters questioned whether Federal agency staffing levels are sufficient to handle the current NEPA workload. Commenters urged CEQ to work to increase funding and training for staff across Federal agencies responsible for NEPA compliance, noting that this would result in increased efficiency and more effective NEPA reviews.

CEQ Response: CEQ acknowledges the comment, but notes that CEQ does not have a formal role in the development of agency budgets. The existing regulations contain a provision on agency capability to comply with NEPA (40 CFR 1507.2), and CEQ retains this provision with minor changes in the final rule. Further, CEQ anticipates the final rule will lower the costs of administering agencies' NEPA programs.

Comment: Commenters requested that CEQ clarify that State and local projects do not become subject to Federal laws and regulations until the project has been approved to receive Federal funds, rather than retroactive to past project phases.

CEQ Response: NEPA, by its own terms, applies only to major Federal actions.

Comment: Commenters stated that the proposed rule, if finalized, would likely be litigated in multiple courts, which would result in delays. Commenters stated that in addition to substantive issues in litigation, there are likely to be disputes regarding standing, ripeness,

²³ *Id.* at 6–7.

deference, retroactivity, and the relationship of current agency NEPA procedures to new CEQ regulations. Commenters who supported the proposed rule stated that the CEQ regulations should be entitled to deference and that putative litigants would have difficulty demonstrating standing. Some commenters urged CEQ to clarify in the final rule that, for the purpose of legal standing, it cannot adversely impact or aggrieve any potential party because the rule covers NEPA procedures.

CEQ Response: CEQ acknowledges that litigation on the final rule could occur and raise a variety of legal issues. CEQ has designed the final rule to withstand scrutiny. The Supreme Court has previously held that “CEQ’s interpretation of NEPA is entitled to substantial deference.” *Andrus*, 442 U.S. at 358; *see also Pub. Citizen*, 541 U.S. at 757 (“The [CEQ], established by NEPA with authority to issue regulations interpreting it, has promulgated regulations to guide [F]ederal agencies in determining what actions are subject to that statutory requirement.”) (citing 40 CFR 1500.3); *Methow Valley*, 490 U.S. at 355–56. Commenters correctly state that NEPA is procedural in nature, as the Supreme Court has held. *Pub. Citizen*, 541 U.S. at 756–57 (citing *Methow Valley*, 490 U.S. at 349–50); *see also Vt. Yankee*, 435 U.S. at 558.

Comment: One commenter stated that NEPA is consistent with the role of government to provide for the general welfare.

CEQ Response: CEQ agrees that the development of NEPA information is beneficial.

Comment: One commenter questioned the authority of officials holding “acting” titles across the Federal Government and particularly at the Department of the Interior (DOI).

CEQ Response: The Senate confirmed the Chairman of CEQ on January 2, 2019. To the extent the comment raises concerns about the authority of officials outside of CEQ, it is beyond the scope of this rulemaking.

Comment: One commenter stated that the proposed rule does not provide procedural fairness to the general public because of the complexity of the proposed rule.

CEQ Response: CEQ conducted extensive outreach to the public, including publication of the rule in the *Federal Register*, notification of the rulemaking to all federally recognized Tribes and over 400 interested stakeholders, two public hearings and other stakeholder outreach and engagements. In addition, CEQ made information available to aid the public's understanding of the proposed rule on its websites at www.whitehouse.gov/ceq and www.nepa.gov, including a redline version of the proposed changes, a fact sheet, a PowerPoint presentation on the proposed rule, instructions on how to comment, and other background information.

The 1978 regulations are challenging to navigate with related provisions scattered throughout, and include definitions and provisions that have led to confusion and generated extensive litigation. The final rule modernizes and clarifies the regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies by simplifying regulatory requirements, codifying certain guidance and case law relevant to the regulations, revising the regulations to reflect current technologies and agency practices, eliminating obsolete provisions, and improving the format and readability of the regulations.

Comment: Some commenters suggested adding language that requires NEPA documentation of significant noncompliance with other Federal land and resource management plans under the National Forest Management Act and how that noncompliance is resolved.

These commenters stated that readers of environmental documents could then assume the proposed action and alternatives comply with other Federal plans unless otherwise documented.

CEQ Response: CEQ declines to adopt the requested change because compliance with the National Forest Management Act is beyond the scope of this rulemaking. CEQ defers specific suggestions on program implementation to the respective Federal agency.

Comment: Commenters disputed the authority of CEQ to issue the proposed rule because it is not currently functioning as established by NEPA, 42 U.S.C. 4342. CEQ presently has only a single Chairman instead of three members whom the President appoints with the advice and consent of the Senate.

CEQ Response: The fact that CEQ currently is comprised of and led by one member, whom the President appointed, by and with the advice and consent of the Senate, and designated as Chairman, does not limit CEQ's authority to issue the final rule. Congress provided that the Council be comprised of three full-time Senate-confirmed Council members, one of whom the President designates as Chairman. *See* 42 U.S.C. 4342. Notwithstanding this statutory provision, Congress has included provisions in enacted appropriations legislation over the past two decades stating that the Council shall consist of one member, appointed by the President, by and with the advice and consent of the Senate, serving as Chairman and exercising all powers, functions, and duties of the Council. *See, e.g.,* Further Consolidated Appropriations Act, 2020, Pub. L. 116-94; Consolidated Appropriations Act, 2019, Pub. L. 116-6, 133 Stat. 13, 252; Consolidated Appropriations Act, 2018, Pub. L. 115-141, 132 Stat. 348, 681; Consolidated Appropriations Act, 2017, 115-31, 131 Stat. 135, 488. Prior appropriations acts have included similar provisions. 42 U.S.C. 4342, note (Council on Environmental Quality; Reduction in Members).

Comment: Commenters stated that Congress has modified NEPA during the past 40 years through legislation, authorizing CEs that now cover most agency actions and allowing agencies to focus on the most complex projects. Commenters stated that major revisions to NEPA such as those proposed by CEQ would be better left to Congress. Commenters stated that CEQ's attempt to override Congress by rewriting NEPA through the regulations exceeds CEQ's statutory authority.

CEQ Response: CEQ has not exceeded its statutory authority or usurped the role of Congress in its rulemaking. NEPA established CEQ as an agency within the Executive Office of the President and assigned it duties and functions related to environmental quality and administration of Federal agency implementation of NEPA. 42 U.S.C. 4332(2) (B), (C), and (I), 4342, (I). CEQ's final rule and, by extension, its ability to place limits on agency NEPA procedures, is grounded in the authority delegated to it by the President under E.O. 11991. E.O. 11991 directed CEQ to "[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA] . . . to make the environmental impact statement process more useful to decision[]makers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives," and to "require [environmental] impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses."²⁴ CEQ notes that most of the CEs available to agencies are established in procedures pursuant to CEQ's regulations and not the result of congressional authorization.

²⁴ *Supra* note 16.

Comment: One commenter stated that the proposed rule attempts to codify numerous Supreme Court decisions, raising concerns about the separation of powers between the executive and judicial branches of government.

CEQ Response: The final rule is consistent with Supreme Court case law and, in some instances, clarifies the meaning of the regulations where there is a lack of uniformity in judicial interpretation of NEPA and the CEQ regulations. Codification of language used in judicial opinions does not violate the separation of powers between the executive and judicial branches of government. In addition, the Supreme Court has recognized that CEQ's regulations under NEPA are entitled to "substantial deference." *Methow Valley*, 490 U.S. at 355–56 (citing *Andrus*, 442 U.S. at 358). This includes instances where CEQ modifies existing regulations, provided it gives a reasoned explanation for the change. Nothing precludes CEQ from adopting a change on the basis of a sound judicial decision, just as CEQ could adopt a change on the basis of an insightful public comment. Conversely, CEQ can adopt revised regulations notwithstanding prior judicial decisions that are not premised on *Chevron* step one reasoning. *See Brand X*, 545 U.S. at 982–83 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, & n.11 (1984)).

Comment: One commenter asked why the proposed rule is revoking E.O. 13690.

CEQ Response: The final rule does not and cannot revoke any Executive orders. E.O. 13807, issued on August 15, 2017, revoked E.O. 13690.

Comment: Commenters stated that CEQ's rulemaking is not in compliance with Administrative Procedure Act (APA) requirements because CEQ has not provided sufficient factual information and legal bases to facilitate effective public comment on the proposed rule. Commenters stated that CEQ has not adequately justified changes in policy.

CEQ Response: The APA requires CEQ to provide sufficient information in the NPRM to enable interested or affected parties to meaningfully comment on the proposed rule, and it has done so. *See, e.g., Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 921 F.3d 1102, 1115 (D.C. Cir. 2019) (“To meet the rulemaking requirements of section 553 of the APA, an agency must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.”). (internal quotation marks and citation omitted). CEQ has provided sufficient factual detail and rationale in the proposed rule. CEQ has provided additional clarifications and made changes to the final rule in response to comments on the proposed rule.

Comment: Commenters argued CEQ has acted “arbitrarily and capriciously” in issuing the proposed rule because CEQ failed to fully consider and respond to ANPRM comments. Commenters stated that CEQ should not proceed with the rulemaking without fully considering the multiple proposals submitted on the ANPRM and explain the reason any submitted proposals were not included in the NPRM.

CEQ Response: While not required under the APA, in June 2018, CEQ issued an ANPRM requesting comment on potential updates to its NEPA regulations. CEQ received over 12,500 comments in response to the ANPRM, and those comments informed the development of CEQ’s proposed rule. CEQ has not acted arbitrarily and capriciously because it did not respond to the ANPRM comments in the NPRM, as it is under no obligation to do so. Further, in the rule CEQ has responded to all substantive issues raised in the public comments on the NPRM, including substantive proposals that CEQ declined to include in the final rule.

Comment: One commenter stated that the proposed rule violates the Information Quality Act, which requires Federal agencies to ensure the quality, objectivity, utility, and integrity of information they disseminate, and asserted that CEQ does not provide sufficient background

information for its statements in the proposed rule. Another commenter stated that the final rule should retain the phrase “accurate scientific information” in 40 CFR 1500.1 because it is a requirement of the Information Quality Act.

CEQ Response: CEQ has provided sufficient factual detail and rationale in the proposed rule, and in response to comments on the proposed rule, CEQ has provided additional clarifications and made changes to the final rule. The Information Quality Act is an independent statute. Moreover, the final rule is consistent with the Information Quality Act²⁵ and subsequent guidance including M-19-15, Improving Implementation of the Information Quality Act (April 24, 2019)²⁶. Additionally, CEQ notes that the revised NEPA regulations are procedural, rather than technical, regulations.

Further, CEQ notes that methodology and scientific accuracy are addressed in § 1502.23 of the final rule, which requires agencies to “ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents.” It also requires agencies to identify any methodologies used and make “explicit reference” to the scientific and other sources relied upon for conclusions in the statement.

Comment: One commenter suggested that the proposed rule violates the duty, as articulated by the Trail Smelter Arbitral Decision, *United States v. Canada*, 3 U.N. Rep. Int’l Arb. Awards 1905 (1941), of any country not to harm the environment of another, which includes the duty to assess whether a proposed action would do so. The commenter also stated that the proposed rule could result in trade sanctions against the United States.

²⁵ See Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. 106–554, sec. 515(a), 114 Stat. 2763A–153 (2000) (as codified at 44 U.S.C. 3516, note).

²⁶ <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf>.

CEQ Response: The final rule does not direct agencies to ignore the potential impacts of proposed Federal actions on the territories of other sovereign states. To the contrary, under the final rule, for activities or decisions with effects in the United States, agencies should analyze the reasonably foreseeable effects of such activities or decisions where there is a reasonably close causal relationship to the proposed action. § 1508.1(g). This may include cross-border or transboundary effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. Accordingly, the final rule also does not increase the risk of trade sanctions against the United States. Moreover, section 102(2)(F) does not establish a mandatory duty; the provision refers to “appropriate” support which inherently involves a discretionary Executive branch determination.

Comment: Commenters stated that CEQ cannot justify the proposed changes based on efficiency, reducing delays, decreasing paperwork, or avoiding litigation because they are non-statutory goals that cannot be elevated over the goals of the NEPA statute, citing *Gresham v. Azar*, 950 F.3d 93, 104 (D.D.C. 2020) (“While we have held that it is not arbitrary or capricious to prioritize one statutorily identified objective over another, it is an entirely different matter to prioritize non-statutory objectives to the exclusion of the statutory purpose.”). Commenters stated that the concept of efficiency cannot focus exclusively on timelines and cost, but must instead focus on outcomes of enhancing environmental quality and avoiding environmental degradation to the greatest extent possible.

CEQ Response: Implementation of NEPA is governed by a rule of reason. *Pub. Citizen*, 541 U.S. at 767–68; *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373–74 (1989). Section 101 of NEPA sets forth a national policy “to use all practicable means and measures.” 42 U.S.C. 4331(a). The term “practicable” is consistent with notions of feasibility, which the case law has

recognized as part of the NEPA process. *See, e.g., Vt. Yankee*, 435 U.S. at 551; *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976). As CEQ has explained in section II.B.1, the final rule is consistent with the purpose of NEPA which is to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process. CEQ has properly referenced efficiency, reducing delays, decreasing paperwork, avoiding litigation and fostering excellent decision making as rationales for its changes to the regulations. These goals are similar to the expressed goals of the 1978 regulations, which were “to reduce paperwork, to reduce delays, and at the same time to produce better agency decisions, which further the national policy to protect and enhance the quality of the human environment.”²⁷ Lastly, NEPA’s objectives include fulfilling the social, economic, and other requirements of present and future generations of Americans, and the Act requires that agencies ensure that the environment is given appropriate consideration along with economic and technical considerations. 42 U.S.C. 4331(a), 4332(2)(B).

Comment: Commenters stated that CEQ has not explained all changes in the proposed rule, which only a side-by-side comparison of the 1978 regulations and proposed rule would reveal.

CEQ Response: CEQ has explained the changes proposed to the 1978 regulations. In addition to the explanation of the proposed changes in the NPRM, CEQ posted a redline version of proposed changes to the 1978 regulations in the rulemaking docket to aid the public’s review

²⁷ 43 FR 55978 (Nov. 29, 1978).

of the proposed rule.²⁸ The final rule supplements explanations previously provided in the NPRM for proposed changes to the 1978 regulations. *See also* RIA Appendix.

Comment: Commenters stated that CEQ is selectively relying on court decisions to support its proposed changes without sufficient explanation. Commenters requested that CEQ address these specific concerns in a supplementary proposed rulemaking notice.

CEQ Response: CEQ has revised the final rule in a manner that is consistent with binding case law from the Supreme Court. Where lower courts have reached judicial interpretations that conflict with one another, CEQ has provided appropriate clarification in the final rule with an accompanying explanation. In addition, well-established precedent from the Supreme Court authorizes CEQ to adopt regulations that reasonably resolve ambiguities in the statute that it is charged to administer. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *see also Brand X*, 545 U.S. at 982–83; Section I.B.1 of the final rule. CEQ therefore declines to issue a supplemental NPRM to further address these concerns.

Comment: Commenters stated that CEQ should delay the rule because it has not yet assessed the effectiveness of the FAST Act and particularly FAST–41). Some argued FAST–41 was sufficient to address the issues raised by CEQ in the proposed rule, while others cautioned against codifying provisions in FAST–41 before understanding the effectiveness. Commenters noted that congressional intent behind the FAST Act was not to alter NEPA or the 1978 regulations, so enhancing efficiency in the NEPA process need not require a comprehensive overhaul of the current regulations.

²⁸ www.regulations.gov, docket ID CEQ–2019–0003–0012.

CEQ Response: In 2015 Congress enacted Title 41 of the FAST Act (FAST-41), to provide for a more efficient environmental review and permitting process for “covered projects.”²⁹ FAST-41 was designed to improve the timeliness, predictability, and transparency of the Federal environmental review and authorization process for covered infrastructure projects. FAST-41 established new procedures that standardize interagency consultation and coordination practices. FAST-41 codified the use of the Permitting Dashboard to track project timelines. Other FAST Act provisions that address the project delivery process and track environmental review and permitting milestones for transportation projects are set out in Title I and Title IX. Project sponsor participation in FAST-41 is voluntarily.

Fewer than 50 projects have used the FAST-41 procedures, and fewer than 30 of these projects have been completed.³⁰ These projects are only a subset of the largest infrastructure projects that fall within the scope of the FAST Act. As a result, sufficient information is not available to assess the effectiveness of the FAST Act or FAST-41.³¹

Congressional enactment of FAST-41 builds on prior legislation and administrative initiatives to improve implementation of NEPA, with the intent of streamlining permitting requirements, improving interagency coordination, and other process related improvements. *See* section I.D of the final rule.

²⁹ *See* Public Law 114-94, sec. 41001-41014, 129 Stat. 1312, 1741 (42 U.S.C. 4370m-4370m-12).

³⁰ *See* <https://www.permits.performance.gov/projects> (accessed June 26, 2020).

³¹ The Annual Report to Congress for Fiscal Year 2018 included observations about best practices related to FAST-41, but did not include timeline information because it was not yet available. <https://www.permits.performance.gov/documentation/fast-41-annual-report-congress-fy-2018>. The Annual Report to Congress for Fiscal Year 2019 was recently issued, and reflects a transition to a performance-based assessment of agencies’ implementation of best practices. <https://www.permits.performance.gov/about/announcements/fast-41-annual-report-congress-fy-2019>.

Comment: One commenter stated that revisions were made to the NEPA regulations in 2015 and questioned whether additional modifications were necessary.

CEQ Response: No revisions were made to the NEPA regulations in 2015. CEQ has not comprehensively updated its regulations since their promulgation in 1978, more than four decades ago. The final rule will modernize and clarify the regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies in connection with proposals for agency action.

Comment: Some commenters observed that NEPA reviews rely only on analyses prior to the agency decision, with no subsequent quality control mechanism to evaluate whether a NEPA review achieved its goal.

CEQ Response: CEQ acknowledges the comment. CEQ has periodically examined the effectiveness of the NEPA process and issued a number of reports on NEPA implementation. *See* section I.B.2.

Comment: Commenters stated that prior to NEPA, minority and low-income populations were disproportionately affected and will be again if these proposed regulation revisions are adopted. Commenters stated that many key provisions in the proposed rule would disproportionately burden and adversely impact low-income and minority communities in violation of E.O. 12898, titled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,”³² and NEPA, and that these communities will continue to be most affected by multiple types of pollution and natural disasters. Commenters also stated that CEQ’s proposed changes raise the threshold for when an EA or EIS is required

³² 52 FR 7629 (Feb. 16, 1994).

under NEPA so that Federal agencies will not be performing an EA or EIS in many cases and will not be obligated to take environmental justice into account.

Commenters also stated that NEPA calls on Federal agencies to take seriously their obligation to consider the environmental justice implications of their actions. The Civil Rights Act, meanwhile, requires agencies to ensure that their actions do not cause disparate environmental impacts based on race, color, or national origin.

CEQ Response: As discussed in the respective sections of the final rule, the changes made in the final rule to the 1978 regulations are consistent with the Act and applicable Supreme Court case law. The changes do not disadvantage or adversely impact low-income and minority communities. CEQ has reviewed the changes in this final rule and has determined that they would not result in adverse environmental impacts. *See* RIA Appendix. In addition, many of the changes that the final rule adopts will improve coordination with local communities and expand opportunities for the public to participate in the NEPA process. Agencies may consider, as necessary and appropriate, environmental justice issues in connection with NEPA compliance.

Comment: Several commenters expressed concerns that changes in the proposed rule would adversely impact Tribes. Specifically, commenters stated that the proposed changes would weaken or reduce opportunities for Federal agency consultations. Some commenters recommended that CEQ require agencies to consult with Tribal governments and involve them in interagency consultations. Commenters stated that the proposed changes would reduce the information available to Tribes regarding a proposed project's environmental impacts, potentially violating treaty law, E.O. 13175 and 40 CFR 1501(d)(2). For example, one commenter stated the proposal would require an agency to make a determination of a reasonably foreseeable effect without accounting for Tribal cultural resources that cannot be known to an

agency without proper input from Tribes. Commenters also stated the proposal's implementation of a "but for" test would weaken Federal environmental review obligations, because the causal relationship between an action and future action may not be considered. Commenters cited to *Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 853 (10th Cir. 2019) (holding that an agency needed to consider the cumulative environmental impacts associated with all reasonably foreseeable future actions). Commenters stated the overall effect of the proposed rule will lower the consideration of and protection from impacts of a federally permitted project on Tribal lands and resources. Commenters asserted that NEPA would no longer be a policy that Tribes can rely upon for involvement in the regulatory process and protection of the cultural and natural environment across jurisdictions. One commenter stated that CEQ should withdraw the proposed rule and begin a separate, narrower rulemaking focused exclusively on affording Tribal governments the same opportunities that other governments have under CEQ's existing NEPA regulations.

CEQ Response: The final rule will not diminish participation by Tribes in the NEPA process or reduce consideration of impacts to Tribal resources. As discussed in section II.A of the final rule and in the response to comments on §§ 1501.9 and 1506.6, the final rule substantially expands participation by Tribal governments and communities. The final rule also maintains requirements to analyze effects on Tribal resources, as described in the response to comments on §§ 1501.3, 1502.16, and 1508.1(g). The final rule does not adopt a "but for" test, but rather provides that effects must be reasonably foreseeable and have a reasonably close causal relationship to the proposed action.

Comment: A commenter stated that any efforts to amend the regulations for the sake of timeliness or to achieve greater efficiency should not increase confusion or burdens on Tribes or

the public to participate in the NEPA process, and that wholesale changes were unnecessary. Another commenter stated that significant changes in Federal regulations are a burden to Tribal governments which strive to comply with the changing regulatory framework and often seek to ensure their own ordinances and governmental programs are consistent with Federal law. The commenter also stated that consideration of significant regulatory change such as this should be measured and coordinated with Tribes, which have an unfunded obligation to revise their programs to remain consistent with regulations.

A commenter also noted that due to their proximity on Tribal lands, the use of Federal funding sources, or mandatory Federal permitting requirements (among other things) cause the obligations of NEPA to disproportionately burden Tribes. The commenter further stated that there is greater uncertainty around project timelines and economic development on Tribal trust lands (often subject to NEPA simply by virtue of their trust status) when compared to similarly situated private lands (less often subject to a comparable NEPA trigger). One commenter added that it may be appropriate for CEQ to consider streamlining certain NEPA regulations involving Tribes to relieve this disproportionate burden.

CEQ Response: The final rule is anticipated to lower, rather than increase, NEPA's administrative burden on Tribal communities through a more efficient and timely process. The final rule includes specific measures to streamline documents (§§ 1501.12 and 1507.3(c)(5)) and expressly reduces duplication with Tribal procedures (§ 1506.2).

Comment: Several commenters expressed concerns that CEQ failed to consider how the proposed regulations will affect Indian Tribes and the requirements for agencies to comply with section 106 of the National Historic Preservation Act (NHPA). One commenter stated that the proposed changes introduce confusion and delay into the integration of NEPA and section 106,

and would provide less protection for Tribal environments and historic properties. Another commenter stated that the adopted regulations should reaffirm the joint CEQ-Advisory Council on Historic Preservation (ACHP) guidance on integrating the NEPA and section 106 compliance processes, which clarifies Federal agency and project proponent obligations to facilitate Tribal participation at the earliest possible stage and on a continuing basis.

Commenters stated that the proposed rule fails to adequately require agencies to consider a project's impacts on Tribal cultural resources because they are not specifically mentioned. Commenters stated that the existing CEQ rules refer to "historic and cultural" resources but never define either term and generally rely on the NHPA definition of "historic resource" or "archaeological site," neither of which captures the essence of what constitutes a Tribal cultural resource and its religious, traditional, or cultural values.

CEQ Response: In the final rule, the interpretation of cultural resources is with the same as the 1978 regulations and already includes Tribal cultural resources under § 1502.16(a)(8) and the definition of "effects" in § 1508.1(g)(1). The addition of "Tribal" throughout the final rule supports this consideration of Tribal cultural resources. The final rule fully supports integration and coordination of NEPA reviews with required reviews under other statutes where NEPA applies. Nothing in the final rule changes the obligation to comply with other statutes.

Comment: Some commenters observed that there is a lack of training and agency staff with expertise in anthropology, sociology, and archaeology sufficient to support necessary Tribal consultation and consideration of Tribal information, which has implications for environmental justice.

CEQ Response: CEQ acknowledges the comment but notes that it and the various action agencies have the ability to consult with such experts housed elsewhere inside the Federal Government.

B. Comments Regarding Changes Throughout Parts 1500–1508

Comment: Commenters stated that CEQ provided two examples of the obsolete sections that it was referencing but did not define the determination of what is obsolete. Commenters further stated that CEQ should not update citations and authorities without inclusion of historical context, and that CEQ must define all new terms introduced.

CEQ Response: In section II, CEQ describes the changes throughout parts 1500–1508, identifies where it strikes obsolete provisions, and explains newly defined terms. In addition, CEQ describes its elimination of obsolete references to publications that no longer exist. *See* section II.A of the final rule.

Comment: Commenters suggested CEQ change the overall structure of the regulations to improve the organization and readability to make it easier to use.

CEQ Response: In the final rule, CEQ has made further revisions and clarifications to improve the organization and readability of the regulations. CEQ believes that the organization of the new regulations will assist Federal agencies in implementing NEPA more efficiently and effectively.

Comment: Commenters suggested that the draft regulations are too discretionary, leaving major decisions to the discretion of the agency and encouraging agencies to do the bare minimum level of analysis. For example, rather than “the agency shall,” which constitutes a non-discretionary mandate, the draft uses the phrase “the agency may” throughout.

CEQ Response: These regulations provide direction to Federal agencies regarding implementation of the procedural provisions of NEPA, which require that agencies consider the effects of major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. 4332(2)(C). NEPA applies to a wide variety of major Federal actions and the CEQ regulations recognize that agencies must apply NEPA to actions they take pursuant to their organic statutes. A rule of reason applies, and agencies must exercise discretion and judgment in conducting their NEPA analyses.

Comment: Commenters suggested using bolding, underlining, or similar revisions in the regulatory text to distinguish new sections.

CEQ Response: In addition to the description in the preamble of the NPRM, CEQ provided a redline of the 1978 regulations to reflected the proposed changes as a “Supporting Document” in the docket to identify new or edited sections. However, the formatting recommended by the commenter is inconsistent with the regulatory format prescribed by the *Federal Register*.

Comment: Commenters recommended that CEQ uses the term “agency” inconsistently throughout the regulations noting that the following types of agencies are mentioned: Federal agencies; non-Federal agencies; State, Tribal, and local agencies; lead agencies; joint lead agencies; cooperating agencies; participating agencies. Commenters further noted that, in many cases, the regulations just use the term “agency” or “agencies” and requested CEQ better clarify the usage.

CEQ Response: In the final rule, CEQ includes updates to the 1978 regulations to clarify when the term “agency” or “agencies” refers to a specific agency, such as a lead, cooperating or participating agency, adds references to “Tribal” agencies throughout the rule, and made other

revisions for clarification. These revisions will assist all agencies participating in the NEPA process. Depending on the particular project or activity, agencies may have a different role, and the terms used in the regulations clarify roles and responsibilities of agencies.

1. Addition of “Tribal” Throughout the Rule

Comment: Commenters expressed support for the proposed revisions to § 1501.2(b)(4)(ii) and elsewhere in the regulations to add “Tribal” to the phrase “State and local,” thereby inviting Tribal participation, cooperation, and consultation on par with State and local jurisdictions and giving Tribes the opportunity to engage in the NEPA process in the same way as their off-reservation counterparts, to the extent Tribes find this appropriate. Commenters supported eliminating the provisions that limited Tribal interests to reservations. Commenters supporting these changes stated that, in many parts of the country, there are no Indian reservations but there are Federal or State-recognized Tribes, and their interests are important to consider. Commenters also supported proposed changes that allow Tribes to serve as joint lead agencies, require consideration of effects that would violate Tribal environmental laws, and expand notice and related obligations where a proposal may impact Tribal interests. *See* §§ 1501.8(a), 1502.16(a)(5), 1503.1(a)(2)(ii), and 1506.6(b)(3)(ii), and the revisions at § 1501.3(b)(2)(iv) (proposed § 1501.3(b)(2)(iii)).

CEQ Response: CEQ acknowledges the support for the proposed changes. The final rule significantly expands coordination with Tribal governments and agencies, in furtherance of informed analysis of a proposed action’s potential effects on Tribal lands, resources, and areas of historic significance.

Comment: Commenters suggested the final rule list “Tribal” before “States and local governments” because Tribes are sovereign nations.

CEQ Response: For consistency throughout the rule, CEQ has referenced Federal, State, Tribal, and local governments or agencies in that order. The order of listing is merely in the nature of a convention and is not intended to take a position on relative priority.

Comment: Commenters requested CEQ respect Tribal sovereignty and not apply the term “agency” to a Tribe or its government in reference to the rule’s addition of “Tribal” to the phrase “State and local” throughout the NEPA regulations.

CEQ Response: “Agency” is a term used throughout the regulations to refer to agency-level participants in the NEPA process. The final rule distinguishes between government-to-government relationships and interagency participation in the NEPA process, which can include agencies of Tribal governments. For example, paragraph (b) of § 1501.9, “Scoping,” requires the lead agency to invite the participation of likely affected Federal, State, Tribal, and local “agencies and governments.”

Comment: Commenters stated that each Federal Government department, agency, and bureau, such as the Bureau of Indian Affairs (BIA), must implement the final rule’s intention to expand “recognition of the sovereign rights, interests, and expertise of Tribes” to achieve NEPA modernization.

CEQ Response: Section 1507.3 requires agencies to develop or revise proposed procedures to implement the final rule within 12 months of its effective date. This provision applies to the major subunits of any agencies or departments that have their own agency NEPA procedures and therefore include BIA.

Comment: Commenters requested that CEQ further clarify the requirements for Tribal notice and consultation.

CEQ Response: Consistent with the proposed rule, CEQ adds “Tribal” and changes “agencies” to “governments” consistent with and in support of government-to-government consultation pursuant to E.O. 13175, titled “Consultation and Coordination With Indian Tribal Governments.”³³

Comment: Commenters requested that CEQ revise the rule to state that Tribal nations must be the final arbiter in determining the effects or impacts to Tribal resources, sacred sites, historic and cultural places, as well as the social, economic, or health effects to Tribal citizens.

CEQ Response: Pursuant to the definition of effects, agencies must evaluate ecological, historic, cultural, social, economic, and health effects, as appropriate to the specific proposal for agency action. *See* § 1508.1(g). Tribal governments are unable to be the final arbiter as requested by the commenters because NEPA and the CEQ regulations are a mandate for Federal agencies. Therefore, Federal agencies are responsible for compliance with NEPA and the CEQ regulations, unless a State, Tribal, or local agency is assuming NEPA responsibilities from a Federal agency pursuant to a statute.

Comment: Commenters requested that the final rule clearly state that a Tribal nation’s assumption of any NEPA duties does not absolve Federal agencies from fulfilling of their trust and treaty responsibilities to Tribal nations.

CEQ Response: Tribal assumption of any NEPA responsibilities does not alter the existing trust and treaty responsibilities of Federal agencies.

Comment: Commenters stated that the addition of the term “Tribal” throughout the proposed rule is rendered meaningless by the substance of the proposal rulemaking, which

³³ 65 FR 67249 (Nov. 9, 2000).

commenters assert would make environmental impact assessment under NEPA an exercise scarcely worth the investment of a Tribe's time.

CEQ Response: The final rule comprehensively updates, modernizes and clarifies the regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies in connection with proposals for agency action. The rule will improve interagency coordination in the environmental review process, promote earlier public involvement, increase transparency, and enhance the participation of States, Tribes, and localities. The amendments will advance the original goals of the CEQ regulations to reduce paperwork and delays, and promote better decisions consistent with the national environmental policy set forth in section 101 of NEPA. Participation in the NEPA process was and will continue to be meaningful, though, of course, entirely voluntary.

Comment: Commenters recommended that the regulations should be consistent with CEQ's 2002 Memorandum on Cooperating Agencies³⁴ which uses the phrase "State, Tribal and/or local government," and that using the term "agency" in some provisions of the regulations and "governments" in other provisions may lead to confusion.

CEQ Response: In the final rule, CEQ replaces "agency" with "government" where appropriate and for clarity.

Comment: Commenters requested that CEQ clarify whether "Tribal" or "Tribes" refers to all Native American groups or just to federally recognized entities. Commenters also requested that the regulations include a definition for "Tribes."

³⁴ Cooperating Agencies in Implementing the Procedural Provisions of the National Environmental Policy Act (Jan. 30, 2002), https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-CoopAgenciesImplem.pdf.

CEQ Response: Due to the complexities of numerous statutory authorities as they pertain to the Nation’s indigenous groups, CEQ declines to add a definition of “Tribal” or “Tribe.” Agencies may provide further specificity concerning the application of the final rule to “Tribal” or “Tribe” in their NEPA procedures, consistent with their organic statutes.

Comment: A commenter stated the adopted regulations, CEQ implementation guidance, and revisions to agencies’ proposed procedures for NEPA practice should reaffirm E.O. 13175 to ensure consultation and coordination with affected Tribal governments and agencies, as necessary and appropriate for a proposed action and require the elimination from Federal agencies’ procedures all provisions that limit Tribal interests to Indian lands. Further, a commenter noted that CEQ should incorporate E.O. 13175 by reference.

CEQ Response: The final rule significantly expands coordination and involvement by Tribal governments in the NEPA process and removes provisions that limit Tribal interests to reservations. These changes in the final rule are consistent with the intent of E.O. 13175, however, the final rule does not incorporate E.O. 13175. E.O. 13175 is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit or trust responsibility, substantive or procedural, enforceable by a party against the U.S., its agencies, or any person.

Comment: A commenter stated that the proposed rule presents an incomplete picture of comments received by Tribes and Tribal organizations on the ANPRM. Another commenter stated several Tribes and Tribal organizations submitted comments on the ANPRM that noted NEPA’s importance to Tribes, expressed reluctance to support substantive amendments to the regulations, and suggested only making revisions that better reflect Tribes’ sovereign status and

protect the unique legal interests that Tribes have in decision making regarding land to which they may not possess legal title.

CEQ Response: The preamble of the proposed rule stated that it was responding in part to comments submitted by Tribal governments supporting the recognition of sovereign rights, interest, and expertise of Tribes in the NEPA process. CEQ did not state that it had presented an overview of all Tribal comments received, but instead pointed to certain proposed changes that reflected Tribal comments.³⁵

2. Changes from Possible to Practicable

Comment: Some commenters supported CEQ's proposed change from the term "possible" to "practicable" stating that it may factor in the cost, time, and technical and economic feasibility of a proposed action. Other commenters opposed revising "possible" to "practicable" and stated that it conflicts with the statute which uses the term "possible" (e.g., "authorizes and directs to the fullest extent possible."). Commenters maintained that the Supreme Court has reinforced this mandate. Commenters opposed the revision to provide that a draft EIS "must meet, to the fullest extent practicable, the requirements established for final statements in section 102(2)(C) of NEPA" as directly contrary to the statutory language to comply with the requirements for the detailed statement now known as an EIS "to the fullest extent possible." Commenters also maintained that courts and individuals interpreting and participating in the NEPA process have been able to successfully distinguish between the possible and practicable for 40 years, and therefore no changes are required. Commenters also cited CEQ's interpretation of section 102 of NEPA in the 1978 regulations, which stated in 40

³⁵ 85 FR at 1692, 1711.

CFR 1500.6 that “[t]he phrase ‘to the fullest extent possible’ . . . means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency’s operations expressly prohibits or makes compliance impossible.” Commenters also cited to *Citizens for Balanced Environment & Transp., Inc. v. Volpe*, 503 F.2d 601, 606–07 (1973) (Winter, J., dissenting) (interpreting “to the fullest extent possible” in the NEPA context).

Commenters additionally stated CEQ should not conflate the words possible and practicable as they have different definitions and different contexts, referencing dictionary definitions, including *Black’s Law Dictionary* and *Ballentine’s Law Dictionary*, and suggested use of the terms “practicable” and “reasonable” rather than “possible” made the regulations more vague or legally uncertain. Commenters specifically stated that “practicable” is a more general term that could open NEPA interpretation up to varying definitions of an agency’s capabilities, and that “reasonable” is even more vague, and its interpretation depends on the values of the individual or agency in question, and suggested that “possible” was more appropriate than “practicable” or “reasonable” in the regulations. Commenters further stated that use of “possible” fit well with NEPA’s original intention of representing American environmental values (even as those values change with the time), and raised concerns that the revisions would leave Federal agencies vulnerable to the type of litigation that slows down the NEPA process considerably. Commenters also cited *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), stating that courts will evaluate agencies’ interpretations of the word “practicable” by first exhausting all tools of statutory interpretation and then evaluating whether the construction is reasonable, and asserted that use of the term “practicable” rather than “possible” would invite judicial interpretation. Finally, commenters raised concerns that CEQ has altered the text so that Federal

agencies must only cooperate to the fullest extent “practicable” and may choose whether to cooperate in fulfilling requirements of local governmental entities’ laws.

CEQ Response: The term “practicable,” which is in the statute (42 U.S.C. 4331(a), (b)) was used many times in the 1978 regulations.³⁶ In the final rule CEQ replaces references from “possible” to “practicable” in a number of sections in the regulations for consistency and to update the regulations to reflect the more modern usage of the term “practicable.” *See* section II.A. As commenters noted in response to the NPRM, the use of the term practicable highlights the need to avoid speculation.

CEQ notes that *Kisor* is not applicable to decisions an agency makes about how to revise its regulations, consistent with its flexibilities under *Chevron* and *Brand X*. CEQ further notes that the phrase “to the extent possible,” which is found in section 102 of NEPA (42 U.S.C. 4332(2)), was addressed in in the 1978 regulations, and the final rule retains it in § 1500.6. This section defines the phrase to mean that each agency of the Federal Government must comply with section 102 consistent with § 1501.1, addressing NEPA thresholds.³⁷ Further, NEPA compliance is governed by a rule of reason. *Pub. Citizen*, 541 U.S. at 767–68; *Marsh*, 490 U.S., at 373–74. The change from “possible” to “practicable” is consistent with the final rule.

Comment: Commenters recommended CEQ replace the term “practicable” with “reasonable” to ensure consistency with the existing case law and NEPA. In support, commenters offer that the standard used to evaluate NEPA actions has historically been the “reasonableness” standard, which implies a balancing process. Commenters further suggested

³⁶ *See* 40 CFR 1500.2(f), 1501.4(b), 1501.7, 1505.2(c), 1506.6(f) and 1506.12(a).

³⁷ To the extent commenter was referring to *Flint Ridge Dev. Co.* 426 U.S. 776 at 788, this decision relates to a clear and fundamental conflict of statutory duty with NEPA and is addressed in § 1501.1(a) of the final rule.

that, while NEPA is a procedural statute, courts have interpreted the term “practicable” under the Clean Water Act to be substantive.

CEQ Response: CEQ declines to use “reasonable” in place of “practicable” for the reasons set forth in section II.A and because CEQ’s approach is consistent with the statute. CEQ agrees that a rule of reason applies to the NEPA process and agencies should use their experience and expertise in carrying out their analyses. The term “practicable” in the Clean Water Act can have substantive meaning because the Clean Water Act is a statute that requires substantive reductions or eliminations of water pollution. NEPA is a procedural statute, and use of the term “practicable” in the NEPA context does not cause usage of the term to become substantive.

Comment: Commenters raised concern over who will determine “practicability” with respect to the revisions in the regulations, asserting it is common for industrial interests to insist that measures proposed by Tribes to protect important aspects of our natural and cultural heritage are “not practicable.”

CEQ Response: The NEPA regulations apply to Federal agencies. Federal agencies will make the determinations required under the regulations. In carrying out their NEPA processes, agencies are subject to a rule of reason and should use their experience and expertise to determine what is practicable. Agencies are familiar with assessing the strength of comments and resolving competing comments by different regulated interests.

Comment: Commenters recommended that CEQ should substitute “practicable” for “possible” in § 1503.3(a), such that CEQ should allow comments to be “as specific as practicable.”

CEQ Response: Section 1503.3 provides guidance on how commenters, including agencies, may tailor their comments to best inform the decision-making process. Vague

comments do not inform the decision-making process. As the Supreme Court stated in *Vermont Yankee*, “administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that ‘ought to be’ considered and then, after failing to do more to bring the matter to the agency’s attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters ‘forcefully presented.’” 435 U.S. at 553–54.

3. Grammatical Changes

Comment: Commenters supported most of the grammatical changes and shifting much of the language to active voice from passive voice to enhance readability of the regulations. Commenters supported changes from “insure” to “ensure” throughout the regulations, changes that increase clarity, and changes that correct grammatical errors. Other commenters stated that much of the language remains very bureaucratic and difficult to understand, and recommended further revisions and use of plain English.

CEQ Response: In the final rule, CEQ makes the proposed changes as well as additional revisions, as appropriate, to improve the clarity and readability of the regulations. CEQ revises language from passive to active voice where appropriate, particularly where it is helpful to identify the responsible parties.

4. Other Changes Recommended Throughout the Rules

Comment: Commenters suggested adding “to the human environment” when references to “impacts” or “effects” are indicated throughout the rule.

CEQ Response: The words “impacts” and “effects” are generally in reference to the human environment. In response to comments, CEQ has added “to the human environment” to

the definition of effects to clarify that any reference to impacts or effects in the rule refers to effects or impacts to the human environment.

Comment: Commenters stated that CEQ uses the terms “final statement” and “final environmental impact statement” throughout the rule. Commenters requested CEQ use consistent terminology arguing that the term “final statement” may result in confusion. For example, in § 1502.5, “Timing,” “final statement” could refer to “other” final reports an agency may prepare associated with a proposal such as a feasibility study.

CEQ Response: The final rule uses the shorthand reference “final statement” to refer to final EISs when the section has previously used the full phrase, “final environmental impact statement.” CEQ retains this shortening in the final rule to improve readability in those sections that make multiple references to final EISs.

Comment: Commenters requested that CEQ review the entire rule and substitute references to “statement” with “document” unless the intent is to exclude EAs. Commenters noted that proposed §§ 1506.1(c) and 1506.2(d) did not include EAs, but recommended that they should include EAs.

CEQ Response: Similar to the 1978 regulations, the final rule addresses EAs and EISs separately. The level of review for an EIS differs from that of an EA, which an agency can prepare where the proposed action is not likely to have significant effects or the significance of the effects is unknown. The final rule clarifies when provisions apply to all environmental documents and when they apply specifically to EAs or EISs. CEQ notes that while CEQ has not added EAs to § 1506.2(d) which is a section intended to apply to EISs, CEQ proposed to add EAs to § 1506.1(c), and in the final rule simplifies the reference from “programmatic

environmental impact statement or environmental assessment” to “programmatic environmental review.”

Comment: Commenters recommended that CEQ not reference E.O. 13807³⁸ as authority for the regulations because it deals specifically with the procedures for permitting infrastructure and therefore is tangential to the policies established under NEPA. Commenters requested that CEQ remove the reference from all “Authority” sections in the final rule.

CEQ Response: E.O. 13807 provides direction to Federal agencies to make the Federal environmental review and permitting process for infrastructure projects more efficient and effective. Section 5(e)(i) of E.O. 13807 provides broad direction to CEQ to enhance and modernize the Federal environmental review and authorization process, including by issuing such regulations as CEQ deems necessary to: (1) ensure optimal interagency coordination of environmental review and authorization decisions; (2) ensure that multi-agency environmental review and authorization decisions are conducted in a manner that is concurrent, synchronized, timely, and efficient; (3) provide for use of prior Federal, State, Tribal, and local environmental studies, analysis, and decisions; and (4) ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays, including by using CEQ’s authority to interpret NEPA to simplify and accelerate the NEPA review process. The direction given by the President to CEQ in E.O. 13807 to use its authority to interpret NEPA to simplify and accelerate the NEPA review process builds on and is consistent with the direction given by the President to CEQ in E.O. 11514, as amended by E.O. 11991, to design regulations for implementing the procedural provisions of NEPA to make the process more useful to decision makers and the public and

³⁸ *Supra* note 2.

reduce paperwork and the accumulation of background extraneous data. CEQ cites E.O. 11514, as amended by E.O. 11991, in the Authority sections for 40 CFR parts 1500–1508. Therefore, it is appropriate to update the Authority sections for each part to include the citation to E.O. 13807.

Comment: A commenter recommended adding a step involving mediation, arbitration, or independent review early in the process as a means of saving time for agencies, resolving issues, and avoiding costly, time consuming, and expensive legal challenges. The commenter also noted that this step should not negate later challenges because an agency may nonetheless avoid recommendations.

CEQ Response: The final rule includes numerous opportunities for agencies to involve the public and resolve issues, including expanding scoping to include the time before an NOI is issued. The final rule also requires that agencies request public comments on an NOI and the draft EIS, and provides that an agency may request comments after issuance of the final EIS. The final rule also provides for elevation of disputes that may lead to delays for timely resolution by appropriate officials of the responsible agencies. Additional steps, such as those recommended by the commenter, are not necessary.

Comment: Commenters stated that the phrase “economic and technical considerations” is used throughout the proposed regulations, and that it would be helpful to provide definitions of what this means; such as whether it refers to “economic” hardship to the agency, the applicant, or other entity.

CEQ Response: CEQ declines to provide definitions for economic and technical considerations. These terms are general references to feasibility on the basis of economic and technical constraints. Agencies should apply these terms based on their common meaning as

informed by their experience and expertise and the circumstances of the particular proposed action.

C. Comments Regarding the Purpose, Policy, and Mandate (Part 1500)

1. Purpose and Policy (§ 1500.1)

Comment: Commenters supported CEQ’s revisions to § 1500.1 to align the section more closely with the statute and certain case law, and to clarify that NEPA is a procedural statute that does not compel particular results or substantive outcomes.

CEQ Response: In the final rule, CEQ finalizes its proposed revisions to § 1500.1 to provide an overview of the purpose and policy of NEPA and the implementing regulations, and align this section more closely with the statutory text. CEQ revises paragraph (a) to make clear the national environmental policy Congress established in section 101 of NEPA. *See* 42 U.S.C. 4331(a). To make clear the general procedural requirements set forth in section 102(2)(C) of NEPA, CEQ also revises § 1500.1 to reference these provisions and explain that the statute requires Federal agencies to provide a detailed statement on proposals for major Federal actions significantly affecting the quality of the human environment. *See* 42 U.S.C. 4332(2)(C).

Consistent with the statute and case law, and as discussed in the NPRM, CEQ finalizes its proposed revisions in § 1500.1(a) to also include language recognizing that NEPA is a procedural statute. The purpose of NEPA is satisfied if a Federal agency has considered relevant environmental information and the public has been informed regarding the decision-making process. In contrast to other statutes that provide agencies with authority to require particular results or substantive outcomes, such as the ESA, Clean Air Act, and Clean Water Act, NEPA does not provide authorization for agencies to require mitigation. As the Supreme Court has stated, “[o]ther statutes may impose substantive environmental obligations on [F]ederal agencies,

but NEPA merely prohibits uninformed—rather than unwise—agency action.” *Methow Valley*, 490 U.S. at 351. Additionally, to address concerns raised in response to the ANPRM that NEPA and the CEQ regulations can lead to excessive litigation, CEQ states in § 1500.1(a) that NEPA’s purpose is not to generate litigation. CEQ also retains language from the 1978 regulations stating that NEPA’s purpose is not to generate paperwork but is to foster excellent action.

To make the regulations clearer and easier to follow, CEQ also finalizes its proposed revisions in § 1500.1(b) to summarize briefly the regulations as updated, including by stating that the regulations provide direction to Federal agencies to determine what actions are subject to NEPA and the level of review. Section 1500.1(b) further states that the regulations are intended to ensure that relevant information is identified and considered early in the process in order to ensure informed decision making by agencies. Consistent with Executive orders, including E.O. 11514, as amended, and E.O. 13807, CEQ explains that the regulations implement section 102(2) of NEPA. CEQ also states that the regulations are intended to ensure agencies conduct environmental reviews in a coordinated, consistent, predictable and timely manner, and to reduce unnecessary paperwork and delays, and advance the policy of integrating NEPA with other environmental reviews to promote concurrent and timely reviews and decision making consistent with statutes, Executive orders, and CEQ guidance. *See, e.g.*, 42 U.S.C. 5189g; 23 U.S.C. 139; 42 U.S.C. 4370m *et seq.*; E.O. 11514, as amended by E.O. 11991, sec. 3(h); E.O. 13604; E.O. 13807, sec. 5(e); 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 Impact³⁹ (“Mitigation Guidance”) and Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act⁴⁰. CEQ intends these revisions to make the regulations clearer to follow and to assist Federal agencies as they comply with NEPA.

Comment: Commenters opposed CEQ’s revisions to § 1500.1 as inconsistent with the purpose and intent of NEPA. Other commenters argued that the revised section focused on the procedural aspects of NEPA and did not sufficiently emphasize environmental protection. Some commenters also objected to the statement in § 1500.1(a) that “the purpose and function of NEPA is satisfied if Federal agencies have considered relevant information and the public has been informed regarding the decision-making process.” Other commenters stated that the purpose of NEPA was not to inform the public but to involve the public in the NEPA process. Some commenters referred to NEPA as the “Magna Carta” or “charter” of Federal environmental protection. Other commenters opposed eliminating sentences referring to NEPA as our “basic national charter” and to NEPA’s “action-forcing provisions.” Commenters also stated that the proposed revisions fail to meet the statute’s mandate to use all practicable means to safeguard the environmental for future generations. Finally, commenters stated that NEPA was not procedural.

CEQ Response: The purpose of the regulations, as directed by E.O. 11514, as amended, is to give direction to Federal agencies on the implementation of the procedural provisions of the Act (42 U.S.C. 4332(2)). See E.O. 11514, as amended by E.O. 11991, sec. 3(h). CEQ’s

³⁹ 76 FR 3843 (Jan. 21, 2011), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.

⁴⁰ 77 FR 14473 (Mar. 12, 2012), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Improving_NEPA_Efficiencies_06Mar2012.pdf.

revisions are consistent with and more closely track section 101 of the Act by setting forth the national environmental policy Congress established and the relevant provisions in section 102(2)(C) for carrying out that policy. *See* § 1500.1(a) and 42 U.S.C. 4331(a), 4332(2)(C).

Specifically, in paragraph (a) of § 1500.1, CEQ states that NEPA is a procedural statute intended to ensure that Federal agencies consider the environmental impacts of their actions in the decision-making process, 42 U.S.C. 4332(2)(C), replacing the reference in 40 CFR 1500.1(a) to NEPA as “our basic national charter for protection of the environment,” which is not language in the statute nor is “Magna Carta.” As explained in the NPRM, CEQ also revises paragraph (a) of § 1500.1 to replace the vague reference to “action-forcing” provisions ensuring that Federal agencies act “according to the letter and spirit of the Act” with a more specific reference to the consideration of environmental impacts of their actions in agency decisions. These changes codify the Supreme Court’s interpretation of section 102 as serving NEPA’s purpose in two important respects: section 102 “ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision[-]making process and the implementation of that decision.” *Methow Valley*, 490 U.S. at 349; *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008); *Pub. Citizen*, 541 U.S. at 756–58. Additionally, the term “action-forcing” does not appear in the NEPA statute.

CEQ’s statement that the purpose and function of NEPA is satisfied where the agency has considered relevant environmental information and informed the public of its decision-making process is consistent with the statute and case law. The Supreme Court has stated that NEPA is a

procedural statute that serves the twin aims of ensuring that agencies consider the significant environmental consequences of their proposed actions and inform the public about their decision making. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citing *Vt. Yankee*, 435 U.S. at 553; *Weinberger v. Catholic Action of Haw./ Peace Educ. Project*, 454 U.S. 139, 143 (1981)). As also explained in the NPRM, the Supreme Court has made clear that NEPA is a procedural statute that does not mandate particular results; “[r]ather, NEPA imposes only procedural requirements on [F]ederal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.” *Pub. Citizen*, 541 U.S. at 756–57 (citing *Methow Valley*, 490 U.S. at 349–50); *see also Vt. Yankee*, 435 U.S. at 558 (“NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.”). NEPA is a procedural statute that requires agencies to look before they leap, as specified in the CEQ regulations.

NEPA prescribes a process to ensure informed decision making but does not mandate substantive outcomes. The Supreme Court has stated that “[s]imply by focusing the agency’s attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” *Methow Valley*, 490 U.S. at 349.

CEQ’s revisions to § 1500.1 do not shift the emphasis away from or weaken environmental protection. Nothing in this section alters the statutory requirements of NEPA, which advance environmental protection through procedural mechanisms by mandating that agencies consider relevant environmental information as part of their decision-making process for proposed major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. 4332(2)(C). Under the statute, that relevant environmental information includes (i) the

environmental impact of the proposed action; (ii) any adverse environmental effects that cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources that would be involved in the proposal should it be implemented. 42 U.S.C. 4332(2)(C)(i)-(v).

Section 1500.1 provides an overview of NEPA's statutory requirements. Subsequent provisions in the CEQ regulations address agency consideration of the detailed information specified above, impose limitations on actions that can be taken during the decision-making process, and require the agency to prepare a ROD discussing alternatives, the agency's decision, and whether the agency has adopted all practicable means to avoid or minimize environmental harm. *See* §§ 1502.1, 1502.16, 1502.22, 1505.2, and 1506. Consistent with § 1505.2, in their RODs, agencies must not only identify alternatives they considered, but also specify the environmentally preferable alternatives, discuss factors agencies considered in selecting an alternative, include any balancing of essential considerations of national policy, and state whether the agencies adopted all practicable means to avoid or minimize harm from the alternative selected, and if not, why not.

CEQ's revisions in § 1500.1 also do not improperly shift the emphasis away from analysis or advancing environmental protection to merely considering environmental data or informing the public of a decision. To the contrary, § 1500.1 affirms that the purpose of NEPA is not to generate paperwork but to promote excellent action by Federal agencies, retaining language from the 1978 regulations. This statement is consistent with section 101 of NEPA stating that it is the policy of the Federal Government to use all practicable means and measures

in order “to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. 4331(a).

Comment: Commenters stated that revisions to § 1500.1 were not consistent with the case law requiring that agencies take a “hard look” at environmental impacts.

CEQ Response: As noted in section II.B.1, CEQ revises § 1500.1 to align more closely with the statutory text and includes language reflecting the statutory requirements of section 102(2)(C) that relate to the analysis agencies must undertake to comply with NEPA. Neither the statute nor the 1978 regulations refer to “hard look,” and CEQ does not insert a reference to that phrase in the final rule. However, CEQ’s revised regulations continue to provide detailed direction for agencies regarding the evaluation of environmental consequences of proposed actions that agencies must undertake during the NEPA process. *See, e.g.*, §§ 1501.3, 1501.5, 1501.9, 1502.1, 1502.16, and 1505.2. Review of agency NEPA actions, which would take place under the APA, will be based on the arbitrary and capricious standard of review.

Comment: Commenters suggested striking the language stating that the purpose of NEPA is not to generate paperwork or litigation because the terms “paperwork” or “litigation” are not in the statute.

CEQ Response: While these terms do not appear in the statute, prior CEQ analyses and comments in response to the ANPRM and NPRM have highlighted concerns that the NEPA process can generate lengthy documents and lead to protracted litigation and related delays. Stating that NEPA’s purpose is not to generate paperwork or litigation clarifies that these are not objectives of the statute, and that the purpose is to ensure Federal agencies consider environmental impacts in order to promote informed decision making.

Comment: Commenters opposing CEQ's revision to § 1500.1 stated the revisions fail to give agencies direction on how and to what end environmental information should be considered in NEPA analyses.

CEQ Response: The regulations provide direction to agencies on implementing the procedural provisions of NEPA. As discussed above, the statute enhances the quality of agency decisions that may affect the environment by mandating in section 102(2)(C) that agencies prepare detailed statements for proposed major Federal actions significantly affecting the quality of the human environment and include in those statements: (i) the environmental impact of the proposed action; (ii) any adverse environmental effects that cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible or irretrievable commitments of resources that would be involved in the proposal should it be implemented. 42 U.S.C. 4332(2)(C)(i)–(v). In §§ 1502.1, 1502.16, 1502.21, 1505.2, and 1506.1, CEQ addresses how agencies should consider such information, limitations on actions during the decision-making process, and the requirement that agencies must state as part of their ROD whether they have adopted all practicable means to avoid or minimize environmental harm, and if not, why the agency did not.

As revised, the regulations provide clearer direction on the analysis required under NEPA, consistent with the statute and case law, and such direction will promote informed decision making and decisions to avoid or minimize environmental harm, consistent with statutory requirements and agency statutory authorities. While NEPA does not provide agencies new authorities to require mitigation or take action, agencies should use the information generated by the NEPA process to consider appropriate actions allowed under their substantive

statutory authorities. To the extent the updated regulations promote more timely decision making to modernize infrastructure or authorize projects that benefit the environment, this will also advance the goals of the national environmental policy set forth in NEPA.

Comment: Some commenters opposed the revisions to § 1500.1 as shifting the emphasis from environmental protection to streamlining project delivery.

CEQ Response: An efficient and timely NEPA process and environmental protection are not mutually exclusive. To the contrary, efficient and timely processes are not only important but also necessary to support the development of new and more efficient infrastructure, as well as for environmentally beneficial projects, including environmental restoration projects. Ensuring an efficient NEPA process is also consistent with and builds on the actions of prior administrations to improve implementation of the NEPA process. *See* sections I.B.1 and I.E. Further, as discussed in these sections of the preamble, both E.O. 11514, as amended, directing CEQ to promulgate the original regulations, and E.O. 13807 directing CEQ to consider revisions to modernize these regulations, focused on reducing paperwork and delay and improving the efficiency of the process. Moreover, as noted in CEQ's NPRM and in sections I.E and I.B.2, streamlining the NEPA process has also been the subject of other presidential directives as well as CEQ guidance and analyses relating to implementation of NEPA. Numerous commenters in response to the ANPRM and NPRM also supported increasing the efficiency of the NEPA process.

Comment: Commenters stated the revisions to § 1500.1 did not appropriately emphasize public involvement in the NEPA process.

CEQ Response: CEQ's revisions to § 1500.1 more closely align this section with the statute, which directs Federal agencies to inform the public, as well as the President and CEQ, of

the detailed statement prepared by the agency. 42 U.S.C. 4332(2)(C). Consistent with these provisions, § 1500.1 of the final rule expressly states that the public must be informed of the decision-making process.

In the regulatory provisions that follow, CEQ continues to emphasize public involvement as part of the NEPA process. In particular, while the solicitation of comments from the public is not expressly required under the statute, CEQ in its 1978 regulations directed Federal agencies to engage with the public. Provisions relating to public involvement in the final rule include sections addressing the scoping process, notice of intent to prepare an EIS, and invitations to comment on the draft (and where applicable final) EIS. *See, e.g.*, §§ 1501.9(d), 1502.17, 1503.1, and 1506.6. In the final rule, CEQ continues to require public engagement and has included provisions in § 1501.9(d) to require agencies to provide more information to and solicit information from the public earlier in the process. In §§ 1501.7(b) and (d), 1501.8(a), 1501.9(b), 1501.10(f), 1502.5(b), 1502.20, and 1503.1(a)(2), CEQ also directs Federal agencies to increase Tribal engagement. In §§ 1502.20, 1503.1(c), 1506.6(b)(3)(x), 1506.6(c), and 1507.4, CEQ also emphasizes the use of current technologies to increase public engagement. The updated regulations also provide clearer direction on public involvement in § 1506.6, encourage the use of more modern and current technologies to facilitate public involvement where available, and enhance public participation in the NEPA process.

Comment: Commenters also opposed elimination of language in § 1500.1 stating that environmental information analyzed by agencies must be of high quality, and that accurate scientific analysis, expert comments, and public scrutiny are essential to implementing NEPA. Commenters stated that consideration of scientifically accurate information is essential to the NEPA process.

CEQ Response: Since promulgation of the 1978 regulations, Congress passed the Information Quality Act,⁴¹ which ensures that agencies consider scientifically accurate information as part of their decision-making process. The updated regulations complement the Information Quality Act.

CEQ agrees that consideration of information that is of high quality and scientifically accurate is important to the NEPA process. In the regulations, CEQ continues to emphasize consideration of scientifically accurate information. *See* § 1502.21. Section 1502.23 specifically addresses methodology and scientific accuracy and directs agencies to ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents. As noted in this section, the regulations also include detailed direction to agencies regarding commenting and public involvement including in §§ 1501.9(d), 1502.17, 1503.1, 1506.6, and 1507.4.

Comment: Commenters asserted that the proposed regulations ignored section 105 of NEPA. Commenters also maintained that section 105 authorizes the imposition of environmentally protective measures.

CEQ Response: Section 105 of NEPA provides that the Act's policies and goals are supplementary to those set forth in existing authorizations of Federal agencies. 42 U.S.C. 4335. This section recognizes that NEPA did not repeal existing law. *See* H. Rep. No. 91-765 at 10 (1969)(Conf. Rep.). The 1978 regulations at 40 CFR 1500.6, "Agency authority," included language reflecting section 105 and the final rule retains this language in § 1500.6, with modifications, including to clarify that an agency shall interpret NEPA as a supplement to its

⁴¹ Pub. L. 106-554 sec. 515, 114 Stat. 2763, 2763A-153-154 (2000)); *see also* Final Information Quality Bulletin for Peer Review, 70 FR 2664 (Jan. 15, 2005).

existing authority and as a mandate to view policies and missions in light of the Act's national environmental objectives, consistent with its existing authorities. To construe NEPA as an open-ended statute that imposes substantive environmental protection requirements would not be consistent with the text of the statute or with relevant case law. As discussed above, the Supreme Court has interpreted NEPA to impose procedural rather than substantive requirements. These procedural requirements supplement any other existing statutory requirements with which agencies must comply, and require agencies to consider the environmental consequences of their proposed actions. NEPA's procedural requirements, however, do not require or authorize actions to be taken to mitigate adverse impacts of a proposed major Federal action. *See Methow Valley*, 490 U.S. at 353 & n.16.

While NEPA does not impose substantive requirements to take action to mitigate the adverse effects of a proposed major Federal action, part of the process prescribed by NEPA is to discuss possible measures to mitigate adverse environmental consequences. In their decision-making process, agencies should consider whether mitigation measures fall within the relevant statutory authorities of the lead or cooperating agencies, and, if so, whether imposition of mitigation measures would be appropriate under the circumstances.

Comment: Commenters objected to the statement that the original goals of the regulations were to reduce paperwork and delays and promote better decisions consistent with the national environmental policy established by the Act.

CEQ Response: E.O. 11514, as amended by E.O. 11991, directed CEQ to issue regulations for the implementation of the procedural provisions of NEPA, and specifically directed that they be designed to reduce paperwork and to provide for the early preparation of

EISs. E.O. 11991(h). The 1978 regulations also included provisions in 40 CFR 1500.4 and 1500.5 to reduce paperwork and to reduce delay.

2. Policy Removed and Reserved (§ 1500.2)

Comment: CEQ received comments both supporting removal of 40 CFR 1500.2 as duplicative of subsequent sections of the regulations and comments opposing removal of 40 CFR 1500.2. A number of commenters specifically opposed the striking of 40 CFR 1500.2(f). They stated that deletion was not consistent with section 101(b) of NEPA, which directs that in carrying out the national environmental policy established in section 101(a), the Federal Government “must use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources” to meet environmental goals.

CEQ Response: CEQ removes and reserves 40 CFR 1500.2 because it is duplicative. As discussed in detail in section II.B.2 of the final rule, this section in the 1978 regulations primarily included language identical or similar to language in E.O. 11514, as amended, which directed CEQ to develop regulations that would make the EIS more useful to decision makers and the public, and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives. *See* E.O. 11514, as amended by E.O. 11991, sec. 3(h). That Executive order also directed that CEQ require agency statements to be concise, clear and to the point, and supported by evidence that agencies have made the necessary environmental analyses. *Id.*

With respect to 40 CFR 1500.2(f), while there is no necessity to restate the statutory text in regulations, the revised regulations do include provisions that discuss the balancing referenced in section 101(b) of the statute, and also direct agencies to explain whether they have used

practicable means to avoid or minimize environmental harm. In particular, § 1505.2 requires agencies in a ROD to identify all alternatives considered, specifying which were environmentally preferable, identify and discuss all factors, including any essential considerations of national policy the agency balanced in making its decision, and state how those considerations entered into its decision. Agencies must also state whether they have adopted all practicable means to avoid or minimize environmental harm from the alternative selected. Section 1505.2 is consistent with section 101(b), which recognizes that agencies must balance competing considerations in the decision making process.

As discussed in this document, the NEPA process advances environmental protection through a procedural mechanism by requiring agencies to consider relevant environmental information as part of their decision-making processes, including potential adverse effects and alternatives to the proposed action, and to explain whether they have taken all practicable means to avoid or minimize environmental harm. Striking this section will improve readability of the regulations and reduce unnecessary duplication.

Comment: Some commenters acknowledged that language from 40 CFR 1500.2 was found in other subsections of the regulations but opposed its deletion because the phrase “to the extent possible” was not included in those subsequent sections. Commenters also stated that “to the fullest extent possible” in section 102 was intended to broaden the responsibilities of agencies to integrate the substantive goals of NEPA into their organic authorities.

CEQ Response: NEPA establishes procedural requirements but does not mandate particular results or substantive outcomes. The 1978 regulations addressed the phrase “to the extent possible,” which is found in section 102 of NEPA. CEQ revises the sentence explaining the meaning of the phrase “to the fullest extent possible” in section 102, replacing “unless

existing law applicable to the agency’s operations expressly prohibits or makes compliance impossible” with “consistent with § 1501.1.” As discussed elsewhere in the final rule and this document, § 1501.1 sets forth threshold considerations for assessing whether NEPA applies or is otherwise fulfilled including considerations related to other statutes with which agencies must comply. The addition of the NEPA thresholds aligns the CEQ regulations with statutory developments and legal mandates as explained in Supreme Court and other case law undergirding § 1501.1.

3. NEPA Compliance (§ 1500.3)

i. Exhaustion

Comment: Commenters noted that the proposed rule frequently used the term “public commenters,” including in § 1500.3, but the meaning of the term is unclear. Commenters recommended including a definition for public commenters.

CEQ Response: The term “public commenters” does not have a distinct meaning. However, that term is intended to distinguish those commenters from the public as opposed to certain governmental commenters. Thus, to clarify that the summary and certification must address all timely submitted comments regardless of the source and for consistency with §§ 1501.2(b)(4)(ii), 1501.7(d), 1501.9(b), 1502.20, and 1503.1, CEQ has revised §§ 1500.3, 1502.17, and 1505.2(b) by adding “State, Tribal, and local governments and” before “public commenters.”

Comment: Commenters stated the proposed regulatory changes impermissibly eliminate mitigation as a Federal activity under NEPA. Specifically, commenters expressed concern with the additional language at proposed § 1500.3, “Agency NEPA procedures to implement these regulations shall not impose additional procedures or requirements beyond those set forth in

these regulations, except as otherwise provided by law or for agency efficiency.” A commenter stated this language would have the effect of precluding an agency from requiring a project proponent to conduct mitigation where the agency is unable to require it under a separate legal authority. Commenters stated this language is contrary to the statute, which requires Federal agencies to use all practicable means to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects. Commenters asserted that CEQ attempts to justify these positions by arguing that NEPA is not a “substantive” statute, but a “procedural” one and that this argument overlooks the fact that mitigation is a matter of procedure, not substance. Commenters also stated that the lead agency’s mitigation authorities should not matter at all because a Federal agency should be able to choose mitigation, regardless of authority.

CEQ Response: The Supreme Court has made clear that NEPA is a procedural statute that does not mandate particular results on individual actions; “[r]ather, NEPA imposes only procedural requirements on [F]ederal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.” *Pub. Citizen*, 541 U.S. at 756-57 (citing *Methow Valley*, 490 U.S. at 349-50); *see also Vt. Yankee*, 435 U.S. at 558 (“NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.”) Following Supreme Court case law, agencies must rely on legal authorities other than NEPA to require an applicant to conduct mitigation for a proposed action. The claim that mitigation is a matter of procedure is incorrect. Requiring mitigation extends beyond analyzing the proposed action and alternatives.

Comment: Commenters raised concerns with the administrative burden of a new process for soliciting and incorporating alternatives, information and analysis from stakeholders in proposed §§ 1500.3(b), 1501.9(d)(7), 1502.17, 1502.18 (1505.2(b) in the final rule), and 1503.1(a)(3). Commenters expressed concerns with the solicitation of specific information during scoping, summary of that information in the draft and final EIS and the subsequent comment on that information, coupled with the exhaustion and forfeiture provisions in the proposed changes in these sections. Commenters stated these sections would require Federal agencies to follow new procedures for soliciting and incorporating information and analysis from stakeholders. Some commenters suggested CEQ revise the provisions to permit agencies to use these provisions on a case-by-case basis at the agency's discretion.

CEQ Response: In response to comments, CEQ has revised portions of this process including clarifying § 1503.1(a)(3) regarding what information agencies must request from the public. CEQ proposed this process, including the invitation to comment at § 1503.1(a)(3) on the summary of all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters at § 1502.17 as a means of enhancing public involvement and the decision-making process. The 1978 regulations required agencies to consider the information received during scoping in development of the draft EIS. As a matter of practice, some agencies routinely summarize and publish comments received during the scoping process in a scoping report. The final rule codifies these practices and instructs the agency to summarize information submitted by commenters in a consolidated section of the draft and final EIS. This will enhance the NEPA process and inform decision making by distilling information in a more digestible form. The summary complements the requirements in § 1502.14(a) that the agency evaluate reasonable alternatives and in § 1503.4 that the agency

consider substantive comments. This is a new process, but when balanced against the benefits of increasing transparency, it is not an undue burden.

Comment: Commenters objected to the proposed requirement in §§ 1500.3(b)(3) and 1503.3(a) that comments be “as specific as possible.” Commenters stated this would cause commenters to write unduly lengthy comments, which in turn would lead to an increase in litigation. Commenters also stated that the proposed process for providing comments would require a level of knowledge or sophistication that some interested parties may not have.

CEQ Response: The 1978 regulations stated that comments “shall be as specific as possible.” 40 CFR 1503.3(a). The final rule updates §§ 1500.3(b)(3) and 1503.3(a) to reflect that commenters must provide as much detail as necessary to meaningfully participate in the NEPA process and fully inform the agency of the commenter’s position. This is consistent with Supreme Court case law. *See Vt. Yankee*, 435 U.S. at 553 (although “NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon [parties] who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the [parties’] position . . .”). The final rule also states that comments should reference the section or page of the draft EIS, propose specific changes, where possible, and include or describe the data sources and methodologies supporting the proposed changes. *Id.* at 553 (“[Comments] must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes a concern. The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results” (quoting *Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375, 394 (1973))). CEQ includes these provisions to ensure that agencies are alerted to all interested and affected parties’ concerns.

Nothing in the final rule should be construed to limit public comment to those members of the public with scientific or technical expertise, and agencies should continue to solicit comment from all interested and affected members of the public at the appropriate points in the process. Further, the final rule is similar to the 1978 regulations concerning commenting and similarly advances the goal of informed decision making. Comments that are relevant to the agency's decision, particularized to the action the agency is evaluating, and timely submitted can meaningfully inform the agency's analysis. Specific comments will lead to the identification and consideration of relevant issues by agencies, which is the focus of NEPA's requirements.

Comment: Several commenters expressed strong support for the requirement that comments be specific and timely, as well as the provision that comments not timely raised are deemed unexhausted and forfeited. These commenters observed that, without these requirements, parties are able to bring challenges to projects at a multiplicity of points, including "eleventh-hour" submissions, causing unnecessary uncertainty, disruption, and delay.

CEQ Response: The NEPA process is best served if comments are relevant to the decision the agency is considering and are specific and timely enough to be of use to the agency in its decision-making process.

Comment: Some commenters raised concerns that the proposed rule would limit the public to commenting on the completeness of the summary rather than the purpose and need of a project. Concerning the provisions related to exhaustion, commenters requested that agencies have discretion to include all public comments.

CEQ Response: In the final rule, the language relating to the completeness has been eliminated in § 1503.1(b) in response to comments. Similar to the 1978 regulations, the final rule directs agencies to invite comment on all aspects of the draft EIS, including the purpose and

need, and additionally directs agencies to invite comment specifically on the submitted alternatives, information, and analyses and the summary. *See* § 1503.1(a). Pursuant to § 1503.4(b), agencies must append or otherwise publish all substantive comments received on the draft statement, or summaries where the responses have been exceptionally voluminous.

Comment: Commenters stated that requiring interested parties to provide comments in a timely manner could be prejudicial to parties that are not aware of a pending draft EIS, or that may not have the resources to respond in a timely way. Some commenters said the requirements particularly disadvantage Tribes, which would not have a remedy in the event of not receiving proper notice or the resources to respond during the specified periods.

CEQ Response: The final rule contains many mechanisms designed to facilitate and enhance notice to interested parties and their ability to provide meaningful input. This begins in the scoping process (§ 1501.9(b)), where the lead agency must invite the participation of likely affected Federal, State, Tribal, and local agencies and governments, the proponent of the action, and other likely affected or interested persons, including those who might not be in accord with the action. It continues with the publication of an NOI (§ 1501.9(d)), which must include, as appropriate, a preliminary description of the proposed action and alternatives the EIS may consider, a brief summary of expected impacts, a schedule for the decision-making process, a request for identification of potential alternatives, information, and analyses relevant to the proposed action, and contact information for a person within the agency who can answer questions. Similarly, after preparation of a draft EIS and before preparation a final EIS, § 1503.1(a) requires the lead agency to invite the comments of appropriate State, Tribal, and local agencies that are authorized to develop and enforce environmental standards, State, Tribal, or local governments that may be affected by the proposed action, and 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. Additionally, the final rule's public involvement provisions in § 1506.6 require that agencies make diligent efforts to involve the public and provide public-notice of NEPA-related hearings, public meetings, and other opportunities for public involvement. Section 1506.6 also states that agencies should consider the ability of affected person and agencies to access electronic media when selecting appropriate methods for providing public notice and public involvement. By requiring agencies to provide the public more information earlier in the process, affirmatively soliciting comments throughout the development of an EIS, and assuring public involvement opportunities, the final rule gives interested parties ample opportunity to provide timely, relevant, and specific comments. Where appropriate, agencies may also receive input directly from Tribes pursuant to their procedures under E.O. 13175 to conduct government-to-government consultations.

Comment: Commenters objected to excluding information that becomes available after the close of the comment period on the draft EIS due to exhaustion. In further references to this point, commenters stated that an NOI is a preliminary statement that notifies the public of a pending action or construction project and that limited data and information are gathered at the time an agency issues the NOI.

CEQ Response: Section 1501.9(d) requires agencies to provide more information to the public in the NOI, and to solicit more information from the public earlier in the process, than was required under the 1978 regulations. As a result of these changes, NOIs will be more informative and, by extension, generate more constructive public input into the draft EIS. The final rule includes multiple opportunities for public involvement. However, it is important to establish a point in the NEPA process after which an agency is no longer obligated to review

information not otherwise in the administrative record. The Supreme Court has long recognized that there would be little hope the administrative process could ever conclude if the process could be kept open because “some new circumstance has arisen, some new trend has been observed, or some new fact discovered” *Vt. Yankee*, 435 U.S. at 554–55 (citing *ICC v. Jersey City*, 322 U.S. 503, 514 (1944)). With regard to new information, § 1502.9(d) addresses circumstances where there is significant new information relevant to environmental concerns bearing on the proposed action or its impacts and how agencies must address such circumstances.

Comment: Some commenters suggested that interested parties may have “unique understandings” or “specialized knowledge” that may be pertinent to the NEPA decision-making process, and that failure to consider those understandings is inconsistent with Congress’ purposes in enacting the statute.

CEQ Response: Nothing in the rule prevents “unique understandings” or “specialized knowledge” from being considered by an agency. This body of knowledge may be relevant to the NEPA decision-making process for a proposed action. Consistent with § 1503.4, agencies must consider substantive comments that are timely submitted during the public comment period. The final rule’s requirements regarding comments enable agencies to obtain such information from the public early in the decision-making process to facilitate the information gathering process and to avoid harmful delays.

Comment: A number of commenters raised concerns with the proposed requirement for agencies to provide a 30–day comment period on the final EIS summary of submitted alternatives, information, and analyses at §§ 1500.3(b)(3) and 1503.1(b). Some commenters objected that it was an unnecessary burden on agencies and would result in delays. Commenters

stated that it was overly burdensome and not necessary to support the agency's certification that it has considered that information. Some commenters suggested revising the requirement so that agencies have the discretion to request comments on the summary of submitted alternatives, information, and analyses section in the final EIS. Commenters also stated that requiring legal challenges to be filed within 30 days following issuance of the final EIS and narrowing the ability to seek injunctions would reduce delays to critical Federal projects, such as those that seek to reduce wildland fire risk on Federal lands.

Other commenters appeared to be confused by the proposed final EIS comment period as the only public comment period in the NEPA process and stated that would disadvantage communities, particularly those with few resources

CEQ Response: In response to comments, CEQ has revised the final rule to remove the requirement of a 30-day comment period on the final EIS. Agencies may request comments on the final EIS and set a deadline for providing such comments consistent with § 1503.1(b). CEQ anticipates that agencies will use this option when the EIS would benefit from additional public comment. CEQ notes that under the 1978 regulations, agencies may seek comments during the 30-day period between publication of a final EIS and issuance of the ROD.

Comment: Some commenters stated that CEQ lacks authority to establish rules of waiver or exhaustion.

CEQ Response: Agencies have the power to establish exhaustion requirements. *See, e.g., Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (“First, exhaustion protects administrative agency authority. Exhaustion gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into [F]ederal court, and it discourages disregard [of the agency's] procedures.”) (internal quotation marks and citations omitted); *McKart v. United*

States, 395 U.S. 185, 193 (1969) (“The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law.”). The exhaustion provision in the final rule reflects the long-standing principle that interested parties must exhaust administrative remedies by raising issues before an agency prior to making them the basis for an action in court. *See, e.g., Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1249 (9th Cir. 2000) (arguments not raised in comments waived); *Ass’n of Mfrs. v. Dep’t of the Interior*, 134 F.3d 1095, 1111 (D.C. Cir. 1998) (failure to raise argument in rulemaking constitutes failure to exhaust administrative remedies). The NEPA process works best when interested parties provide specific, relevant, and timely information.

Comment: Commenters stated that deeming comments “unexhausted” and “forfeited” if not brought in a timely manner is contrary to law, because some flaws are so obvious that the agency itself either should be or is in fact aware of them.

CEQ Response: CEQ acknowledges that an oversight in the NEPA process could be so obvious as to be arbitrary and capricious for purposes of the APA, particularly if an agency has awareness of it in fact. *See Pub. Citizen*, 541 U.S. at 765. Federal agencies have primary responsibility for NEPA compliance. *Id.* However, the final rule contains mechanisms designed to facilitate and enhance the NEPA process that will aid agencies in avoiding oversights by identifying relevant information early in the process. For example, § 1501.9(d) of the final rule requires that in the NOI, agencies include, as appropriate, a preliminary description of the proposed action and alternatives the EIS may consider, a brief summary of expected impacts, a schedule for the decision-making process, a request for identification of potential alternatives, information, and analyses relevant to the proposed action, and contact information for a person within the agency who can answer questions. Under § 1503.1(a), after preparation of a draft EIS

and before preparation of a final EIS, the lead agency must invite the comments of appropriate State, Tribal, and local agencies that are authorized to develop and enforce environmental standards; State, Tribal, or local governments that may be affected by the proposed action; and 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. These solicitations of information should aid agencies in identifying all relevant information and thereby avoid obvious oversights.

Comment: Some commenters stated that the rule would limit those who did not publicly comment on the rule from pursuing litigation in court.

CEQ Response: Challenges to agency action alleging non-compliance with NEPA procedures are brought under the APA. 5 U.S.C. 551 *et seq.* Whether a party may pursue litigation alleging non-compliance with NEPA's procedural requirements will depend on whether the party has standing. *See, e.g., Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1294–95 (D.C. Cir. 2007) (“The ‘irreducible constitutional minimum of standing’ consists of three elements: (1) an ‘injury in fact’ that is (2) ‘fairly . . . trace[able] to the challenged action of the defendant,’ and (3) ‘likely . . . redress[able] by a favorable decision.’”(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Comment: Commenters stated that the proposed rule would improperly limit judicial review of agency determinations under NEPA. Commenters specifically objected to the provision in § 1500.3(b)(4) whereby the decision maker would certify the agency's consideration of the record, as well as the provision that this certification would give rise to a conclusive presumption of validity in any subsequent judicial review of the agency's determination.

Commenters maintained that this combination of certification and conclusive presumption improperly limits the role of the courts under the APA.

CEQ Response: In the final rule, CEQ modifies the proposed text of § 1502.18(b) and moves it to § 1505.2(b) to clarify that the decision maker’s certification in the ROD is informed by the summary of submitted alternatives, information, and analyses in the final EIS and any other material in the record that the decision maker determines to be relevant. This includes both the draft and final EIS as well as any supporting materials incorporated by reference or appended to the document. The final rule also changes “conclusive presumption” to a “presumption” and clarifies that the agency is entitled to a presumption that it has considered the submitted alternatives, information, and analyses, including the summary thereof, in the final EIS. The presumption of regularity that supports the final rule reflects the important principle that public officials are presumed to discharge their duties in a regular manner. *See U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) (“[W]e note that a presumption of regularity attaches to the actions of government agencies.”) (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)). The presumption may be rebutted by clear and convincing evidence that the agency has not properly discharged its duties under the statute.

ii. Judicial Review

Comment: Some commenters supported the proposed language in § 1500.3(c). Other commenters objected to the provision in the proposed rule stating that agencies could structure their decision making to allow private parties to seek stays of their own decisions pending administrative or judicial review of those decisions. These commenters asserted that this proposal would impose an additional and unnecessary layer of review for important projects. Other commenters objected to the provision in the proposed rule stating that agencies would be

authorized to impose bond requirements, “[c]onsistent with their organic statutes,” to further the purposes of NEPA. They specifically argue that such requirements might discourage public participation in the NEPA process.

CEQ Response: In the final rule, CEQ strikes the reference to stays in § 1500.3(c). Section 1500.3(c) does not establish any bonding requirements, but rather recognizes that agencies, consistent with their organic statutes, may structure their administrative procedures to include an appropriate bond or other security requirement. Whether the agencies choose to do so is thus beyond the scope of CEQ’s authority, but judicial review of any such decisions can be sought at the appropriate time using the relevant cause of action, if one is available.

Comment: A commenter recommended that CEQ consider equitable means to connect bond retention by the courts to the number of issues won or lost in the resulting litigation. For example, if ten issues are litigated and the litigant prevails on only one, then the litigant would forfeit 90 percent of the bond. The commenter also recommended that the regulations require litigants to disclose how they are affected and the economic or environmental effect the litigant expects to suffer. In addition, the commenter recommended that CEQ consider requiring litigants to disclose funding sources for case preparation and courtroom representation, the amount and appropriateness of requiring a bond, and encourage agencies and courts to weigh the relative economic harms implicated by the bond.

CEQ Response: Section 1500.3(c) does not establish any bonding requirements, but rather recognizes that agencies may structure their administrative procedures to include an appropriate bond or other security requirement, consistent with their organic statutes. The establishment of such requirements would depend on the agency’s statutory authorities.

Comment: Some commenters supported CEQ’s reiteration that judicial review of an agency’s determination under NEPA cannot take place until final agency action has occurred. Other commenters argued that judicial review should or must be available as soon as an agency generates any NEPA document under the auspices of the statute, to ameliorate “informational injury.”

CEQ Response: NEPA does not include a private right of action and specifies no remedies. Challenges to agency action alleging non-compliance with NEPA procedures are brought under the APA. *See* 5 U.S.C. 551 *et seq.* Accordingly, NEPA cases proceed as APA cases. Section 704 of the APA authorizes Federal courts to hear cases only after “final agency action” has occurred. *See Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882 (1990) (“When . . . review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the ‘agency action’ in question must be ‘final agency action.’”). Thus, to determine when final agency action has occurred, “[t]he core question is whether the agency has completed its decision[-]making process, and whether the result of that process is one that will directly affect the parties.” *Franklin v. Mass.*, 505 U.S. 788, 797 (1992). Because NEPA’s procedural requirements apply to proposals for agency action, judicial review should not occur until the agency has completed its decision-making process, and there are “direct and appreciable legal consequences.” *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Final agency action for judicial review purposes is not necessarily complete when the agency publishes an environmental document such as the final EIS, EA, or FONSI or makes the determination to categorically exclude an action; rather, final agency action occurs when the agency issues the ROD or other decision document to take or not to take a “major Federal action significantly affecting the quality of the human environment.” 42 U.S.C. 4332(2)(C). In some

instances, an agency may choose to combine its ROD with a final EIS. In that case, the combined EIS/ROD would constitute “final agency action” under the APA.

Comment: Several commenters supported proposed § 1500.3(d), in which CEQ recognized and emphasized that compliance with NEPA’s procedural requirements is the ordinary and sufficient remedy for identified violations of the statute. Others disagreed, stating that injunctive relief is the presumptive remedy for identified violations of NEPA, and relying on the APA and cases construing that Act for authority.

CEQ Response: “NEPA imposes only procedural requirements on [F]ederal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.” *See Pub. Citizen*, 541 U.S. at 756–57 (citing *Methow Valley*, 490 U.S. at 349–50). Because analyses of environmental impacts to inform agency decision making are the statute’s focus, compliance with its procedures is the proper remedy. As the Supreme Court has observed, in response to “statements [that] appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances,” “[n]o such thumb on the scales is warranted.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010); *see also Winter*, 555 U.S. at 22, 31–33 (“Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.”) (emphasis in the original); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544–45 (1987) (rejecting the proposition that irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action).

Further, CEQ notes that NEPA section 102(2)(C) does not prohibit the substantive action of beginning a project that will cause an “irreversible and irretrievable commitment of resources.” Instead, consistent with NEPA’s nature as a procedural statute, NEPA section

102(2)(C), as part of the detailed statement, requires that “all agencies of the Federal Government shall ... include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on ... any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.” Including a detailed statement of irreversible and irretrievable commitments of resources as part of an EIS is a procedural mandate, not a substantive one aimed at avoiding any particular results or substantive outcomes.

Comment: Commenters supported the provision in § 1500.3(d) that “minor, non-substantive errors” in the NEPA process are harmless and do not affect the validity of agency action. Commenters stated that invalidating agency action on the basis of such errors does not serve the process that NEPA contemplates, and it causes unnecessary delay. Other commenters stated that this provision is superfluous to the harmless error doctrine courts have developed under the APA, and that CEQ is without authority to expand this doctrine.

CEQ Response: CEQ is asserting no more authority in § 1500.3(d) of the final rule than it did in the 1978 regulations. No assertion of APA interpretive authority is indicated by the statement that it is CEQ’s intention that minor, non-substantive errors that have no effect on agency decision making are considered harmless and will not invalidate an agency action.” Rather, CEQ is merely indicating its interpretation of the effect of its own regulations, which courts may consider as they have this provision in the 1978 regulations.

Comment: Commenters expressed concern that limiting judicial review until an agency has issued its ROD in § 1500.3(c) would enable an action to proceed further in the NEPA process, with an increased chance of poor decision-making and legal vulnerability.

CEQ Response: Interim steps in the NEPA process are subject to change and therefore are not, in CEQ's view, final agency actions subject to judicial review within the meaning of *Bennett*, 520 U.S. at 177-78. Applying judicial review prior to issuing a ROD would generate unnecessary litigation and further delay the NEPA process.

iii. Severability

Comment: Several commenters supported the proposed language in § 1500.3(e) regarding severability. These commenters stated that the changes in the proposed rule are clearly related but not intertwined. These commenters stated that no single provision of the proposed rule, if removed, would impair the remaining portions of the proposed regulations or render them meaningless. Other commenters opposed the severability language in § 1500.3(e). These commenters stated that the proposed rule contains interrelated provisions that should be read holistically. Some commenters stated that the severability provision improperly purports to direct judicial review with respect to how a court should treat remaining portions of the rule if another provision of the rule is invalidated under NEPA and the APA.

CEQ Response: The final rule merely reflects CEQ's intent regarding severability without directing judicial review. The APA allows a court to sever a rule by setting aside only invalidated portions of the rule. *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 351 (D.C. Cir. 2019) (citing *K Mart Corp. v. Cartier*, 486 U.S. 281, 294 (1988); *Virginia v. EPA*, 116 F.3d 499, 500–01 (D.C. Cir. 1997)). In the event that litigation results in invalidation of a portion of the final rule, the court can address the appropriate remedy based on the particular circumstances at that time.

Comment: Several commenters raised concerns regarding the implications of the severability language in § 1500.3(e) in the event litigation occurs, especially if there are different

legal outcomes in multiple jurisdictions regarding the scope of remedial relief. Commenters stated that the severability language could result in portions of the final rule being applicable in some jurisdictions but not others, resulting in complexities for Federal agencies, States, Tribes, local governments, and project proponents. Some commenters stated that the severability language would increase legal fees associated with litigating the final rule.

CEQ Response: CEQ acknowledges that litigation on the final rule could occur and raise issues regarding remedies. The Supreme Court has previously held that “CEQ’s interpretation of NEPA is entitled to substantial deference.” *Andrus*, 442 U.S. at 358 & n.20; *see also Methow Valley*, 490 U.S. at 355–56; *Pub. Citizen*, 541 U.S. at 757. CEQ has designed the final rule to withstand scrutiny.

Comment: One commenter requested clarification regarding the meaning of the phrase, “the applicability of any section to any person or entity is held invalid.”

CEQ Response: This language addresses a potential as-applied challenge to the final rule. While a facial challenge to the final rule would require a litigant to establish that no set of circumstances exists under which the rule would be valid, *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1214 (10th Cir. 2006); *see United States v. Salerno*, 481 U.S. 739, 745 (1987), an as-applied challenge would concern how the rule has been “applied in a particular instance.” *Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1243 (10th Cir. 2011) (citing *Reno v. Flores*, 507 U.S. 292, 300 (1993) (internal quotation marks omitted)).

4. Reducing Paperwork and Delay (§§ 1500.4 and 1500.5)

Comment: Commenters recommended that CEQ in both §§ 1500.4(a) and 1500.5(a) should add “normally” before “do not have a significant effect” and mention the possibility of extraordinary circumstances. Commenters supported the proposed changes in § 1500.4(i)

regarding the use of the scoping process not only to identify key relevant issues but also to dismiss irrelevant issues from analysis early in the NEPA process. Commenters stated that CEQ should add “as appropriate” to § 1500.4(k) because high-level NEPA review is not always warranted. Commenters recommended that CEQ should broaden § 1500.4(p) to reference additional tools for eliminating duplication beyond in addition to “adopt appropriate environmental documents,” such as using a Determination of NEPA Adequacy. Commenters recommended that § 1500.5(d) include “only” before “on a completed document.”

CEQ Response: In response to comments and for consistency with § 1501.4, the final rule inserts “normally” in §§ 1500.4(a) and 1500.5(a). CEQ declines to make the other requested changes to the final rule in §§ 1500.4 and 1500.5 because they are unnecessary. Sections 1500.4 and 1500.5 summarize other operative portions of the final rule that further the objectives of reducing paperwork and delay. Section 1500.4(k) is not intended to suggest that higher-level NEPA review is always warranted, and § 1502.4 regarding “programmatic” reviews already contains the phrase “as appropriate.” The phrase “adopt appropriate environmental documents” in § 1500.4(p) sufficiently covers the tool of a Determination of NEPA Adequacy, which some agencies use. The final rule makes other revisions in § 1500.5(d) for clarity.

5. Agency Authority (§ 1500.6)

Comment: A commenter requested that CEQ remove “as interpreted by the regulations in parts 1500 through 1508.”

CEQ Response: The final rule constitutes the implementing regulations for section 102(2) of NEPA. Section 1500.6 references “as interpreted by the regulations in this subchapter.” This language clarifies that agencies should ensure full compliance with the purposes and provisions of the Act as interpreted by the CEQ regulations. This is also consistent

with E.O. 11514, which provides that Federal agencies shall “[i]n carrying out their responsibilities under the Act and this Order, comply with the [CEQ regulations] except where such compliance would be inconsistent with statutory requirements.” E.O. 11514, as amended by E.O. 11991, sec. 2(g). For these reasons, CEQ declines to make the change.

D. Comments Regarding NEPA and Agency Planning (Part 1501)

1. NEPA Thresholds (§ 1501.1)

Comment: Commenters supported adding a new section on NEPA threshold considerations, stating that it was helpful to provide direction on whether NEPA applies, recognizing that not all Federal decisions require a NEPA analysis, and expressing the view that this section would provide greater clarity for agencies and regulated entities. Commenters also stated it is appropriate to focus initially on whether a proposed Federal action triggers NEPA, and that applying a clear analytical framework early in the process can help ensure agencies allocate their resources efficiently. One commenter supported the inclusion of threshold considerations but suggested CEQ clarify that the five considerations are not an exhaustive list.

CEQ Response: Section 1501.1 recognizes that the application of NEPA by Congress and the courts has evolved over the last four decades in light of numerous other statutory requirements Federal agencies implement, and addresses circumstances in which NEPA has been found not to apply or to be otherwise fulfilled. *See* section II.C.1 of the final rule. CEQ includes this new provision in the final rule, but retitles, reorders and revises it from the proposed rule. The final rule also adds a sixth consideration, which is whether the proposed activity or decision is expressly exempt from NEPA under another statute. This list encompasses the legal bases that are sufficient for agencies to determine whether NEPA does not apply or is otherwise fulfilled.

Agencies should consider proposed actions on a case-by-case basis unless their agency NEPA procedures already address them.

Comment: Other commenters opposed the addition of the thresholds section. Some commenters asserted that the threshold factors were vague and would inject uncertainty into the process, CEQ had not provided adequate guidance of interpretation or application of the factors, and the section would lead to litigation. Some commenters perceived the addition of a section on NEPA thresholds as narrowing the scope of projects to which NEPA applies, and expressed concerns that agencies could read it expansively to mean many Federal actions would no longer be subject to NEPA, such as pipeline construction. Other commenters raised concerns that the number of projects subject to NEPA would decrease and that elimination would result agencies doing fewer analyses under the National Historic Preservation Act (NHPA). Other commenters raised concerns this section would give agencies discretion to avoid NEPA review and would be inconsistent with sections 101 and 102 of NEPA or case law, including *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1213 (9th Cir. 2008) (the phrase “to the fullest extent possible” in section 102 is intended to prevent agencies from avoiding compliance with NEPA by narrowly construing statutes to create a conflict with NEPA, and further that repeals of statutes by implication are not favored (quoting *Forelaws on Board v. Johnson*, 743 F.2d 577, 683 (9th Cir. 1985))). Finally, some commenters opposed this section, asserting that all actions are subject to a three-part test under NEPA (EIS, EA or CE), although not all require intensive environmental analysis.

CEQ Response: The procedural provisions of section 102(2)(C) of NEPA apply only to proposed “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. 4332(2)(C). Section 1501.1, which should be read in conjunction with § 1507.3

relating to agency NEPA procedures, will assist agencies in determining whether NEPA applies to a proposed activity or decision. It reduces uncertainty. Section 1501.1 recognizes that Congress and the courts have addressed NEPA's application under a range of statutes and determined that there are circumstances where NEPA does not apply due to the requirements or procedures and documentation under another statute. *See* section II.C.1 of the final rule. The 1978 regulations also provided that agencies may determine that certain actions are categorically excluded or that agencies may conduct EAs to determine whether an action is likely to have significant effects requiring preparation of an EIS. However, the procedural provisions of NEPA do not apply to all actions by Federal agencies, but only to "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). CEQ notes that commenters reading the thresholds as "factors" are incorrect. Each threshold could result in NEPA application being unnecessary. The thresholds are not intended to be weighed against one another, although it is conceivable that more than one threshold may rule out NEPA application. For instance, a given action may not qualify as a "major Federal action" and the action may not be discretionary.

In the final rule, CEQ identifies considerations upon which courts have determined that NEPA does not apply or is otherwise fulfilled based on other statutory provisions, such as when other statutes expressly prohibit or makes compliance impossible, or when procedures or documentation under other statutes serve the function of compliance with NEPA. *See* section II.C.1 of the final rule. Agencies should not improperly construe their statutory authorities so as to avoid compliance with the procedural provisions of section 102(2)(C). Under the final rule, projects or activities that require a Federal permit or approval would generally continue to be subject to review under NEPA.

Additionally, the requirements of all other statutes, including NHPA, will continue to apply. To the extent that NHPA requires analysis relating to historic properties, nothing in the final rule alters agency obligations to comply with those requirements.

Finally, the application of NEPA to pipeline projects in particular is beyond the scope of this general rulemaking. Individual agencies with authority over such projects will apply these regulations and their NEPA procedures to such projects. Individual facts and circumstances may also bear on how NEPA is applied to pipelines.

Comment: One commenter on § 1500.1 requested that the final regulations require public comment on all environmental decisions, whether done under CEs, EAs or EISs, and that CEQ increase the use of EISs, specify that grazing decisions require full NEPA analysis, and require an EIS for all land-use planning decisions.

CEQ Response: EAs and CEs, and public involvement and comment, are addressed in other sections of the regulations. *See* §§ 1501.4, 1501.5, 1501.6, part 1503, and 1506.6. The extent to which grazing or other land-use planning decisions require an EIS, and the extent to which EISs are used generally depends on the particular facts and circumstances of each proposed action.

Comment: Some commenters raised concerns that the thresholds section would eliminate the ability of the public to determine if NEPA should be applied to a project, and that currently there is public involvement with the process for CEs and EAs. They raised additional concerns that there is no process for disputing a threshold analysis determination.

CEQ Response: Section 1501.1 sets forth a number of threshold considerations relating to whether NEPA applies or is otherwise fulfilled, and provides that agencies may make determinations in their agency NEPA procedures or on an individual basis, as appropriate.

Under § 1507.3, agency determinations would be subject to public comment during the development of agency procedures. To the extent that agencies make individual determinations regarding the applicability of NEPA, the process for challenging such determinations where a challenge is permitted is no different under the final rule than it was under the 1978 regulations. The threshold determination in *Public Citizen* was challenged and tested in that case. The challengers lost but clearly there was a mechanism (APA review) that allowed such review to take place and that will remain the case after the final rule.

Comment: One commenter stated that the thresholds section was inconsistent with NEPA's role of integrating and coordinating with other agency's responsibilities, and with NEPA's role as an umbrella statute, which creates a confusing patchwork of responsibilities.

CEQ Response: The thresholds provision reflects statutory and case law developments since the CEQ regulations were issued in 1978, and in the instance of the analysis of what is a "major Federal action," a requirement of NEPA itself. This provides clarification for agencies. Section 1501.1 reflects application of NEPA by Congress and the courts since NEPA was enacted, including identification of circumstances where NEPA does not apply or is otherwise fulfilled due to the requirements of other statutes or procedures and documentation under other statutes. *See* sec. II.C.1 of the final rule. The final rule supports integration and coordination of NEPA reviews with required reviews under other statutes where NEPA applies. Where NEPA does not apply to a proposed action, nothing in the final rule changes the obligation to comply with other statutes.

Comment: Some commenters objected to the provision in the proposed rule stating that agencies could make determinations regarding whether NEPA applies on an individual basis.

CEQ Response: Agency procedures provide Federal agency staff with direction on the implementation of NEPA, and for this reason, in § 1507.3(d) of the final rule CEQ has directed that agencies should identify when NEPA does not apply in their agency procedures. This is consistent with agency practice. *See, e.g.,* EPA Agency Procedures, (Subpart A-General Provisions for EPA Actions Subject to NEPA, 40 CFR 6.101 (Applicability)(referencing section 511(c) of the Clean Water Act exempting most Environmental Protection Agency (EPA) actions under the Clean Water Act from the requirements of NEPA, and section 7(c) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 793(c)(1)) exempting all actions under the Clean Air Act from the requirements of NEPA); NOAA, Policy and Procedures for Compliance with the National Environmental Policy Act, and Related Authorities, Companion Manual for NOAA Administrative Order 216-6A (Jan. 2017), 2. Determining When NEPA Applies (stating that courts have found that NEPA does not apply to certain actions implementing ESA). However, when agency NEPA procedures do not address specific circumstances raised, agencies should make determinations on an individual basis, based on their experience and expertise, and considering relevant statutory provisions and case law, where applicable. In the final rule, CEQ clarifies in § 1501.1(b)(1)–(2) that agencies may make such determinations in consultation with CEQ and must consult with other Federal agencies concerning their concurrence where more than one Federal agency administers the statute.

Comment: Some commenters stated CEQ lacked authority to exempt activities from NEPA.

CEQ Response: As discussed elsewhere, since NEPA was enacted, Congress and the courts have exempted certain activities from NEPA. *See* sections I.D and II.C.1 of the final rule. Under the final rule, an agency may identify statutory exemptions in their agency procedures,

which is consistent with current agency practice. Section 1501.1(a) does not exempt agency actions or activities from NEPA, but among other things, directs agencies to determine whether a proposed activity or decision is already statutorily exempt from NEPA. Section 1501.1(a) reflects the case law and statutory enactments of exemptions from NEPA. Sections 1501.1(a) does not exempt agency actions or activities from NEPA, but among other things, directs agencies to determine whether a proposed activity or decisions is already statutorily exempt from NEPA. It is helpful to agencies to recognize these statutory exemptions in the CEQ regulations and in agency procedures, where applicable. Case law, such as *Public Citizen*, also reflects areas where NEPA does not apply.

Comment: Some commenters opposed consideration of whether application of NEPA would clearly and fundamentally conflict with the requirements of another statute.

CEQ Response: This consideration is consistent with Supreme Court case law. *See, e.g., Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 791 (1976) (concluding that “even if the Secretary’s action in this case constituted major [F]ederal action significantly affecting the quality of the human environment so that an environmental impact statement would ordinarily be required, there would be a *clear and fundamental conflict* of statutory duty.”) (emphasis added). It is helpful to agencies to recognize this case law in the CEQ regulations and in agency procedures, where applicable. Locating the threshold considerations in a single section will assist agencies in determining whether NEPA applies and promote efficiency.

Comment: One commenter requested CEQ add a new subsection directing Federal agencies to consider conflicts with existing laws, policies, and regulations when considering a major Federal action and whether NEPA applies. The commenter further stated that such conflicts do not necessarily disqualify the agency from moving forward with the NEPA process;

however, all conflicts with existing laws and policies must be disclosed in the NEPA document for public review and comment.

CEQ Response: CEQ declines to make the suggested addition. Section 1501.1 focuses on circumstances where Federal statutes may render NEPA inapplicable or otherwise fulfilled. In the final rule, CEQ retains with modifications § 1506.2(d), which requires agencies to disclose in an EIS any inconsistencies with State and local requirements. This section specifically requires agencies to discuss any inconsistency of a proposed action with any State, Tribal, or local plan or laws, including the extent to which the agency would reconcile its proposed action with the plan or law.

Comment: Commenters opposed consideration of whether compliance with NEPA would be inconsistent with congressional intent and raised concerns this could lead to litigation.

CEQ Response: This provision is consistent with case law finding that compliance with NEPA would be inconsistent with congressional intent expressed in another statute. *See sec. II.C.1* of the final rule. It is helpful to agencies to recognize this case law in the CEQ regulations and in agency procedures, where applicable.

Comment: Some commenters requested CEQ clarify that if an action is not a “major Federal action” no further analysis is required. Other commenters recommended that CEQ distinguish major Federal actions that do not trigger NEPA from major Federal actions that have no significant effects and thus qualify for a CE or an EA.

CEQ Response: The final rule clarifies that a non-major Federal action is an action to which NEPA does not apply. In particular, § 1501.1(a)(4) includes consideration of whether the proposed activity or decision is a major Federal action. The final rule further provides in § 1507.3(d)(4) that agencies in their NEPA procedures should identify any non-major Federal

actions as one of the types of activities or decisions that is not subject to NEPA. Read together, these provisions clarify that a non-major Federal action is an action to which NEPA does not apply.

In the final rule, CEQ also identifies activities or decisions that are eligible for a CE or an EA. Specifically, the final rule addresses CEs and EAs in §§ 1501.4, 1501.5, and 1501.6 and requires agencies to identify such activities or decisions in their agency procedures in § 1507.3.

Comment: Commenters opposed consideration of “whether an action is a major Federal action.” Commenters noted that current definition of “major Federal action” includes an action that “may be significant” and therefore subject to preparation of an EA or eligible for a CE. Commenters on this section also expressed concern it was unclear how this section should be read and whether the revised definition of “major Federal action” would eliminate a number of projects from review based on minimal Federal funding or minimal Federal involvement, and based upon the actions being non-discretionary actions. One commenter requested that CEQ revise proposed § 1501.1(a) (paragraph (a)(4) in the final rule) to add “or has a significant environmental impact” to “Whether the proposed action is a major Federal action.”

CEQ Response: In the final rule, CEQ further clarifies the definition of “major Federal action” in § 1508.1(q) to strike “may be significant” in the first sentence to reduce confusion. CEQ also makes revisions to the definition consistent with case law to clarify in § 1508.1(q)(1)(vi) that it does not include non-Federal projects with minimal Federal funding or involvement where the agency does not exercise sufficient control and responsibility over the outcome of the projects. With respect to actions that may require preparation of an EA or are eligible for a CE, the revised regulations provide that agencies may identify and include in their agency procedures such actions. *See* §§ 1501.3, 1501.4, 1501.5, 1507.3. In § 1507.3(e), CEQ

further clarifies that agencies' NEPA procedures should identify CEs as well as those actions that normally require an EA but not necessarily an EIS.

Comment: Commenters supported considering whether an action was non-discretionary, in whole or in part. One such commenter noted that where there is no decision to be made, further analysis is not an efficient use of agency resources. Another commenter requested that CEQ further distinguish between actions that are ministerial where the agency has no discretion, and actions where the agency has some discretion but where environmental considerations cannot change the outcome of an agency's exercise of its discretion. One commenter suggested changing "lacks" to "clearly lacks."

CEQ Response: As discussed in section II.C.1 of the final rule, it is well established that non-discretionary ministerial actions are not major Federal actions. *See, e.g., Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir 2001) (where an agency's role is "merely ministerial, the information that NEPA provides can have no effect on the agency's actions, and therefore NEPA is inapplicable"); *South Dakota v. Andrus*, 614 F.2d 1190, 1193–94 (8th Cir. 1980) (concluding that the granting of a mineral patent for a mining claim was a nondiscretionary, ministerial act and nondiscretionary acts should be exempt from NEPA). Regarding distinguishing between ministerial and other actions, the definition of major Federal action in §§ 1508.1(q)(1)(ii) and (vi) excludes both activities and decisions that are ministerial as well as non-Federal projects with minimal Federal funding or involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project. Regarding insertion of "clearly" before "lacks," the case law relating to non-discretionary actions does not use the modifier clearly before lacks and the modifier is unnecessary.

Comment: Some commenters raised concerns that the provision relating to non-discretionary actions was vague and should be more particularly described, that there was the potential for agencies to describe such actions differently in their procedures, and that the addition of this section would lead to litigation.

CEQ Response: Congress and the courts have addressed NEPA's application and determined that non-discretionary actions do not trigger NEPA. *See* sec. II.C.1 of the final rule. The final rule recognizes these court decisions and provides in § 1507.3(d)(5) that agencies may identify such activities or decisions in their agency procedures. The final rule also adds language in § 1501.1(b) clarifying that Federal agencies may seek CEQ's assistance in making an individual determination under the section, and that an agency must consult with other Federal agencies concerning their concurrence in statutory determinations under § 1501.1(a) where more than one agency administers the statute.

Comment: One commenter raised concerns that including consideration of whether actions were non-discretionary would in practice lead to less thorough consideration of effects, potentially lead to fewer applicants seeking necessary State permits, and analytical gaps for States that currently do not have State equivalents of NEPA.

CEQ Response: Congress and the courts have addressed the application of NEPA and the thresholds section reflects these developments. Section 1501.1 does not alter or change the obligations of project applicants to comply with all applicable laws, including State laws requiring permits. Additionally, NEPA does not regulate State permitting processes.

Comment: Some commenters supported the threshold consideration relating to functional compliance where analysis from other agencies is efficient and supported avoidance of

duplicative efforts because additional layers of review extend the time for decision making and may unnecessarily consume the resources of agencies and applicants.

CEQ Response: Under the final rule, agencies should identify those activities or decisions that are not subject to NEPA, including actions where the agency has determined that another statute's requirements serve the function of agency compliance with NEPA.

§ 1507.3(d)(6). To the extent agencies make such determinations on an individual basis, CEQ revises the final rule in § 1501.1(b) to clarify that agencies may seek CEQ's assistance in making individual determinations, and must consult with other Federal agencies concerning their concurrence in statutory determinations made under § 1501.1(a) where more than one agency administers the statute.

Comment: CEQ received a number of comments opposing consideration of whether other analyses or processes under other statutes would serve the function of NEPA. Commenters stated that allowing an agency to determine that analyses and processes under other statutes serve the function of agency compliance with NEPA would amount to a delegation of substantive discretion to the agencies and would be improper. One commenter stated that it would be very rare that two statutes are completely redundant, that NEPA is the broadest statute of its kind, and that other statutes generally cover the requirements of NEPA only partially. Another commenter stated that, while they supported incorporating other analyses by reference, NEPA is unique and analyses under other statutes should not be considered full replacements for a NEPA document. Another commenter similarly stated that agencies can incorporate by reference other analyses, and, as proposed, there was a lack of standards for functional equivalence, which would be an invitation for agencies or affected communities to argue that NEPA no longer applied to a variety of actions such as land management, planning, permitting, fisheries management, and

mining claims without public participation. Finally, one commenter stated that more guidance would be needed to ensure other analyses or processes under other statutes served as agency compliance with NEPA.

CEQ Response: Existing case law recognizes that some agency documentation and procedures can serve the function of compliance with NEPA. In response to comments, CEQ revises § 1501.1 to clarify that this section addresses circumstances in which NEPA does not apply or is otherwise fulfilled. CEQ also does not include “the agency has determined other analyses or processes under” so that § 1501.1(a)(6) in the final rule reads “[w]hether the proposed action is an action for which another statute’s requirements serve the function of agency compliance with the Act.” CEQ also includes similar language in § 1507.3(d)(6) that agencies should identify in their NEPA procedures those activities or decisions that are not subject to NEPA, including actions where the agency has determined that another statute’s requirements serve the function of agency compliance with NEPA.

Comment: A commenter recommended establishing a process under § 1501.1 that distinguishes “mom and pop” or “minor operations and maintenance proposals” from large proposals with major impacts on the landscape.

CEQ Response: Similar to the 1978 regulations, the final rule allows different levels of review, as described in § 1501.3, based on whether the effects of the proposed action are significant.

Comment: Some commenters expressed concern that there was no definition of the terms “analyses or processes” in proposed § 1501.1(a)(5) (paragraph (a)(6) in the final rule) leaving too much discretion to individual agencies to determine what analyses or processes would serve as a functional equivalent for a NEPA document. These commenters were also concerned that the

regulations did not define the term “functional equivalent.” Further, commenters were concerned that “other statutes” was too vague.

CEQ Response: In the final rule, CEQ makes several revisions to address the commenters concerns. The final rule does not use the terms “analyses or processes” in § 1501.1(a)(6). With regard to § 1501.1, paragraph (b) makes clear that agencies may consult with CEQ in making individual determinations and must consult with other Federal agencies concerning their concurrence in statutory determinations made under § 1501.1 where more than one Federal agency administers the statute. If an agency is identifying actions where it has determined that another statute’s requirements serve the function of agency compliance with NEPA in its agency NEPA procedures pursuant to § 1507.3(d)(6), the agency must consult with CEQ. In § 1506.9, concerning functional compliance with NEPA where the proposed action is a proposal for regulation, the final rule clarifies that procedures and documentation pursuant to other statutory or Executive order requirements may satisfy some or all of the requirements of the CEQ regulations. It further states that agencies must identify which corresponding requirements in the CEQ regulations are satisfied, and consult with CEQ to confirm such determinations.

2. Apply NEPA Early in the Process (§ 1501.2)

Comment: Commenters opposed changing “shall” to “should” and “possible” to “reasonable” in § 1501.2(a). Commenters stated that the proposed change could undermine consultation, consideration of alternatives, and render agencies less likely to revise the proposed action. Other commenters supported the changes stating that the appropriate time to begin the NEPA process is dependent on when the agency has sufficient information and how it can most effectively integrate the NEPA review into the agency's decision-making process. Some

commenters stated that the proposed change muddies the waters with terms that are unclear. Commenters stated that agency discretion is a good thing, but this proposed change provided little guidance on what CEQ intends.

CEQ Response: The proposed change, adopted in the final rule, will not substantively or adversely change the NEPA process. Typically, the onset of planning processes is not well defined and varies across agencies and types of Federal actions. In practice, agencies initiate the NEPA process at the earliest reasonable time, including for applicant driven proposals. The final rule provides the necessary flexibility for agencies to tailor early planning and NEPA process integration to their specific circumstances.

Comment: Commenters requested CEQ add a sentence to the end of § 1501.2(a) to direct agencies to analyze the potentially affected environment and degree of direct, indirect, and cumulative effects when considering whether the effects of a proposed action are significant.

CEQ Response: CEQ declines to make the requested change to the final rule. Section 1501.3(b) addresses how agencies should consider significance and § 1508.1(g) provides a revised definition of effects.

Comment: Commenters supported the consideration of economic factors in § 1501.2(b)(2), but stated that the consideration should not be limited to the economic benefits from a proposed action. Commenters stated that agencies should also consider the economic benefit that can be realized by “no action” or the economic losses that would occur due to implementation of one or more project alternatives.

CEQ Response: NEPA requires that agencies consider the no action alternative in their analyses. Consistent with § 1502.22, when agencies conduct a cost-benefit analysis, they should consider the no action alternative along with other alternatives with differing environmental

effects. The final rule does not require preparation of a cost-benefit analysis and does not require agencies to compare the various alternatives in a monetary cost-benefit analysis. Further, agencies should not compare alternatives in that manner when there are important qualitative considerations. CEQ provides broad guidance in § 1502.22, recognizing that agencies will apply their respective policies and procedures when developing a cost-benefit analysis.

Comment: Commenters supported the proposal to include economic and technical analyses in NEPA documents, although some interpreted the change as allowing economic and technical factors to outweigh environmental concerns.

CEQ Response: As a clarification, the language in § 1501.2(b)(2) states that agencies must identify environmental effects and values so they can be appropriately considered along with economic and technical analyses in other planning documents. This is consistent with section 102(2)(B) of NEPA. The final rule does not provide direction concerning the weighing of the factors under consideration.

Comment: A commenter requested clarification on the difference between “compared,” which the 1978 regulations use, and “appropriately considered,” which the proposed rule used in § 1501.2(b)(2). In the 1978 regulations, analysis is required to identify environmental effects and values in adequate detail so they can be “compared” to economic and technical analyses. In the proposed rule, analysis is required to identify environmental effects and values so they can be “appropriately considered” with economic and technical analyses.

CEQ Response: “Appropriately considered” is a more precise phrase because environmental, technical, and economic factors are considered together in the NEPA process. This is consistent with section 102(2)(B) of NEPA.

Comment: Commenters recommended removing the requirement that an agency publish an EA or EIS “at the same time as other planning documents” in § 1501.2(b)(2) and requested citation in NEPA that supports the proposed change. Other commenters requested more information on the meaning of the language.

CEQ Response: Section 1501.2(b)(2) is consistent with section 102(2)(B) of NEPA and intended to timely inform the public and facilitate coordination across relevant Federal, State, Tribal, and local governments. For example, when an agency releases a draft feasibility report, it should at the same time release the draft EIS. In response to comments, CEQ has further revised the final rule so that agencies are required to concurrently review and publish environmental documents and appropriate analyses with other planning documents “whenever practicable.” The additional flexibility will enable documents to be made available to the public without delay, because other documents are not yet ready for public release.

Comment: Commenters recommended that CEQ further clarify “unresolved conflicts concerning alternative uses of available resources” in § 1502.1(b)(3).

CEQ Response: CEQ retains the language from the 1978 regulations, which is consistent with the statute at section 102(2)(E). CEQ declines to make changes to address the commenters’ concern.

Comment: Commenters requested that CEQ allow State and local governments to become cooperating agencies as soon as formal technical analyses or pre-NEPA planning begins. Some commenters suggested striking § 1501.2(b)(4)(ii), because it is ambiguous.

CEQ Response: Close coordination with other Federal, State, Tribal, and local governments is essential to conduct an efficient and timely environmental review and to fulfill the requirements of section 102(2) of NEPA. The final rule in § 1501.8 requires cooperating

agencies to participate in the NEPA process at the earliest practicable time. CEQ expects that pre-NEPA planning will include cooperating agencies; however, there may be circumstances when an agency may not find it practicable. For this reason, CEQ declines to provide further specificity.

Comment: Commenters stated that the proposed rule did not clarify the level of detail needed about a proposal to initiate and complete the environmental review.

CEQ Response: The planning process for applicants, where the NEPA process involves applicants, typically begins well before an agency releases an NOI to the public. The proposed rule integrates environmental considerations and early consultation with State, Tribal, and local governments into agency planning with the intention that the proposed action undergoes some degree of scrutiny for its economic, technical and environmental merits prior to publication of the NOI. For example, the agency must understand the purpose and need for a proposal and how the proposal can meet that purpose and need. The agency retains discretion as to the level of detail needed to initiate and complete analyses. This may depend on the agency's statutory authority and policies, and the complexity of the proposal.

Comment: Commenters stated their support for applying NEPA early in the planning process to concentrate on relevant environmental analysis rather than producing an encyclopedia of all applicable information.

CEQ Response: CEQ acknowledges the commenter's support for the revision.

Comment: Commenters recommend that CEQ amend § 1501.2(b)(4)(ii) to require agencies to notify, invite, and consult early at the earliest time practicable.

CEQ Response: The use of the term “consults” is sufficient to ensure early coordination with State, Tribal, and local governments, and CEQ declines to make further changes to address the commenters’ concern.

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

Comment: Commenters supported the proposed rule’s establishment of a clearer framework for determining the appropriate level of NEPA review, whether an EIS, EA or CE. Commenters stated that ensuring that agencies use a practical and flexible decisional framework for assessing proposed actions and choosing the appropriate level of environmental review is essential for the efficiency of future projects. Some commenters suggested emphasizing the use of the simplest and most efficient reviews possible.

CEQ Response: CEQ acknowledges the support for its proposal. The final rule retains the language of the proposed rule at § 1501.3(a).

Comment: Commenters stated that, in § 1501.3(a)(2), when the significance of a proposed action is unknown, the agency should prepare an EIS. Commenters stated that preparation of an EIS would be more in line with NEPA’s precautionary principle and that the increased public participation with an EIS would better inform novel science or methodologies.

CEQ Response: The level of analysis that NEPA requires is governed by a rule of reason, which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of information to the decision-making process. *Pub. Citizen*, 541 U.S. at 767–68 (“[I]nherent in NEPA and [the CEQ] regulations is a ‘rule of reason,’ which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decision[-]making process. Where the preparation of an EIS would serve ‘no purpose’ in light of NEPA’s regulatory scheme as a whole, no rule of reason

worthy of that title would require an agency to prepare an EIS.” (citing *Marsh*, 490 U.S. at 373-74; *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289 (1975)). Where a risk is reasonably foreseeable, but the strength of the effect is highly uncertain or unknown, agencies should base their determinations on the specific circumstances of the proposed action. The precautionary principle is a term of art that the NEPA statute and the CEQ regulations do not use.

Comment: Commenters requested that CEQ add a category in § 1501.3(a) to provide that projects having beneficial environmental effects are appropriate for an EA or CE.

CEQ Response: The final rule in § 1501.3(b)(2)(ii) provides that agencies should consider both beneficial and adverse effects in determining significance. This language is sufficient to allow agencies the flexibility needed to make an appropriate determination of the level of NEPA review for environmental restoration projects. When developing or revising their NEPA procedures, agencies may identify environmental restoration projects as actions that are generally appropriate for an EA or CE under § 1507.3(e)(2).

Comment: Commenters requested that CEQ include language in the final rule that would allow an applicant to request that an agency take a harder look at particular issues and effects identified by the applicant as potentially significant in order to minimize litigation risk for the action agency and applicant. Other commenters observed that the development of EAs sometimes drags on for years as EAs become de facto EISs, in an effort to avoid administrative protest or appeal. This protracted process wastes time and limited resources for both applicants and Federal agencies.

CEQ Response: CEQ encourages agencies to work with project applicants to understand potentially significant effects of the proposed action. *See* §§ 1501.5(e) and 1502.5(b). However,

litigation risk should not be a predominant driver of an agency's actions, including the determination of significance. The final rule's time limits in § 1501.10 and page limits in §§ 1501.5(f) and 1502.7 should reduce instances where an EA takes a lengthy amount of time to complete and becomes similar to an EIS.

Comment: Commenters stated that CEQ should reconsider the need for the changes in § 1501.3(a), when the 1978 regulations already contained many of its concepts. Alternatively, commenters stated that CEQ should provide a specific required timeframe for a decision on the level of NEPA review.

CEQ Response: The final rule reorganizes language formerly located in other portions of the 1978 regulations to create a framework for agencies to use in determining the appropriate level of NEPA review that is both clear and based on informative considerations. CEQ declines to adopt a specific timeframe for a decision on the level of NEPA review in order to allow agencies maximum flexibility in allocating their resources to meet the time limits of § 1501.10.

Comment: Commenters stated that the use of the word “normally” in § 1501.3(a) introduces ambiguity, even though the 1978 regulations uses the term.

CEQ Response: The final rule retains the use of the word “normally” because it describes a broad range of situations while allowing limited exceptions. Agency practice over the past 40 years has not demonstrated a need to clarify the meaning of “normally.”

Comment: A commenter recommended that CEQ add language in §§ 1500.5 and 1501.3(a) that would require agencies as an initial step to ensure the proposed action meets the definition of a major Federal action.

CEQ Response: CEQ declines to include language requiring agencies to ensure a proposed action meets the definition of major Federal action in §§ 1500.5 and 1501.3(a) because that analysis is more appropriately addressed in § 1501.1(a)(4).

Comment: Commenters stated that CEQ insufficiently explained its justification for moving the definition of “significantly” to § 1501.3(b) and altering its language.

CEQ Response: While listed in part 1508, “Definitions and Index,” the 1978 regulations did not provide a definition of “significance,” but rather provided direction for applying “significantly,” pursuant to 42 U.S.C. 4332(2)(C). Upon further review, the application of “significantly” is more readily understood in an operative framework as set forth in § 1501.3(b). CEQ further notes that the final rule revises the proposed § 1501.3(b), as described in in section II.C.3 of the final rule, to provide further clarification.

Comment: Commenters recommended that CEQ provide a concise definition of “significantly,” given that the regulations also use “significance” or “significant” in § 1501.3(a) regarding the appropriate level of NEPA review, § 1501.4(b) regarding CEs, and in § 1508.1(g), which defines effects. Commenters pointed to dictionaries and other environmental laws as sources for a definition of “significance.” Some commenters recommended that CEQ use the definition of “significant regulatory action” in E.O. 12866 titled, “Regulatory Planning and Review.”⁴²

CEQ Response: Section 1501.3(b) functionally defines significant. *See, e.g.,* § 1501.3(b) (referencing “degree of the effects of the action”). CEQ declines to create a definition for significantly because it is an operational concept and therefore is more clearly addressed in

⁴² 58 FR 190 (Oct. 4, 1993).

§ 1501.3. In response to comments, CEQ has made further changes to the definition of “effects” in § 1508.1(g) and removed the word “significant.” CEQ declines to revise § 1501.4(b) because the term “significant” is directly relevant to the considerations set forth in § 1501.3 for determining significance. The final rule does not adopt the “significant regulatory action” definition from E.O. 12866 because that Executive order only governs regulatory actions, so its provisions are inapplicable to other Federal actions under NEPA that are not rulemakings.

Comment: Some commenters were confused as to CEQ’s intent with the substitution of different terms for “context” and “intensity” from 40 CFR 1508.27 in § 1503.1(b). Commenters noted that the proposed rule replaced “intensity” with “degree” and suggested that CEQ intended this change to reduce the number of actions that are considered significant.

CEQ Response: The intent of this change is to make the consideration of significance more manageable by taking a confusing provision from the 1978 regulations and moving it into a more appropriate provision and making its application straightforward. The final rule replaces “context” and “intensity” with “potentially affected area” and “degree,” to provide greater clarity as to the considerations agencies should assess in determining significance. The phrase “potentially affected environment” relates more closely to physical, ecological, and socio-economic aspects than “context.” The final rule reorganizes several factors formerly categorized under intensity to further clarify this distinction. The final rule uses the term “degree” because some effects may not necessarily be of an intense or severe nature, but nonetheless should be considered when determining significance. While 40 CFR 1508.27 used several different words to explain what was meant by “intensity,” it also used “degree” numerous times. Therefore, the consistent use of “degree” rather than “intensity” and “degree” is clearer.

Comment: Commenters stated that by using “may” in § 1501.3(b)(1) instead of “must” as used in 40 CFR 1508.27(a), the proposed rule is too permissive and would result in confusion. Some commenters preferred “must,” while others requested that CEQ clarify how agencies should consider impacts to the affected area when determining significance.

CEQ Response: In response to comments, the final rule changes “may” to “should” in § 1501.3(b)(1). With the change, both § 1501.3(b)(1) and § 1501.3(b)(2) use “should,” thereby reducing confusion and applying the two provisions in a consistent manner. Although 40 CFR 1508.27(a) used “must,” CEQ notes that 40 CFR 1508.27(b) used “should” to describe the consideration of intensity. Agency practice under the 1978 regulations has been to consider both context and intensity in a similar manner. CEQ notes that the final rule requires agencies to analyze both the potentially affected environment and degree of the effects, even though it uses “should” in reference to the specific considerations.

Comment: Commenters stated that considering whether effects are significant based on “the potentially affected environment” and “the affected area” § 1501.3(b)(1) will narrow the scope and lead to a lower level of review for many proposed actions. Commenters stated that removing consideration of impacts on “society as a whole,” “the affected region,” and “affected interests” will result in vagueness and confusion when determining significance. Commenters stated that agencies should consider effects wherever they might occur. Some commenters stated that the proposed changes do not further section 101 of NEPA’s policy “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. 4331. Some commenters stated that the proposed changes are contrary to CEQ’s statutory mandate to analyze and interpret information concerning the conditions and trends in the quality

of the environment for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of the Act. Other commenters supported the proposed changes because they assert that “potentially affected environment” is a clearer and more precise term than “context.”

CEQ Response: In response to comments, CEQ further revises the final rule at § 1501.3(b) to clarify that consideration of the affected area includes “its resources, such as listed species and designated critical habitat under the Endangered Species Act.” By adding “its resources,” CEQ is clarifying that “affected area” not only refers to the geographic boundary of the affected area, but the resources within it, including as applicable, its historic, cultural, and ecological characteristics, where those resources are affected. Further, agencies apply § 1501.3(b) based on the definition of effects in § 1508.1(g), which includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic (such as the effects on employment), social, or health effects. The final rule maintains full consideration of a proposed action’s environmental impact when an agency makes a determination on its significance. Section 101 of NEPA is a broad and ambiguous provision that, consistent with *Chevron*, accommodates a wide range of procedural regulations to implement NEPA as reflected in the procedural framework created by the 1978 regulations. Applying § 1501.3(b)(1) in the final rule will inherently build in a consideration of the impact of current trends.

Comment: Commenters requested clarification regarding CEQ’s intent in proposing, “in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the Nation as a whole.” Some commenters stated that substituting “Nation as a whole” for “world as a whole,” precludes consideration of extraterritorial effects. Commenters

stated that significant effects of a project can be local, regional, national, or global. Some commenters stated that the proposed changes would result in eliminating consideration of climate change. Other commenters stated that analyzing site-specific impacts using a national scale would only lead to a conclusion of non-significance, so only the affected area should be considered. Commenters stated that considering rural local areas with major metropolitan areas can make the economic impacts appear insignificant.

CEQ Response: In response to comments, the final rule revises the example replacing “locale” with “local area” to track more closely with “national, regional, local” which is used earlier in § 1501.3(b)(1). The final rule deletes the latter part of the sentence because it merely sets up a comparison by way of example, and referencing “Nation as a whole” is superfluous. The final rule also inserts “only” to clarify the intent that the local area should be the focus of a significance determination for a site-specific project. The rule does not preclude agencies from analyzing any particular effect of a proposed action on the human environment, as long as it meets the definition of “effects” set forth in § 1508.1(g).

Comment: Several commenters stated that removing the references to society as a whole, the affected region, and affected interests in § 1501.3(b)(1) will result in decreased consideration of environmental justice concerns. Other commenters stated that determining “significance” at an early stage of the NEPA process would limit the EISs before public participation has occurred, particularly the participation of environmental justice communities.

CEQ Response: Section 1501.3(b)(2) states that agencies must consider the degree of the effects when determining significance. In addition, under the scoping process in § 1501.9, in their agencies must include information in their NOIs about a project’s expected impacts and request input from the public to ensure consideration of significant effects. The definition of

“effects” in § 1508.1(g) continues to include effects that are relevant to environmental justice communities, including ecological, aesthetic, historic, cultural, economic, social, and health impacts. Under the final rule, the timing of the significance determination should not disproportionately impact environmental justice communities, as agencies will consider effects relevant to environmental justice communities when analyzing the degree of the effects regardless of the timing of that analysis.

Comment: Commenters stated that the proposed removal of 40 CFR 1508.27 eliminates problematic language included under the “intensity” factors. Commenters stated that both agencies and courts at times have approached these factors as a rote checklist that requires separate written justification for each factor regardless of whether they are relevant to the action at hand. Commenters stated that deletion of these factors simplifies the regulatory text while meeting the aims of NEPA.

CEQ Response: Section 1501.3(b) sets forth considerations agencies should use in making a significance determination. The final rule includes the phrase “as appropriate to the specific action” to indicate that these considerations are not a rote checklist if a particular consideration is not relevant to the proposed action. The final rule eliminates language in 40 CFR 1508.27 that was extraneous and beyond the scope of the statute, while retaining the substantive elements.

Comment: Commenters stated that the proposed rule’s removal of seven of the ten intensity factors listed in 40 CFR 1508.27(b) for determining “significance” is contrary to congressional intent. Commenters stated that removing the intensity factors in 40 CFR 1508.27(b)(3)–(9) would generate uncertainty in the NEPA process when determining significance. Commenters stated that removing the definition of “significance” will result in

uncertainty and delay because it casts doubt on established court precedent and methodologies for determining the impacts of projects, and will likely lead to litigation. Commenters questioned whether agencies would no longer need to evaluate impacts on resources not listed in § 1501.3(b) when determining significance. Multiple commenters raised concerns about the omission of unique characteristics, controversy, uncertainty, precedent, cumulative effects, segmentation, historical and cultural resources, threatened and endangered species, and critical habitat. Commenters stated that the final rule should expressly prohibit agencies from segmenting proposed projects. Commenters stated that the sentence concerning segmentation that CEQ proposed to delete from 40 CFR 1508.27(b)(7) concerned a factor for the significance determination, while the language in §§ 1501.9(e) and 1502.4(a) addresses the scope of an EIS once it has been deemed necessary. Commenters stated that by not including “cumulative impacts” as a criterion for significance determinations, the proposed rule diminishes the scope of significant effects. Commenters with particular interests in historical and cultural properties asserted that deletions in the proposed rule would impact the Federal Government’s ability to “preserve important historic, cultural, and natural aspect of our national heritage.” 42 U.S.C. 4331(b)(4). Some commenters stated that the proposed rule’s changes would not further NEPA’s mandate to “utilize a systematic, interdisciplinary approach.” 42 U.S.C. 4332(2)(A). Some commenters supported the changes in § 1501.3(b) of the proposed rule because it would be simpler and clearer.

CEQ Response: Several factors formerly considered as “intensity” in 40 CFR 1508.27(b)(3), (8), and (9), are more appropriately considered as the “potentially affected environment.” The final rule uses the phrase “affected area and its resources” as a means of clarifying that agencies consider a variety of resource impacts in a given area, and uses the

illustrative example of listed species and designated critical habitat under the ESA. Further, agencies apply § 1501.3(b) based on the definition of effects § 1508.1(g), which includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic (such as the effects on employment), social, or health effects. In this way, the final rule continues to fulfill NEPA's direction to use a "systematic, interdisciplinary approach." 42 U.S.C. 4332(2)(A). Moreover, as discussed in section II.H of the final rule, the NEPA statute does not define significantly. The test for significantly that was created in the 1978 regulations in 40 CFR 1508.27(b) can thus be revised by CEQ consistent with long-standing principles of administrative law.

CEQ makes further changes to the final rule in response to comments concerning 40 CFR 1508.27(b)(6) and (7). Similar to the 1978 regulations, the final rule does not allow agencies to avoid significance by segmentation (*i.e.*, "terming an action temporary or by breaking it down into small component parts."). Section 1501.3(b) directs agencies to consider connected actions consistent with § 1501.9(e)(1). Additionally, where a proposed action is a component or segment of a larger project, the final rule requires Federal agencies under § 1501.9(e) and § 1502.4(a) to evaluate in a single EIS all proposals or parts of proposals that are related closely enough to be, in effect, a single course of action. To the extent future actions, which include ongoing or connected actions, are identified in the scoping process, the final rule would require consideration of all effects that are reasonably foreseeable and have a reasonably close causal relationship to the related Federal actions. Although some commenters raised concerns about the deletion of "temporary" in 40 CFR 1508.27(7), the final rule retains the concept of short-term effects in § 1501.3(b)(2)(i). Thus, the final rule should not lead to segmentation of NEPA analyses.

CEQ does include language in the final rule to address concerns with treatment of 40 CFR 1508.27(b)(5). Highly uncertain effects or effects that involve unique risks, bounded by the requirement that they be reasonably foreseeable and have a reasonably close causal relationship to the proposed action, will be considered under the final rule.

CEQ does not include language in the final rule to address concerns with treatment of 40 CFR 1508.27(b)(4). The extent to which an effect is highly controversial is challenging to assess objectively and not indicative as to whether a proposed action has a significant impact on the human environment.

Comment: Commenters who supported the proposed rule's changes to "significantly" asserted that 40 CFR 1508.27 used a vague and overbroad definition. They stated that, in some cases, the vagueness has led to an agency conflating the potential significant impacts of one action into the analysis of the potential impacts of another. One commenter used the example of a Rural Utilities Service loan or loan guarantee that would be analyzed as to the impacts of project construction before first examining whether the decision on the loan or loan guarantee was necessary for project construction. These commenters argued that the proposed rule would reduce unnecessary and duplicative environmental reviews that increase costs and delay projects.

CEQ Response: The final rule's changes to "significantly" should improve clarity and reduce unnecessary and duplicative environmental reviews. Agencies should base their determination of significance on an analysis of the potentially affected environment and the degree of the effects of the proposed action.

Comment: Some commenters stated that the reason for the proposed retention of the three former "intensity" factors from 40 CFR 1508.27(b) and deletion of others in § 1501.3(b)(2) is unclear. These commenters recommended that CEQ delete these remaining three "degree"

factors. Commenters stated that their removal would not foreclose their consideration where appropriate, but the proposed inclusion of these three factors in proposed § 1501.3(b)(2) does not clarify what “degree of effects” means. Commenters stated that there is no need to mention violation of other laws because it is already clear that agencies cannot violate other environmental laws. Commenters stated that “beneficial” is subjective and has caused confusion in courts and recommended the phrase “agencies should consider the degree of effects in a holistic manner” to avoid any possibility of a beneficial effect alone mandating an EIS.

CEQ Response: CEQ declines to make the recommended changes. CEQ has clarified which factors are included to help ensure consistent implementation of NEPA by Federal agencies. As to § 1501.3(b)(2)(i), the farther effects are into the future, the less important and more speculative those effects generally become. As to § 1501.3(b)(2)(ii), the joint consideration of benefits and adverse effects could result in a different analysis of the degree of effects than focusing only on adverse effects. As to § 1501.3(b)(iii), effects on public health and safety are paramount and part of assessing the overall degree of effects, especially in light of NEPA section 101(a)’s purpose to “fulfill the social, economic, and other requirements of present and future generations of Americans.” Finally, as to § 1501.3(b)(2)(iv), looking to all relevant sources of law to see whether environmental effects are barred by law (as opposed to permitted under law) is another relevant factor to consider in assessing the degree of effects.

Comment: Some commenters stated the proposed change from “the degree to which (the proposed action affects)” as used in 40 CFR 1508.27 to “[i]n considering the degree of the effects” in § 1501.3(b) results in watering down the emphasis that decision makers must place on assessing the degree to which an impact affects the environment resource. These commenters recommended CEQ retain the language as used in 40 CFR 1508.27.

CEQ Response: The final retains the phrasing as proposed for clarity.

Comment: Commenters stated that the language in proposed § 1501.3(b)(2)(iii) is an inadequate replacement for the intensity factor in 40 CFR 1508.27(b)(9) regarding ESA-listed species. Commenters stated that the proposed rule would eliminate consideration of whether an action “may adversely affect” a species listed as threatened or endangered under the ESA in determining the significance of an action. These commenters asserted that this proposed change is inconsistent with NEPA’s core aims of ensuring informed decision making and detailed consideration of environmental impacts. They further stated that this proposed change is inconsistent with NEPA’s legislative history, which explains the need to counteract “the decline and extinction of fish and wildlife species” as a reason for passing NEPA.

CEQ Response: In response to comments, the final rule makes further changes in § 1501.3(b)(1) to clarify that consideration of the affected area includes its resources and uses as an illustrative example “listed species and designated critical habitat under the Endangered Species Act.” CEQ notes that agencies would also consider listed species and critical habitat under the definition of effects, which includes ecological effects. Thus, the final rule furthers the purposes of NEPA and is consistent with the statute’s legislative history.

Comment: Some commenters asserted that vagueness in the factor at 40 CFR 1508.27(b)(9) regarding endangered or threatened species has confused some courts, such as those holding that a finding in a biological assessment that an action is “likely to adversely affect” a listed species is sufficient to require preparation of an EIS. These commenters asked CEQ to provide clarity that the fact an action requires a formal consultation under the ESA does not necessarily trigger preparation of an EIS.

CEQ Response: As the courts have held numerous times, NEPA and the ESA are different statutes with different standards, definitions, and underlying policies. NEPA is a procedural statute, while the ESA, at least in several respects, imposes substantive duties on Federal agencies and the public. A proposed action that is likely to adversely affect a listed species or critical habitat may also have significant impacts; however, whether preparation of an EIS is required depends on the particular facts and circumstances of the proposed action.

Comment: Commenters stated the language in proposed § 1501.3(b)(1) that “[b]oth short- and long-term effects are relevant” to the significance determination is inconsistent with the language in § 1508.1(g) that effects that are “remote in time” should not be considered significant. Some commenters requested that CEQ delete the language regarding long-term effects in § 1501.3(b)(1) in order to reconcile the perceived inconsistency.

CEQ Response: Long-term effects are not necessarily remote. Remoteness is a question of degree—an effect that is exceedingly far out into the future. The commenters also are mistaking the duration of an effect with the point in time at which an effect occurs. The onset of a long-term effect may be soon after the proposed action and reasonably foreseeable, and have a reasonably close causal relationship to the proposed action. Whereas, an effect that is remote in time is generally not reasonably foreseeable and characteristic of “but for” causation. By further revising the definition of effects at § 1508.1(g)(2) to include “generally,” CEQ accounts for the fact that there may be circumstances when an effect that is remote in time is reasonably foreseeable and has a reasonably close causal relationship to the proposed action.

Comment: One commenter requested that CEQ retain the definition of “context” in 40 CFR 1508.27, which instructs the agency to consider both short- and long-term effects as

relevant, so that resource management plans with impacts well into the future could continue to be discussed.

CEQ Response: The proposed rule stated that both short-term and long-term effects are relevant to the significance determination. The final rule retains this operative language, while moving the reference to short- and long-term effects to § 1501.3(b)(2) because the duration of an effect is more closely associated with the degree of the effect than with the affected area.

Comment: Some commenters stated that the factor regarding beneficial and adverse effects in proposed § 1501.3(b)(2)(i) was weaker than the language in 40 CFR 1508.27(b)(1), which stated that a significant impact may exist even if effects on balance were beneficial. Some commenters welcomed the clarification regarding consideration of both beneficial and adverse effects.

CEQ Response: The language in the 1978 regulations concerns the direction or nature (*i.e.*, beneficial or adverse) of individual effects, recognizing that one or more significant adverse effects may be present despite an overall beneficial impact of a proposed action. CEQ declines to make further changes to the final rule because it is clearer to state that agencies should consider both beneficial and adverse effects. This phrasing does not weaken consideration of those situations where beneficial impacts offset significant adverse impacts from a proposed action. Further, the second sentence in 40 CFR 1508.27(b) is superfluous since the definition of effects in § 1508.1(g) contains similar language regarding the balancing of beneficial and detrimental effects.

Comment: Some commenters stated that CEQ should strike “public” from “public health and safety” in proposed § 1501.3(b)(2)(ii) because NEPA does not distinguish between whether an action affects the nonpublic versus the public.

CEQ Response: The final rule retains the language of the proposed rule in § 1501.3(b)(2)(iii). The 1978 regulations included the word “public” at 40 CFR 1508.27(b)(2). Because NEPA is directed at major Federal actions significantly affecting the quality of the human environment, it necessarily is concerned with “public” health.

Comment: Some commenters stated that the NPRM did not sufficiently explain the proposed removal of “controversy” from the considerations for significance because the preamble did not discuss why scientific controversy would not be worth considering. Some commenters stated that the current regulation recognized that the controversy referenced in 40 CFR 1508.27(b)(4) was about the action’s effects and not the action itself. Other commenters supported the proposed rule’s removal of “controversy” because some courts had viewed any opposition to the proposed action as “controversy,” and therefore a significant impact. Some commenters observed that other independent agencies have definitions of “significant” that consider controversy. Some commenters requested that CEQ expressly state in the regulatory text that the level of opposition to a proposed action does not create significance.

CEQ Response: The final rule does not include “controversy” as a consideration for a significance determination. The inclusion of “controversy” in 40 CFR 1508.27 has resulted in confusion that has not furthered NEPA’s objectives. As stated in the preamble to the proposed rule, courts have treated “controversy” as scientific controversy rather than political or other forms of controversy. Scientific controversy, as applied in this context, represents the extent of disagreement in the scientific literature regarding how a proposed action changes the human environment, not mere opposition to the proposed action. The final rule continues to consider scientific controversy within the definition of effects, as the strength of the science informs whether an effect is reasonably foreseeable.

Comment: Some commenters stated that the proposed rule would weaken the provision at 40 CFR 1508.27(b)(10) because CEQ proposed to change “threatens a violation” to “violate” in § 1501.3(b)(2)(iii). Some commenters stated that CEQ should clarify that violations of law include failure to comply with law and not exceedance of ambient air quality standards based on modeling when an area would not be in nonattainment of the air quality standards.

CEQ Response: The final rule includes the language as proposed in § 1501.3(b)(2)(iv). The phrase “threatens a violation” is ambiguous and difficult to apply. Further, the phrase “threatens a violation” suggests that an effect may be fully compliant with other environmental laws, yet nonetheless significant because the effect is said to be close to violating the law. This provision does not affect the applicability of other environmental laws, and any uncertainty as to whether a proposed action violates such laws would be considered through associated permitting or other approval processes. CEQ declines to clarify in the final rule how this provision would apply to agencies’ specific statutory authorities.

Comment: Commenters stated that agencies must consider Tribal laws protecting the environment in the significance determination.

CEQ Response: Section 1501.3(b)(2)(iv) retains the language from the proposed rule stating that agencies should consider effects that would violate Tribal environmental laws when making a significance determination. The use of “should” in this section remains unchanged from the 1978 regulations. The final rule adds the reference to “Tribal” alongside Federal, State, and local law to give more consideration of Tribal law than in the 1978 regulations.

Comment: Commenters recommended that CEQ strike the term “local” among the environmental laws in proposed § 1501.3(b)(2)(iii) because local laws can be particularly

burdensome, do not fall within the realm of Federal agency authority or expertise, and could federalize a local decision over which a project proponent has little or no control.

CEQ Response: The final rule retains this consideration from the proposed rule at § 1501.3(b)(2)(iv). CEQ declines to strike the term “local” because the purpose of this section is to set forth considerations for whether agencies should prepare an EIS rather than address substantive compliance with other environmental laws. Under the final rule’s definition of “major Federal action” in § 1508.1(q), federalizing a local decision where an agency does not have sufficient control or involvement should not occur.

Comment: Some commenters stated that the intent or overall result of the proposed changes to the former definition of significantly was to avoid consideration of climate change.

CEQ Response: The rule does not preclude agencies from considering any particular effect of a proposed action on the human environment as long as it meets the definition of “effect” set forth in § 1508.1(g). Agencies should consider all effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action when determining the significance of the proposed action. CEQ regulations are not specific to any particular type of environmental effect but rather provide a framework for analyzing broad categories such as short- and long-term effects.

Comment: Commenters recommended that the final rule add a consideration in § 1501.3(b) regarding whether the action’s adverse effects can be mitigated. Commenters recommended that the final rule add a consideration in § 1501.3(b)(2) regarding the duration and permanency of adverse environmental effects, such as those effects that are subject to later reclamation.

CEQ Response: CEQ declines to add an additional consideration regarding mitigation or the duration and permanency of effects. The fact that a proposed action's adverse significant effects can be offset through mitigation does not mean that those same effects are no longer significant. The ability to offset adverse significant effects through mitigation may be the basis for a mitigated FONSI in § 1501.6. Further, § 1501.3(b)(2)(i) already addresses short- and long-term effects.

Comment: Commenters recommended that the final rule add a consideration in § 1501.3(b)(2) regarding existing land uses and existing land use designations (including zoning and land management plans).

CEQ Response: CEQ declines to add an additional consideration regarding land use. Agencies should consider any relevant land uses under § 1501.3(b)(1) as part of the affected area and its resources. Additionally, to the extent local laws such as zoning laws are violated, § 1501.3(b)(2)(iv) will consider that factor when assessing the degree of effects.

Comment: Some commenters recommended that CEQ add a significance consideration for adverse long-term effects on water pollution, air pollution, and public health and safety.

CEQ Response: CEQ declines to adopt this recommendation in the final rule. The considerations in § 1501.3(b)(1)-(2) adequately cover these effects. As noted above, devising rules that are environmental medium-specific (such as air, land, or water) is not the approach to NEPA that CEQ has chosen.

Comment: Some commenters recommended that the final rule add a consideration in § 1501.3(b) for effects of other reasonably foreseeable Federal, State, Tribal, or local actions.

CEQ Response: CEQ has made further changes in the final rule in § 1502.15 to clarify that the affected environment includes reasonably foreseeable environmental trends and planned

actions. Reasonably foreseeable Federal, State, Tribal, or local actions that are not connected actions (§ 1501.9(e)) are appropriate to consider as an aspect of the affected environment rather than a discrete consideration in § 1501.3(b)(1).

Comment: Some Tribal commenters recommended that the final rule add a consideration in § 1501.3(b) for the degree to which an action might diminish (or enhance) the Federal Government's capacity to fulfill its trust responsibility to safeguard Tribal resources and trust assets.

CEQ Response: The final rule requires agencies to consider effects that would violate Tribal law in addition to Federal, State, and local law (§ 1501.3(b)(2)(iv)). Further, the final rule continues to require consideration of the resources of the affected area, which would include Tribal resources and trust assets where applicable. For these reasons, CEQ declines to make the requested change in the final rule.

Comment: Commenters recommended that CEQ include in § 1501.3(b)(2) the following additional significance considerations:

- The degree to which an action may result in multiple different but insignificant impacts, but whose total impact could extract a substantial toll on environmental quality.
- The degree to which the intensity of a normally non-significant impact affects a large spatial or temporal domain.
- The degree to which an action is inconsistent with existing use, or with land-use policies or plans.
- The degree to which the action would degrade an environmental resource even if it would not breach a threshold of significance.

- The degree to which the action would contribute to the generation of hazardous, radioactive, or biological materials or waste.
- The degree to which an action would alter, degrade, or impair visual, natural landscape, cultural, or geological resources, aesthetics, or natural amenities.
- The degree to which an action would involve a commitment of irreversible or irretrievable resources.
- The degree to which the action would contribute to urban sprawl or intrusion into less developed areas.
- The degree to which adverse environmental effects or high risks to human health resulting from an action taken in response to an agency's programs, policies and activities might disproportionately affect minority and low-income populations.
- The degree to which an action would consume non-renewable energy or natural resources.
- The degree to which an action would limit the range of beneficial uses of the environment for Americans or future generations of Americans.
- The degree to which any incomplete or unavailable information, relevant to reasonably foreseeable significant adverse impacts, may affect the decision.
- Actions that have a low probability or frequency of occurrence, but which could result in large or potentially catastrophic impacts on the environment, or human health and safety.

Commenters further stated that an impact cannot necessarily be dismissed simply because it has a low probability or frequency of occurrence.

CEQ Response: CEQ declines to adopt these recommendations in the final rule. As described in section II.C.3, the considerations in § 1501.3(b)(1) and(2), which are based on the

definition of effects in § 1508.1(g) and description of affected environment in § 1502.15, are sufficient to consider the full range of appropriate impacts.

Comment: Commenters recommended that CEQ add the word “environmental” before the word “effects” in § 1501.3(b)(2) because it is more consistent with NEPA’s directive.

CEQ Response: CEQ declines to insert “environmental” before “effects” in § 1501.3(b)(2). As used in this section, “effects” relies on the definition at § 1508.1(g), which describes effects in connection with the human environment consistent with NEPA.

4. Categorical Exclusions (CEs) (§ 1501.4)

Comment: Commenters supported CEQ’s revisions to the definition of “categorical exclusion” and the reorganization of the regulations, stating that they will provide greater clarity to agencies and promote efficient NEPA reviews.

CEQ Response: CEQ acknowledges the support for the revisions.

Comment: Commenters stated that the proposed rule would expand the definition of CEs unlawfully and unreasonably by inserting “normally” and eliminating “individually or cumulatively,” which modified “significant effect.”

CEQ Response: CEQ proposed to modify the definition to add “normally” to account for the possibility of extraordinary circumstances. Use of this phrase is consistent with CEQ’s 1978 regulations. 40 CFR 1504.4(a)(2). CEQ proposed to remove “individually or cumulatively” because this language is unnecessary due to the revised definition of effects in § 1508.1(g). In establishing CEs in their agency NEPA procedures, agencies will continue to demonstrate that the category of actions being considered for a CE normally do not have a significant effect on the human environment, and therefore do not require preparation of an EA or EIS.

Comment: Commenters requested clarification as to what constitutes an “extraordinary circumstance.” A commenter recommended that CEQ state in § 1501.4 that extraordinary circumstances exist when a proposed action triggers compliance with a statute or Executive order that is functionally equivalent to NEPA (e.g., Section 106 of the National Historic Preservation Act, E.O. 11990, titled “Protection of wetlands”⁴³).

CEQ Response: An extraordinary circumstance is a situation where a normally excluded action may have a significant effect, such as potential significant effects on a species listed as endangered under the ESA or a property listed on the National Register of Historic Places. A proposed action that triggers compliance with a statute or Executive order that is functionally equivalent to NEPA may not necessarily create a significant effect. Further, NEPA may not apply where an agency is carrying out activities under a functionally equivalent statute. *See* § 1501.1(a)(6). Agency procedures include the extraordinary circumstances applicable to their CEs. For these reasons, CEQ declines to provide further specificity in the final rule.

Comment: Commenters desired greater consistency across agencies in application of extraordinary circumstances and requested that CEQ add a new paragraph to § 1501.4 requiring agencies to consider the presence of particular resources and conditions as extraordinary circumstances that agencies must evaluate before applying a CE to a proposed action. Commenters further stated that agencies may supplement these extraordinary circumstances in agency NEPA procedures (§ 1507.3(d)(2)(ii)) with additional extraordinary circumstances based on the agency’s mandates and policies. These suggestions included the following:

⁴³ 42 FR 26961 (May 25, 1977).

- Federally listed threatened or endangered species or designated critical habitat and species proposed for Federal listing or proposed critical habitat.
- Flood plains, wetlands, or municipal watersheds.
- Congressionally or presidentially designated areas, such as units of the national park system, wilderness, wilderness study areas, potential wilderness areas, wild and scenic rivers, national monuments, or national recreation areas.
- Native American, Native Alaskan, or Native Hawaiian religious or cultural sites.
- Archaeological sites, or historic properties or areas.

CEQ Response: In the final rule, CEQ declines to include government-wide CEs, including government-wide extraordinary circumstances.

Comment: Commenters noted that proposed § 1501.4 uses the term “extraordinary circumstances” several times, but does not define it. Commenters suggested defining “extraordinary circumstances” in § 1508.1 to mean those factors or circumstances that help a Federal agency identify situations or environmental settings that may require an action otherwise categorically excluded to be further analyzed in an EA or an EIS. Commenters suggested that absent a definition, the term “extraordinary circumstances” would be a subject of litigation and commenters recommended a definition such as found in Black’s Law Dictionary.

CEQ Response: The 1978 regulations used the term “extraordinary circumstance” without a definition, and its meaning has not been in dispute. The final rule uses it in the same manner. Further, § 1501.4(b) defines the term operationally as a circumstance in which a normally excluded action may have a significant effect. CEQ declines to add any further definition in § 1508.1.

Comment: Commenters raised concerns about the language proposed in § 1501.4(b)(1) regarding “mitigating circumstances.” Some commenters interpreted this to be an authorization of “mitigated CEs” similar to mitigated FONSI. Commenters sought clarity on how agencies would determine when to use mitigated CEs instead of an EA. Other commenters found this language unclear and expressed concerns that it is likely to cause confusion. Further, commenters expressed concern that the proposed process did not include an opportunity for public comment or a requirement that mitigation be incorporated in legally binding instruments as there is for an EA and FONSI. Commenters observed that there are no mechanisms in the application of a CE to provide oversight or accountability for mitigation, in contrast to the formal NEPA processes for EAs and EISs. Commenters recommended that if mitigation is considered appropriate where an action is normally categorically excluded, then agencies should integrate and analyze mitigation within the proposal. Some commenters supported the proposed changes, observing that the proposed changes promote agency flexibility by allowing use of a CE where there is no risk of significant environment impacts.

CEQ Response: The NPRM did not propose “mitigated CEs.” Rather, it proposed to allow agencies to consider circumstances specific to the action that would lessen the impact of an otherwise extraordinary circumstance. To address the confusion regarding “mitigated CEs,” § 1501.4(b)(1) replaces “mitigating circumstances” with “circumstances that lessen the impacts.” Specifically, when an agency’s proposed action falls within a CE, but an extraordinary circumstance is present, the agency may still apply the CE if there are action-specific circumstances that avoid impacts that may be significant and are the basis for the extraordinary circumstances. For example, an action may be located in designated critical habitat for an endangered species, but would not adversely modify the critical habitat and would have no effect

on the listed species. It is not possible for an agency to always foresee or precisely define case-specific extraordinary circumstances, and this change is consistent with agency practice for many agencies. The change further clarifies that the mere presence of an extraordinary circumstance does not automatically preclude the use of a CE.

Comment: Commenters raised concerns about “mitigating circumstances,” noting its potential impact on Tribes, minority, and low-income communities. Commenters stated that agencies should determine if extraordinary circumstances exist that may result in further analysis of the project under an EA or EIS. Commenters stated that archaeologists are not aware of potential impacts to sacred sites and cultural resources and an agency cannot ascertain them from literature reviews. Thus, commenters argued, agencies must make any determination regarding an extraordinary circumstance and appropriate mitigation to address that extraordinary circumstance with consultation and input from Tribes.

CEQ Response: CEQ clarifies in § 1501.4(b)(1) that agencies may categorically exclude a proposed action if the agency determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects. As discussed in section II.C.4 of the final rule, the use of “mitigation” in the NPRM caused confusion and implied that agencies could apply a CE where the project proponent offset through mitigation the significant effects created by the presence of an extraordinary circumstance. The final rule does not change the requirement to consider extraordinary circumstances. Agencies must identify extraordinary circumstances for consideration when applying a CE to a proposed action. Agencies develop these extraordinary circumstances based on the specific characteristics of their individual agency NEPA procedures.

Comment: Commenters stated that CEQ's plan to withdraw existing guidance only enhances the possibility that Federal agencies will adopt CEs without public accountability. Some commenters requested that CEQ provide additional guidance to clarify the proposed changes to use of CEs.

CEQ Response: Withdrawing guidance will not have an adverse impact on the adoption and application of CEs because the final rule codifies existing agency practice, expands instruction to agencies on CEs, and organizes implementation requirements into one section for greater consistency in their application. The revisions do not reduce existing agency public involvement practices concerning CEs as required by § 1507.3. Further, agency procedures are subject to notice and comment under the APA.

As discussed in sections II.H.7 and II.K of the final rule, the final rule supersedes previous CEQ guidance and CEQ intends to publish a separate notice in the *Federal Register* listing guidance it is withdrawing. CEQ will issue new guidance, as needed, consistent with the final rule and presidential directives.

Comment: Commenters stated that the preamble to the proposed rule did not provide a reason for the deletion of the statement that agencies could choose to prepare EAs even if an action might potentially qualify as a CE.

CEQ Response: The draft rule did not propose to and the final rule does not eliminate an agency's discretion to prepare an EA in those circumstances where an action may satisfy the criteria for a CE. The final rule maintains the statement in § 1501.5(b) that an agency may prepare an EA on any action in order to assist agency planning and decision making.

Comment: Many commenters responded to the proposed rule's request for comment on whether CEQ should establish government-wide CEs. Many commenters noted with support

that CEQ historically has avoided making determinations about the level of analysis needed for specific categories of proposed actions. Other commenters supported an effort to establish government-wide CEs and discussed numerous examples that could be the basis of a government-wide CE.

CEQ Response: Most departments and agencies have developed CEs for administrative activities and other activities that occur government-wide. Further, under the final rule agencies may use CEs that have been developed by other agencies, where appropriate, once they establish a process in their agency NEPA procedures that also includes consultation with the originating agency (§ 1507.3(f)(5)). For these reasons, CEQ does not plan to initiate a rulemaking to establish government-wide CEs for administrative or other activities at this time. Any CEQ proposal to promulgate government-wide CEs would be the subject of a future notice of proposed rulemaking and may be appropriate to promote further efficiencies.

Comment: Commenters encouraged development of regional and location-specific CEs.

CEQ Response: The final rule supports the development of new CEs through agency NEPA procedures (§ 1507.3), which could include those designed for actions in a specific region or location. While agencies usually develop CEs for nationwide application, circumstances may occur when a geographically tailored CE is more appropriate and the applicable regulations do not inhibit such tailored CEs. The changes codify long-standing agency practice.

Comment: Commenters suggested imposing a time limit on agencies to determine whether a CE applies to a project application. They recommended adding a 30-day to 6-month time limit for agencies to determine applicability of CEs in § 1501.10. Commenters stated that the option to extend these limits should be at the discretion of the senior agency official and the applicant only after meeting clearly established criteria.

CEQ Response: CEQ declines to establish a time limit for CE determinations in the final rule. Agencies often complete CE determinations on a shorter time frame than the commenter suggested limits.

Comment: Commenters asserted that the NEPA process is implemented inequitably for federally recognized Indian Tribes. Commenters stated that Tribal projects triggering NEPA cannot qualify for a CE because of the Secretary's discretion to approve or disapprove a Tribal project, which commenters assert is, by definition, a major Federal action. Commenters further stated that CEQ should use this update as an opportunity to consider clarifying that the regulations allow agencies to adopt CEs that apply to projects on Tribal lands.

CEQ Response: NEPA does not make any distinction for major Federal actions that take place on Tribal lands. An agency's NEPA procedures for applying a CE to actions on Tribal lands should be the same as those on non-Tribal lands. Nothing in the CEQ regulations precludes agencies from applying CEs on Tribal lands. However, agencies are in the best position to determine whether a CE is appropriate for any particular proposed action.

Comment: Commenters stated that it is important to note that when an agency applies a CE, there is no public notice, no public comment, no consideration of alternatives, no mitigation, no monitoring, and no enforcement.

CEQ Response: The public has an opportunity to participate in the development of an agency's CEs because agencies must establish CEs through their NEPA procedures, a process subject to public notice and comment. Additionally, some agencies do provide public notice regarding CE determinations in certain circumstances.

Comment: Commenters requested that the regulations require agencies to publish their policies for CEs on their websites or, preferably, in a centralized publicly available database and

managed by CEQ. Commenters stated that this would facilitate the public's ability to understand agency NEPA processes. Other commenters expressed support for the new requirement that agencies make CE determinations available in a publicly searchable database.

CEQ Response: Consistent with § 1507.4, agencies should make their procedures for CEs publicly available. The NPRM did not propose requiring agencies to make CE determinations available in a publicly searchable database, but rather noted in § 1507.4(a)(5) that a searchable database is one of several means of making environmental documents available to the public. Many agencies maintain a publicly available list of their CEs, and CEQ has developed a comprehensive list of agency CEs that is available to the public.⁴⁴ In § 1507.4, the final rule requires agencies to provide for efficient and effective interagency coordination of their environmental program websites, including use of shared databases or application programming interface, in their implementation of NEPA and related authorities. CEQ declines to make further changes to the final rule to address the commenters' concern.

Comment: A commenter stated that in California, CEs require extensive identification, documentation, and review of their effects, irrespective of the FHWA NEPA procedures in 23 CFR 77.117(c), as established in the NEPA Assignment (MOU) with the State of California. The commenter recommended that CEQ should prohibit this additional burden in State MOUs, which unnecessarily increases support costs and review time for these types of projects.

CEQ Response: The MOUs between FHWA and States pursuant to 23 U.S.C. 326 are outside the scope of this rulemaking. However, CEQ notes that the final rule requires agencies

⁴⁴ Council on Environmental Quality, List of Federal Agency Categorical Exclusions (June 18, 2020) ("List of Agency CEs"), <https://ceq.doe.gov/nepa-practice/categorical-exclusions.html>.

to propose revisions to their agency NEPA procedures in accordance with the final rule within 12 months of the effective date of the final rule. The final rule also prohibits agency NEPA procedures that are inconsistent with the requirements in the final rule, unless they are necessary for agency efficiency or because there is a clear and fundamental conflict with the requirements of another statute.

Comment: Commenters requested that the final rule require each agency to update regularly its inventory of CEs and to provide an opportunity for affected members of the public to comment on or contest the application of a CE.

CEQ Response: Agencies may update CEs at any time pursuant to the requirements in the final rule. Whenever agencies revise such procedures, they must consult with CEQ, and provide notice to the public and an opportunity to comment before finalizing the procedures.

Comment: Commenters requested that CEQ clarify in the final regulations that actions that do not qualify as “major Federal actions” do not need to be the subject of a CE (or require a FONSI). Commenters asserted that these actions are simply not subject to NEPA in the first instance, and therefore do not require an exclusion from NEPA. Often agencies regard any action or activity, regardless of its minor scope, as being subject to NEPA. Commenters stated that this is erroneous.

CEQ Response: Agencies do not need to consider the applicability of CEs (or conduct analysis in EAs or EISs) for activities or decisions that do not meet the definition of a major Federal action. The final rule includes a new § 1501.1, “Threshold analysis,” for the consideration of the application of NEPA at the beginning of a review as a means of identifying and discouraging unnecessary analysis. CEQ declines to make further changes to address the commenters’ concern.

Comment: Commenters recommended that CEQ require a certain level of documentation (e.g., a written statement) of an agency's determination that a categorical exclusion applies to proposed action, citing *Alaska Ctr. for the Env't. v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999) as an example. Commenters stated that this requirement could avoid costly litigation where a court must delve into an administrative record to determine whether an agency has fully considered the potentially significant environmental effects of extraordinary circumstances. Commenters also stated that decisions to apply categorical exclusions identified by other agencies (proposed § 1507.3(e)(5)) should include a brief written explanation detailing why significant environmental impacts will not result.

CEQ Response: In the final rule, § 1507.3(e)(2)(ii) requires agencies to identify in their NEPA procedures when documentation of a CE determination is required. With respect to the process to apply another agency's CE under § 1507.3(f)(5), an agency's process must provide for consultation with the agency that listed the CE in its NEPA procedures to ensure that the use of the CE is appropriate, document the consultation, and identify for the public those CEs that the agency may use. However, given the variability among Federal agencies with respect to both their CEs and records management, CEQ declines to require a specific level of documentation.

Comment: Commenters stated that CEQ should clarify in § 1501.4 that CEs created by Congress are distinct from CEs created by agencies through the regulatory process. Commenters noted, as an example, the CE for certain insect- and disease- treatment projects on National Forest System lands created by the Healthy Forests Restoration Act, which does not require the extraordinary circumstances analysis that would be required under an agency-created CE.

CEQ Response: Statutorily-created CEs are distinct from and not subject to the requirements of the final rule unless the statute so specifies. CEQ declines to clarify this point in the final rule, since it has not been a source of confusion for agencies.

Comment: Commenters requested that the regulations require Federal agencies to provide summary lists of proposed CEs for interested Tribes to review on a periodic basis, such as quarterly, to help alleviate the potential for adverse effects to tribally significant cultural resources located off reservation lands.

CEQ Response: Tribes have an opportunity to review and comment on all proposed CEs when agencies update their NEPA procedures to establish new CEs because the procedures must go through a public review and comment process consistent with § 1507.3. As appropriate, agencies also may engage in consultation with Tribes pursuant to E.O. 13175 and other agency procedures.

Comment: A commenter requested that CEQ require that agency action be subject to a rebuttable presumption that a CE applies to a proposed action as long as the action was subject to a NEPA analysis within five years prior to the date the action is expected to be implemented and (a) there has been no significant change to the proposed project that is relevant for purposes of environmental review of the project, and (b) no significant circumstance or new information has emerged that is relevant to the environmental review for the proposed project.

CEQ Response: The circumstances described by the commenter may satisfy the requirements for the agency to adopt a previously completed EIS, EA, or determination that a CE applies to a proposed action under § 1506.3. An agency's procedures may further address the commenter's concern by applying CEQ's requirements for CEs to the particular aspects of their programs. Where an agency has prepared an EIS, the circumstances the commenter described

may also be addressed by § 1502.9(d)(4) of the final rule, which provides that agencies may find that changes to the proposed action or new circumstances or information relevant to environmental concerns are not significant and therefore do not require a supplement. Under such circumstances, an agency may document the finding consistent with its agency procedures, or, if necessary, in a FONSI supported by an EA.

5. Environmental Assessments (EAs) (§ 1501.5)

Comment: Commenters asserted that the proposed changes to § 1501.5, “Environmental Assessments,” prioritized speed over public input (e.g., not requiring a draft EA for public review), discussion of alternatives it eliminated, and effective consideration of environmental impacts. Other commenters supported the proposed rule language that retains the purpose of an EA, and requested clarification that an agency need only evaluate a single action alternative and a no-action alternative.

CEQ Response: In the final rule, CEQ consolidates the requirements for EAs in § 1501.5. Similar to the 1978 regulations, the final rule does not require agencies to distribute a draft EA for comment. The range of alternatives required remains the range of reasonable alternatives necessary to address potential environmental effects, and is not limited to a single action and a no action alternative. Under § 1501.5(c)(1) and (2), the EA must continue to provide “sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact” based on its discussion of “the environmental impacts of the proposed action and alternatives.”

Comment: Commenters requested further clarity concerning the proposed rule’s preamble that the requirement for an EA would continue to be more limited than an EIS.

CEQ Response: When an agency has not categorically excluded a proposed action, or a categorical exclusion is inapplicable due to extraordinary circumstances, the agency may prepare an EA to document its analysis of the effects of the proposed action. If the analysis demonstrates that the action's effects would not be significant, the agency documents its reasoning in a FONSI, thereby completing the NEPA process. If the analysis demonstrates that the action's effects may be significant, the agency can use the EA to facilitate preparation of an EIS. Paragraphs (c) and (f) of § 1501.5 require agencies to "briefly" provide sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI, "briefly" discuss the purpose and need for the proposed action, alternatives, and the environmental impacts of the proposed action and alternatives, include a list of agencies and persons that the agency consulted. In addition, §§ 1501.5 and 1501.10 set presumptive page and time limits to discourage EAs that are unnecessarily lengthy.

Comment: Commenters stated that an EA must consider alternate means of accomplishing the project or activity's purpose and need while minimizing impacts. Commenters suggested that not requiring a detailed description of alternatives considered and those eliminated from detailed study would encourage agencies to not consider alternatives that could reduce impacts. Commenters argued that this could also provide less than complete information to the agency's decision maker and the public about a proposed project.

CEQ Response: An agency may prepare an EA when a proposed action is not likely to have significant effects or when the significance of the effects is unknown. An EA can assist agencies in determining whether they should prepare an EIS or whether a FONSI would be appropriate. Similar to the 1978 regulations, the final rule requires agencies to briefly describe the proposed action and any alternatives it is considering that would meet the need of the

proposed agency action. Under the final rule, an agency must describe the environmental impacts of its proposed action and alternatives, providing enough information to support a determination to prepare either a FONSI or an EIS. The EA should focus on whether the proposed action (including mitigation) would “significantly” affect the quality of the human environment and tailor the length of the discussion to the relevant effects. The agency may contrast the impacts of the proposed action and alternatives with the current and expected future conditions of the affected environment in the absence of the action, which constitutes consideration of a no-action alternative. If the agency finds no significant impacts based on mitigation, § 1501.6(c) requires the mitigated FONSI to state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts.

Comment: Commenters requested that CEQ use the word “succinctly” rather than “briefly” in § 1501.5(c)(1).

CEQ Response: The 1978 regulations use the word “briefly,” and CEQ declines to make the requested word change.

Comment: Commenters suggested striking the reference in § 1501.5(c)(2) to remove the reference to section 102(2)(E) and substitute the corresponding text.

CEQ Response: Section 102(2)(E) was referenced in 40 CFR 1508.9(b), and CEQ moves this language to § 1501.5(c)(2) of the final rule with only minor revisions while retaining the reference to 102(2)(E). CEQ notes that the text of section 102(2)(E) is also referenced in § 1507.2(d) of the final rule which, similar to the 1978 regulations, directs that agencies study, develop and describe alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources.

Comment: A commenter expressed support for the changes in proposed § 1501.5(d), in particular the addition of “relevant” as a modifier to “agencies, applicants, and the public.” The commenter noted that some agencies already limit an expansive public comment process on EAs. The commenter stated that a typical EA tends to run less than 50 pages in length, and expressed the view that there was not a major informational or public benefit to unlimited comments on such shorter documents compared to EISs. Commenters expressed that they thought the modification reflects common sense.

CEQ Response: In the NPRM, CEQ proposed to change “environmental” to “relevant” to limit involvement not only to “environmental” agencies. In the final rule, CEQ makes changes to this sentence in § 1501.5(e) to clarify that “relevant” only modifies “agencies” by reordering and adding language to read “the public, State, Tribal, and local governments, relevant agencies, and any applicants.”

Comment: Commenters stated that a lack of details regarding the minimal level of public involvement that is required could lead to additional confusion regarding what is adequate public involvement for the purpose of preparing an EA. Commenters asserted the lack of clarity in the preamble to the proposed rule concerning the phrases, “tailored to the interested public,” and “available means of communication” could result in litigation. Other commenters supported proposed changes to §§ 1503.1(a)(2)(v) and 1506.6, noting increased flexibility with respect to public involvement.

CEQ Response: The 1978 regulations did not specify a minimum level of public involvement for EAs. In the proposed rule, CEQ explained that there is no single correct

approach to public involvement.⁴⁵ Similar to the 1978 regulations, the final rule requires agencies to involve the public, relevant agencies, and any applicants, to the extent practicable, in preparing EAs. When preparing an EA, agencies retain the flexibility to structure public involvement based on the specific circumstances of the proposed action. Under the final rule, agencies also must continue to list the public, relevant agencies, and applicants, involved in preparing the EA to document agency compliance with the requirement to involve the public in preparing EAs to the extent practicable. Given the wide range of circumstances in which agencies prepare EAs, CEQ declines to make further revisions.

Comment: Commenters specifically objected to proposed § 1501.5(d) directing that agencies involve the public “to the extent practicable” in preparing EAs. Commenters stated that regulations should require public involvement for an EA.

CEQ Response: The 1978 regulations (40 CFR 1501.4(b)) used the phrase “to the extent practicable,” and CEQ did not propose to change this phrase in the proposed rule. Section 1501.5(e) of, the final rule retains this phrase and the requirement in the 1978 regulations that agencies involve the public, State, Tribal, and local governments, relevant agencies, and any applicants, to the extent practicable, in preparing EAs. The final rule also adds State, Tribal, and local governments to this list.

Comment: Commenters recommended that the final rule clearly state that agencies are not required to seek public review and comments on draft and final EAs and that agencies have broad discretion in deciding whether to involve the public in preparation of an EA.

⁴⁵ 85 FR at 1697. (“Rather, agencies should consider the circumstances and have discretion to conduct public involvement tailored to the interested public, to available means of communications to reach the interested and affected parties, and to the particular circumstances of each proposed action.”).

CEQ Response: The final rule at § 1501.5(e) provides that agencies shall involve the public, State, Tribal and local governments, relevant agencies, and applicants to the extent practicable. As discussed in section II.C.5 of the final rule, however, CEQ provides agencies with the flexibility to structure public involvement in the preparation of an EA, as practicable and similar to the 1978 regulations. This recognizes that there are a wide variety of circumstances in which EAs are prepared by Federal agencies.

Comment: Commenters requested that CEQ revise § 1501.5(d) to require that Federal agencies involve relevant non-Federal agencies, applicants, and the public, to the extent practicable in preparing an EA by affirmatively soliciting comment for no less than 30 days, and revise proposed § 1501.5(f) to substitute “shall,” for “may.”

CEQ Response: CEQ declines to make the suggested changes. Agencies prepare an estimated 10,000 EAs annually under a variety of circumstances necessitating some degree of flexibility in structuring both form and content. The 1978 regulations did not apply the referenced provisions in §§ 1502.21, 1502.23, and 1502.24 to EAs. The final rule allows for these EIS provisions to be used in EAs, but maintains flexibility in EA form and content.

Comment: Commenters stated that the effort to include Tribes and local governments in the regulations is incomplete because the proposed § 1501.5(d) does not include Tribes and local governments in the list of entities.

CEQ Response: In the final rule, CEQ has revised § 1501.5(e) to include “State, Tribal, and local governments” in the list of entities that agencies should be involved to the extent practicable, in preparing EAs.

Comment: A commenter recommended that CEQ further revise proposed § 1501.5(d) to reference specifically participating and cooperating agencies.

CEQ Response: In § 1501.5(e) of the final rule, CEQ makes clarifying revisions and reorders the sentence to provide that agencies shall involve the public, State, Tribal, and local governments, relevant agencies, and any applicants, to the extent practicable, in preparing EAs. This would include participating and cooperating agencies, as appropriate.

Comment: Commenters questioned why proposed § 1501.5(f) does not reference proposed § 1502.23, “Cost-benefit analysis,” as an EIS provision that agencies may apply to EAs. Commenters stated that these analyses could be applicable for EAs when the lead agency deems it relevant to their decision making.

CEQ Response: An EA does not require the same level of detail as an EIS because the proposed action is an action not likely to have significant effects or for which the significance of the effects is unknown. Depending on the circumstances and other applicable statutes, agencies may nonetheless be required to prepare a cost-benefit analysis pursuant to E.O. 12866⁴⁶ for regulations or other applicable law or policy.

Comment: Commenters noted that proposed § 1502.25 would require agencies to prepare draft EISs, to the fullest extent possible, concurrent and integrated with other environmental reviews and analyses. They recommended that CEQ incorporate a similar provision into proposed § 1501.5.

CEQ Response: Section 1501.5(g)(3) provides that agencies may apply to EAs § 1502.24 relating to environmental review and consultation requirements.

Comment: Commenters supported presumptive page and time limits for EAs and EISs in coordination with the role of a senior agency official and the new definition of “page,” stating

⁴⁶ *Supra* note 42.

that the proposed revisions align with agency practice and will improve timeliness and transparency.

CEQ Response: CEQ acknowledges the support for the revisions. Presumptive page and time limits will encourage agencies to identify the relevant issues, focus on significant environmental impacts, and prepare concise readable documents that will inform decision makers as well as the public, while creating a more efficient and effective NEPA process.

Comment: Commenters expressed opposition to presumptive page limits for EAs stating that they are arbitrary, capricious, and unnecessary as actions requiring an EA are infrequent. Some commenters opposing the revisions believed that the new page limits would set a “one size fits all” approach, rush the process causing declines in the public’s ability to participate (including Tribal, State, and local governments) and the quality of the analyses. Commenters also raised concerns over challenges in meeting the proposed page limits due to project complexity and ability to complete needed studies within a small field season window.

CEQ Response: CEQ finalized a presumptive limit of 75 pages for EAs, which is half of the existing 150–page limit for EISs. This proposed presumptive page limit is consistent with CEQ’s past guidance on EAs, which advises agencies to avoid preparing lengthy EAs except in unusual cases where a proposal is so complex that a concise document cannot meet the goals of an EA, and where it is extremely difficult to determine whether the proposal could cause significant effects.⁴⁷ CEQ previously recommended that EAs be approximately 10 to 15 pages; however, in practice, such assessments are often longer. CEQ notes that the page limit is

⁴⁷ “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” 46 FR 18026 (Mar. 23, 1981) (“Forty Questions”) at Questions 36a and 36b, <https://www.energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act>.

presumptive, so agencies may extend the 75–page limit if a senior agency official approves in writing and establishes a new limit. To create a more efficient process, Federal agencies have begun establishing procedures consistent with previous EA guidance and E.O. 13807. For example, in August 2018 DOI issued a memorandum titled, “Additional Direction for Implementing Secretary’s Order 3355 Regarding Environmental Assessments.”⁴⁸ It states that DOI bureaus should strive to produce EAs consistent with CEQ guidance of 10 to 15 pages and DOI’s normal practice of 30 to 40 pages, and that in certain circumstances, EAs may need to exceed these amounts. In such cases, the memorandum instructs that DOI bureaus should strive to complete EAs in 75 pages or less. Similarly, the U.S. Department of Transportation (DOT) issued an interim policy for public comment, Page Limits for NEPA Documents and Focused Analyses (“DOT Page Limits Guidance”), which states that the text of an EA should generally be no more than 75 pages.⁴⁹ This additional flexibility ensures that the page limit does not preclude an agency from otherwise complying with the requirements of NEPA and the final rule.

Comment: Commenters opposed CEQ’s proposal to add a new paragraph to clarify that agencies may apply certain provisions in part 1502 to EAs. Commenters stated that if an agency finds itself needing those provisions that the analysis should be an EIS rather than an EA.

CEQ Response: The provisions in part 1502 relating to incomplete or unavailable information (§ 1502.21), methodology and scientific accuracy (§ 1502.23), and coordination of environmental review and consultation requirements (§ 1502.24) may be useful to agencies as they prepare an EA and determine whether to prepare an EIS or a FONSI. Agencies prepare EAs

⁴⁸ https://www.doi.gov/sites/doi.gov/files/uploads/so_3355_additional_direction_on_eas_08.06.2018.pdf.

⁴⁹ <https://www.transportation.gov/sites/dot.gov/files/docs/mission/transportation-policy/permittingcenter/345206/nepa-page-limits-policy-081919.pdf>.

under a variety of circumstances, and the final rule provides that agencies at their discretion may apply these specific subsections to an EA where appropriate to the circumstances.

Comment: Commenters stated that CEQ should revise the proposed § 1501.5 to clarify that agencies can scope an EA to cover multiple similar actions.

CEQ Response: The final rule amends the provisions relating to “tiering” in § 1501.11 to make clear that agencies may use EAs at the programmatic stage for decisions on a program, plan, or policy covering multiple actions, allowing narrower or site-specific decisions to tier from a programmatic EA, as well as from an EA on a specific action at an early stage to a supplement or a subsequent assessment at a later stage.

Comment: Commenters recommended that it would be helpful to note that an agency can identify actions that would normally be subject to an EA or EIS. Similarly, commenters stated it would be helpful to clarify that an agency can use an EA if there are no known significant effects, to determine whether an EIS is needed or not.

CEQ Response: Section 1507.3(e)(2) directs agencies to identify in their NEPA procedures typical classes of action that normally require an EA or EIS. Section 1501.3(a)(2) and (3) provides direction for agencies on determining the appropriate level of NEPA review, including consideration of whether a proposed action is not likely to have significant effects or the significance of the effects is unknown and an EA is therefore appropriate. Finally, § 1507.4 requires agencies to provide NEPA program information, including information on actions that normally require an EA or EIS, by website and other means to allow agencies and the public to efficiently and effectively access information about NEPA reviews.

Comment: Commenters recommended that CEQ encourage agencies to scale down proposed actions to align with expected project execution timelines and expected budget

availability. Commenters stated that ideally project implementation would begin immediately after environmental analysis is completed.

CEQ Response: The final rule provides flexibility for agencies to structure proposed actions to meet the purpose and need based on their time and budget circumstances, with exceptions to page and time limits subject to oversight by a senior agency official acting under authority of § 1501.10, “Time limits.” CEQ declines to make further changes to the process of preparing EAs based on the specific aspects of project execution.

Comment: Commenters asked who should determine the meaning of “marginal details” referenced in the NPRM preamble.

CEQ Response: In its proposed rule, CEQ explained that agencies preparing an EA should focus on analyzing “material effects and alternatives,” rather than “marginal details that may unnecessarily delay the environmental review process.” This is similar to the emphasis in the 1978 regulations on reducing excessive paperwork by discouraging the analysis of insignificant issues. 40 CFR 1500.4(g). When implementing NEPA, agencies should apply a rule of reason and should use their experience and expertise in conducting their analyses.

Comment: Commenters noted that the NPRM preamble states that the agency may compare the action alternative to current and expected future conditions of the affected environment in the absence of the action. Commenters supported use of this standard as the “no action” baseline against which the effects of the proposed action and alternatives are compared. They recommended including this language in the regulations themselves, such as in §§ 1501.5 and 1502.16 to create an explicit, consistent baseline for use in EAs and EISs. They also recommended that CEQ change the wording in the preamble from “agencies may” to “agencies

must” contrast the impacts of the proposed action with this baseline, to make clear the effects of the action and the scope of the no-action alternative.

CEQ Response: In the final rule, CEQ revises § 1502.15, which addresses the affected environment, to provide that agencies should describe the environment of the area(s) to be affected or created by the alternatives under consideration, including reasonably foreseeable environmental trends and planned actions in the area(s). The preamble to the final rule clarifies that agencies will consider predictable trends in the area in the baseline analysis of the affected environment. CEQ declines to further revise the final rule as commenters requested because it is not necessary. Requiring agencies to use the no-action alternative as the baseline may not be appropriate in every circumstance and the word “may” allows agencies flexibility. While neither the 1978 regulations nor the final rule require a specific no-action alternative in every EA, the preamble to the final rule explains that an agency may contrast the impacts of the proposed action and alternatives with the current and expected future conditions of the affected environment in the absence of the action, which constitutes consideration of a no-action alternative.

Comment: Commenters asked why § 1501.5 of the proposed rule did not require EAs to include a summary and response to any public comments.

CEQ Response: An EA is appropriate to prepare when a proposed action is not likely to have significant effects or the significance of the effects is unknown. While agencies may include a summary and any public comments received, agencies have flexibility in preparing an EA, which is a concise document that briefly discusses the proposed action and provides sufficient evidence or analysis for the agency to determine whether to prepare a FONSI or to proceed with an EIS.

Comment: Commenters suggested CEQ add a new paragraph to § 1501.5 to require agencies to develop a monitoring and mitigation implementation plan for any mitigation measures that are adopted to mitigate potentially significant effects to the point of insignificance.

CEQ Response: Section 1501.6(c) addresses mitigation and monitoring, and provides that the FONSI state the authority for any mitigation that the agency has adopted and any applicable monitoring and enforcement provisions. This section further provides that if the agency finds no significant impacts based on mitigation, the mitigated FONSI must include in the FONSI any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts.

Comment: Commenters requested that CEQ include information on how agencies proceed when conditions have changed after an agency completes an EA. They referenced proposed § 1502.9(d)(4), which discusses the procedures when changes are not significant and do not require a supplemental EIS. Commenters recommended CEQ include similar language for EAs requiring an agency to document its review of the FONSI when it finds changes to the proposed action or new circumstances or information relevant to environmental concerns are not significant. Commenters also suggested adding information about the longevity of an EA, acknowledging that EAs should not have a discreet lifespan, but rather it should be up to the deciding official to determine when decisions can be implemented without further NEPA analysis.

CEQ Response: After an agency completes an EA and issues a FONSI, the Federal review is generally complete. When an agency determines that a major Federal action remains to occur and changes to the remaining action or new circumstances or information relevant to

environmental concerns are not significant, the agency may make a finding that supplementation is unnecessary consistent with § 1502.9(d)(4).

Comment: Commenters recommended that CEQ also require agencies to report the cost to prepare EAs similar to that of EISs.

CEQ Response: CEQ declines to make the suggested revision. Because EAs should be a brief and succinct analysis of the relevant environmental issues, typically leading to a FONSI, CEQ expects agency expenditures in most cases to reach such a conclusion to be substantially less in comparison to preparation of EISs.

6. Findings of No Significant Impact (FONSI) (§ 1501.6)

Comment: Commenters noted a discrepancy between the language in proposed § 1501.6(a) that describes a FONSI as being appropriate when the proposed action is “not likely to have significant effects” and the definition of a FONSI in proposed § 1508.1(l), that a FONSI “will not have a significant effect.” Commenters stated that there is no rationale or justification for using different standards.

CEQ Response: The proposed rule’s language at § 1501.6(a) and § 1508.1(l) were not aligned. Paragraph (a) of § 1501.6 used an incorrect standard for preparing an EA. In the final rule, CEQ has revised “not likely to” to “will not” in § 1501.6(a) for consistency with the definition of a FONSI in § 1508.1(l).

Comment: Commenters recommended that CEQ revise § 1501.6(a)(2) to state that the agency should provide the draft EA and the draft FONSI for public review before making any formal determination of whether an EIS is necessary. Commenters also stated that providing only the FONSI for review will not provide the public with sufficient information to evaluate its conclusions, and suggested the agency must also provide the EA.

CEQ Response: The final rule requires that an agency make the FONSI available to the public for a 30-day review period before a final determination is made in certain circumstances as noted in § 1501.6(a)(2), including where the proposed action is closely similar to one that normally requires the preparation of an EIS under the agency's procedures or the nature of the proposed action is without precedent. This approach is similar to the 1978 regulations. Under paragraph (b), agencies "shall" include the EA or incorporate it by reference in the FONSI. Therefore, an agency must provide both the EA and the FONSI as requested by the commenters.

Comment: Commenters recommended that CEQ add "as determined by the agency" to paragraph (a)(2) to better reflect the discretionary nature of those circumstances when an agency must make a FONSI available for public review. They also suggested narrowing paragraph (a)(2)(ii) to ensure "without precedent" only encompasses truly novel proposed actions whose environmental impacts are not well understood.

CEQ Response: CEQ declines to make the requested revisions to § 1501.6(a)(2) in the final rule. The language "as determined by the agency," is superfluous because agencies are responsible for making such determinations. Proposed actions "without precedent" are similar to "novel proposed actions," so further clarification is unnecessary.

Comment: Commenters stated that the proposed revisions to § 1501.6(a)(2) only allow for public review of a FONSI in the event that a project is without precedent or if a FONSI is issued on a project where EISs are typically prepared. Commenters stated that this eliminates public participation in all other circumstances, preventing the public from overseeing agency decision making and challenging agency decisions to issue a FONSI when a project may have significant impacts. Some commenters requested that CEQ add conditions that require the lead Federal agency to make a FONSI available for public review. Other commenters stated that

requiring a 30-day review of a FONSI would be unnecessary if agencies afforded review during the EA development. Further, they stated that it is late in the process for the public to raise concerns.

CEQ Response: The 1978 regulations established limited circumstances where an agency must make a FONSI available for the public to review. CEQ retains this approach in the final rule in § 1501.6(a)(2), and CEQ declines to revise the conditions.

Comment: A commenter suggested striking § 1501.6(a)(2)(ii), stating that precedent should not be a determining factor, but rather a lack of significant environmental impact.

CEQ Response: Section 1501.6 (a)(2)(ii) was included in the 1978 regulations, and CEQ did not propose to revise this provision. Sections 1501.6 (a)(2)(i) and (ii) address factors for determining whether a FONSI should be made available for 30 days for public review before making a determination whether to prepare an EIS and before the action may begin. The time for public review under such circumstances may inform agency decision making, and CEQ has not revised this provision in the final rule.

Comment: Commenters recommended that the final rule include an additional criterion in § 1506.6(a)(2) to require release of a FONSI for public review if there is any missing information.

CEQ Response: A FONSI is appropriate where an agency has determined a proposed action will not have significant effects. Under the final rule, agencies will continue to be required to make a FONSI available where the proposed action is, or is closely similar to, one which normally requires the preparation of an EIS under the agency's procedure or the proposed action is one without precedent. For proposed actions that do not normally require preparation of an EIS or are actions that the agency has previously analyzed through an EA, public review and a

30-day waiting period is not necessary or appropriate because the action has been determined not to have significant effects. To the extent that information is incomplete or unavailable, the agency may apply the provision of § 1502.21.

Comment: Commenters requested that CEQ clarify § 1501.6(b) to identify the consequences if a FONSI does not list a “related” document. Commenters also stated that this section’s relationship to proposed § 1501.9(f)(3) is not clear.

CEQ Response: Related documents are described in further detail in § 1501.9(f)(3) of the final rule. Both §§ 1501.6(b) and 1501.9(f)(3) are similar to the 1978 regulations at 40 CFR 1501.7(a)(5) and 1508.13, and further clarification is not necessary.

Comment: Commenters supported codifying in § 1501.6(c) the long-standing practice of a mitigated FONSI. Commenters noted there is uncertainty in some agencies regarding whether mitigated FONSIs are acceptable. Some commenters expressed concern that the proposed changes to the regulations precluded the use of a mitigated FONSI.

CEQ Response: The term mitigated FONSI is not in the 1978 regulations. CEQ issued its Mitigation Guidance⁵⁰ “which is consistent with previous court rulings (*e.g.*, *Cabinet Mountains Wilderness/Scotchman’s Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982), and *Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982)). As the commenters note, some agencies implemented the practice of applying mitigated FONSIs many years before to CEQ’s 2011 guidance. Incorporating the concept into the final rule should eliminate any remaining confusion about use of mitigated FONSIs. Nothing in the final rule

⁵⁰ *Supra* note 44.

precludes a project proponent from voluntarily conducting mitigation in order to receive a FONSI or for other purposes.

Comment: Commenters requested clarification of proposed § 1501.6(c), which would require agencies to state the “means of and authority for” included mitigation measures. Commenters sought clarification, including examples, of whether “means of” referred to a list of the particular mitigation measures, and “authority for” refers to the statute requiring the particular mitigation measure. Commenters asked whether NEPA is a statute agencies will cite. While some commenters expressed support for the change, others conveyed concerns that requiring citations to specific statutes may discourage agencies from including mitigation measures. They also recommended that CEQ clarify that NEPA does not prohibit mitigation and that the rule does not limit a project proponent from voluntarily proposing and accepting mitigation measures.

CEQ Response: In response to comments, CEQ has revised the final rule to remove the phrase, “means of” to reduce confusion. When preparing an EA, many agencies develop, consider, and commit to mitigation measures to avoid, minimize, rectify, reduce, or compensate for potentially significant adverse environmental impacts that would otherwise require preparation of an EIS. An agency can commit to mitigation measures for a mitigated FONSI when it can ensure that the mitigation will be performed, when the agency expects that resources will be available, and when the agency has sufficient legal authorities to ensure implementation of the proposed mitigation measures. The phrase, “authority for” refers to the authority for requiring the mitigation, including any applicable legal authorities and requirements, recognizing that NEPA does not mandate the form or adoption of any mitigation. The requirement to identify the authority for mitigation does not preclude project applicants from voluntarily

including mitigation as part of the project for the purpose of receiving a FONSI or other purposes.

Comment: Commenters expressed concern with the requirement in proposed § 1501.6(c) for FONSI to include the “means of and authority for mitigation, as well as monitoring or enforcement.” Commenters stated that the required information is often not available at the time of FONSI approval because agencies often issue the FONSI before a permit decision, while mitigation is often determined through the permitting process. Commenters argue that requiring this new information in a FONSI adds unnecessary requirements and runs contrary to streamlining efforts because the list of mitigation measures in the FONSI may not be complete.

CEQ Response: In response to comments the final rule requires agencies to state the authority for any mitigation adopted and any applicable monitoring or enforcement provisions. CEQ does not include “means of and” in § 1501.6(c) of the final rule, which created confusion. The final rule is sufficient to ensure that mitigation upon which a FONSI has been prepared will be performed, recognizing that mitigation activities may be conducted over a period of time.

Comment: Commenters recommended that CEQ revise the language in § 1501.6 to clarify that mitigation would never be required by NEPA consistent with the Supreme Court’s holding in *Methow Valley*.

CEQ Response: In the final rule, CEQ clarifies in the definition of “mitigation” at § 1508.1(s) that, while NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation.

Comment: Commenters stated that the efficiency of EAs would be much improved if agencies could include FONSI in EAs themselves rather than requiring separate documentation.

CEQ Response: The final rule codifies current agency practice with respect to EAs and FONSIIs.

Comment: A commenter requested the regulations state that a Tribe may adopt an EA and FONSI as well as an EIS if the Tribe has a Tribal Integrated Resource Management Plan (TIRMP) or similar Tribal environmental standards and mechanism for adopting EAs prepared by other agencies in place.

CEQ Response: These regulations apply to Federal agencies, and this request is outside the scope of this rulemaking. Therefore, CEQ declines to make the requested change to the final rule.

Comment: To eliminate duplication with State, Tribal, and local procedures, commenters requested that the final rule authorize agencies to accept FONSIIs prepared by Tribal governments.

CEQ Response: CEQ declines to make the requested changes to the final rule. Absent separate statutory authority, Federal agencies may not delegate their responsibilities under NEPA for FONSIIs. The final rule includes a number of changes to improve coordination with Tribal governments, including the incorporation of environmental documents that have been prepared for other purposes (e.g., §§ 1501.12, 1506.3). Similar to the 1978 regulations, the final rule allows an applicant to prepare an EA under the supervision of an agency. *See* § 1506.5. The agency must independently evaluate all environmental documents prepared by an applicant or contractor, and the agency must take responsibility for the accuracy, scope and contents of the environmental documents.

Comment: A commenter recommended limiting a FONSI to 300 words.

CEQ Response: In the final rule, an EA that supports a FONSI should not be more than 75 pages unless a senior agency official approves an extension and establishes a new page limit. CEQ declines to provide for a word count for a FONSI, as agencies should have flexibility in the preparation of this document.

7. Lead and Cooperating Agencies (§§ 1501.7 and 1501.8)

Comment: Some commenters did not support the designation of cooperating agencies in the EA process as too great a burden on lead and cooperating agencies.

CEQ Response: In response to comments, the final rule authorizes the designation of a lead agency in the development of a complex EA. The additional administrative process associated with establishing lead and cooperating agencies is not needed for many EAs, which are completed within several months. Approximately four to eight percent of EAs have cooperating agencies,⁵¹ which is a rough estimate of the proportion of complex EAs where designation of a lead agency may be warranted.

Comment: Commenters did not believe the concept of “joint lead agencies” as referenced in § 1501.7(b) was effective or efficient, since this would lead to confusion and make dispute resolution more challenging. Commenters stated that it is not difficult to imagine a project with several “joint lead” agencies and the challenges such a situation engenders—in many instances, this would be the status quo.

CEQ Response: The provision to allow the designation of joint lead agencies has been a part of the CEQ NEPA regulations since 1978, is intended to facilitate coordination between

⁵¹ Council on Environmental Quality, “The Fourth Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act,” (Oct. 2016), https://ceq.doe.gov/ceq-reports/cooperating_agencies.html.

Federal agencies and one or more State, Tribal, or local agencies, and has not resulted in the inefficiencies of concern to the commenters. Where two Federal agencies could potentially function as the lead agency, the Federal agencies may develop an efficient and effective means to manage a joint lead relationship or resolve the issue of the lead agency designation using the dispute resolution process established pursuant to § 1501.7(c), (d), (e), and (f).

Comment: Commenters recommended that CEQ add a subparagraph to § 1501.7(b) to prohibit sharing of information discussed at cooperating agency meetings and preliminary draft documents with agencies not designated as cooperating agencies until the lead agency allows such information to be distributed to the public for review.

CEQ Response: The final rule leaves the management of meetings and preliminary draft document review to the discretion of the lead and cooperating agencies and applicable law regarding public disclosure.

Comment: A commenter requested clarification regarding the reference in § 1501.7(c) to a letter or memorandum.

CEQ Response: If there is more than one potential lead agency for a proposed action, then the agencies will determine which agency will be the lead agency and which will be cooperating agencies. Such determination will be made in a written agreement, *i.e.*, a letter or memorandum, which could include an email, MOU, or memorandum of agreement (MOA), that states which agency will be the lead agency and which will be cooperating agencies.

Comment: A commenter requested clarification regarding when a request to CEQ to determine a lead agency under § 1501.7 (e), including clarification regarding when the 45-day clock starts under the regulations.

CEQ Response: The final rule provides at § 1501.7(d) that any Federal agency, or any State, Tribal, or local agency or private person substantially affected by the absence of lead agency designation may make a written request to the senior agency officials of the potential lead agencies that a lead agency be designated. The 45 days would begin from date the request is made under paragraph (d). If the potential lead agencies have not resolved the issues of lead and cooperating relationships within 45 days of that request, then it may be appropriate to request resolution by CEQ.

Comment: Commenters expressed support for provisions authorizing and encouraging agencies to issue a single EIS and ROD in § 1501.7(g). Commenters requested early, thorough, and reliable coordination with eligible cooperating agencies. Commenters also requested that lead agencies send invitations to eligible cooperating agencies as early as possible in the process and include States, Tribes, and local entities.

CEQ Response: CEQ declines to make further changes to the rule to address the commenters' suggestions because the rule adequately addresses these issues. The final rule emphasizes coordination with cooperating agencies early in the NEPA process in § 1501.7(h)(1) by requiring the lead agency to request the participation of cooperating agencies at the earliest practicable time. This focus on what is practicable, rather than simply possible, provides lead and cooperating agencies sufficient flexibility to coordinate efficiently.

Comment: Commenters stated that the proposed changes to § 1501.7(g) are less stringent than the 1978 regulations and recommended revising § 1501.7(g), (h)(4), (i), and (j) and striking § 1501.10(b)(2) (setting a 2-year timeframe for EISs). Commenters recommended that if any of the cooperating or participating agencies decide that an EIS is required under their program, and

not an EA, then the lead agency will defer and pursue an EIS. Commenters also requested that CEQ strike the requirement to develop a schedule for the EIS. *See* § 1501.8(b)(6) and (7).

CEQ Response: The referenced proposed changes improve coordination of agencies involved in the NEPA process and do not make the regulations less stringent. Each Federal agency remains responsible for the scope, accuracy, and content of the environmental documents used in their respective decision-making processes, and cannot defer their decision on the level of required environmental review to another agency. In the uncommon situation where two Federal agencies have different levels of review (*i.e.*, an EA versus an EIS), for their respective decisions, then the agency that must prepare an EIS would serve as the lead agency. Striking language at § 1501.7(h)(4), (i), and (j) and § 1501.10(b)(2) from the final rule would not improve the implementation of NEPA.

Comment: Commenters acknowledged that Federal agencies are implementing elements of the OFD policy, including preparing a single EIS and issuing a joint ROD, but objected to the implementation of the OFD policy stating that it curtails the environmental review process. Furthermore, commenters objected to codifying provisions related to the OFD policy before Federal agencies had an opportunity to study the impacts of the OFD policy.

CEQ Response: The OFD policy does not curtail environmental reviews. Rather, it increases interagency coordination, which will improve the efficiency and effectiveness of the environmental review process. The final rule includes changes to align with the OFD policy established by E.O. 13807 to improve interagency coordination. E.O. 13807 specifically instructed CEQ to take steps to ensure optimal interagency coordination, including through a concurrent, synchronized, timely, and efficient process for environmental reviews and authorization decisions.

Comment: Commenters objected to the process described in § 1501.7(g) for lead and cooperating agencies to prepare a single EIS and issue a joint ROD, or prepare single EA and issue joint FONSI, including highlighting the possibility that a cooperating agency’s mission may not necessarily align with the lead agency’s objective in preparing a single EIS or EA.

CEQ Response: To promote improved interagency coordination and more timely and efficient reviews and in response to these comments, CEQ codifies and generally applies a number of key elements from the OFD policy in this final rule, including preparation of a single EIS and joint ROD to the extent practicable.

Comment: Commenters sought additional clarification regarding the term “practicable” as used in § 1501.7(g), including clarification that Federal agencies should consider efficacy, efficiency, and the potential for delays in determining whether to prepare a single EIS and issue a joint ROD, or prepare single EA and issue joint FONSI.

CEQ Response: The term “practicable” includes considerations for effectiveness and efficiency.

Comment: Commenters stated, with regard to § 1501.7(g), that Federal agencies should avoid combining a final EIS and a ROD, except in very limited circumstances.

CEQ Response: Pursuant to § 1506.11, agencies may issue the final EIS with a ROD where provided by law or in agency procedures to meet statutory requirements.

Comment: Commenters supported CEQ’s proposal to clarify in §§ 1501.7, 1501.8, and 1508.1(e) and (o) the responsibility of lead agencies to determine the purpose and need as well as the alternatives in consultation with cooperating agencies. They also suggested the regulations require written concurrence points for defining the purpose and need, alternatives, and identification of the preferred alternative.

CEQ Response: The final rule clarifies the responsibilities of lead agencies and ensures that the lead agency will consult cooperating agencies during their development of the purpose and need statement. The final rule ensures that the lead agency plays a leading role in the final determination of purpose and need, providing direction on the range of reasonable alternatives and focus of the analysis. The final rule does not require specific concurrence points, as required by the OFD Framework Guidance for major infrastructure projects.⁵² Instead, § 1501.7(i) of the final rule requires the lead agency to develop a schedule, setting milestones for all environmental reviews, that may include specific concurrence points for consultation with cooperating agencies.

Comment: Commenters recommended that CEQ revise the proposed regulations to incorporate a specific trigger point for the timelines in order to reduce any confusion as to when such timelines begin. Commenters recommended that CEQ should add a provision to state that if cooperating agencies do not meet the schedule agreed upon by the lead and cooperating agencies in accordance with § 1501.7(i), the lead agency need not delay the EIS schedule if the lead agency does not receive timely comments on the EIS from the cooperating agencies.

CEQ Response: Section 1501.10 of the final rule establishes time limits and includes direction on EAs and EISs. Additionally, § 1503.2 requires cooperating agencies to comment during specified time periods. Consistent with the use of the NEPA process as the umbrella environmental review process for decisions by each jurisdictional agency, the final rule respects the jurisdiction of cooperating agencies while requiring their participation in the development of a schedule and milestones to implement the schedule. If the lead agency anticipates that a milestone will be missed, § 1501.7(j) requires the responsible agencies elevate the issue to the

⁵² *Supra* note 10.

appropriate officials of the responsible agencies for timely resolution. Each multi-agency action and schedule is fact-specific, and therefore CEQ declines to establish specific trigger points.

Comment: Commenters requested that CEQ modify § 1501.7(j) to state that where a lead agency anticipates that a milestone will be missed, “immediately elevate the issue within the agency, address the cause of the delay, and establish, if necessary, a new milestone date in consultation with the lead agency.

CEQ Response: CEQ finalizes § 1501.7(j) as proposed with minor modifications for clarity. This section directs agencies to elevate the issue as soon as practicable to the appropriate officials of responsible agencies for timely resolution. CEQ declines to incorporate the commenters proposed changes because they are unnecessarily limiting.

Comment: Commenters requested that CEQ clarify in the final rule how the coordination should occur to ensure that study requirements are not needlessly extended and the relevance of an applicant funded study “times out” before a ROD is signed. Commenters asked CEQ to address in its response to comments and in future guidance, how the final rule might impact lead agency designation of cooperating agencies and time limits.

CEQ Response: The final rule encourages early coordination and requires that during scoping, lead agencies invite likely affected Federal, State, Tribal, and local agencies and governments to participate in the development of a schedule and milestones to implement the schedule. If the lead agency anticipates that a milestone will be missed, § 1501.7(j) requires the responsible agencies to elevate the issue to the appropriate officials of the responsible agencies for timely resolution.

Comment: Commenters recommended that § 1501.7 should apply to CEs as well.

CEQ Response: CEQ declines to make the commenters suggested change because designating lead and cooperating agencies for proposed actions to which a CE may apply is unnecessary. It typically takes only several days for an agency to review and apply a CE.

Comment: Commenter suggested requiring cooperation between agencies by combining § 1500.5(d) and § 1501.7(g) and (h) into § 1501.8.

CEQ Response: CEQ declines to consolidate the recommended provisions into § 1501.8 because § 1500.5(d) serves only as a cross-reference and § 1501.7(g) and (h) are provisions that are specifically applicable to lead agencies.

Comment: Commenters stated that the final rule should specify that State, Tribal, and local entities can participate as cooperating agencies when a proposed action impacts an area or activity over which such entities have jurisdiction. Commenters suggested such a standard would ensure that only the parties with decision-making authority are elevated to the status of a cooperating agency. Commenters also recommended striking the reference to “similar qualifications” and replacing it with “jurisdiction by law or special expertise with respect to environmental, social, or economic impacts associated with a proposed action or reasonable alternative.”

CEQ Response: Section 1501.8(a) states that a State, Tribal, or local agency of similar qualifications may become a cooperating agency by agreement with the lead agency. The use of “similar qualifications” refers to jurisdiction by law or special expertise in the preceding sentences, which are appropriate limits.

Comment: Commenters stated that proposed § 1501.8(a) is inconsistent with the definition of “cooperating agency” in proposed § 1508.1(e). Commenters suggested revising

§ 1501.8(a) to change “environmental issue” to “environmental impact” and requiring any potential cooperating agency demonstrate why it meets the definition thereof.

CEQ Response: CEQ disagrees that § 1501.8(a) and the definition of cooperating agency in § 1508.1(e) are inconsistent. CEQ declines to make the recommended changes to § 1501.8(a) because lead agencies have the discretion to invite cooperating agencies, and the proposed changes are unnecessarily limiting.

Comment: Commenters questioned the change in § 1501.8(a) from “Federal agency” to “agency.” Commenters stated that CEQ added confusion to the scope of the regulation, given that the definition of “Federal agency” in § 1508.1(k) includes “States, units of general local government, and Tribal governments.” Commenters recommended that CEQ revert to “Federal agency” or clarify the meaning of “agency.” Commenters further stated that this term seems to contradict section 102(2)(D) of NEPA, which only allows incorporation of findings of State agencies, and only when certain important conditions are met.

CEQ Response: The final rule at § 1501.8(a) continues to use the term “Federal agency” and does not change the term to “agency.” In the final rule, “Federal agency” only includes those States and units of local or Tribal governments that have “assum[ed] NEPA responsibilities from a Federal agency pursuant to statute.” Therefore, the final rule provisions at § 1501.8(a) for an “agency” are consistent with the definition of “Federal agency” in § 1508.1(k).

Comment: Commenters suggest revising § 1501.8 to add that a lead agency “shall” request all Federal agencies with jurisdiction by law to participate as a cooperating agency, and those agencies shall be a cooperating agency. They also suggest revising §§ 1501.8(b)(7) or 1503.2 to clarify that the lead agency is not required to consider cooperating agencies’ comments that are received after the deadline for providing comments.

CEQ Response: The final rule requires participation by Federal agencies with jurisdiction by law when requested by the lead agency, though the degree of participation as a cooperating agency may be subject to resource limitations. The lead agency is responsible for managing issues regarding the schedule it develops, in consultation with cooperating agencies, by elevation of issues up to senior agency officials. The final rule at § 1501.8(b)(7) requires cooperating agencies to meet the lead agency’s schedule for providing comments, and § 1503.2 of the final rule also requires that cooperating agencies must provide their comments with the time period specified for comments.

Comment: Commenters recommended that CEQ revise the proposed regulations to require lead agencies to invite and designate as “cooperating agencies” State, local, and Tribal agencies that have jurisdiction by law or special expertise with respect to any environmental impact of a proposal and who request such designation. Commenters noted that Federal agencies may challenge a denial to a request to serve as a cooperating agency, and commenters requested that non-Federal agencies, including local agencies, and Tribes receive the same right to appeal to the CEQ if denied by a lead agency.

CEQ Response: CEQ declines to make this change in § 1501.8(a). As part of the scoping process, § 1501.9(b) requires the lead agency to invite the participation of likely affected Federal, State, Tribal, and local agencies and governments, the proponent of the action, and other likely affected or interested persons (including those who might not be in accord with the action). However, the final rule does not require non-Federal agencies or Tribes to become cooperating agencies. Accordingly, the right to appeal to CEQ if the lead agency fails to allow an agency to serve as a cooperating agency is limited to Federal agencies.

Comment: In § 1501.8(a), a commenter suggested replacing “agency” with “interagency and intergovernmental” in the first sentence to reflect partnership with Federal, State, and local governments. A commenter also proposed to revise language in § 1500.5(d) to refer to intergovernmental cooperation.

CEQ Response: The 1978 regulations do not use the term “intergovernmental” and the referenced language has not been a source of confusion.

Comment: Commenters recommended that CEQ revise § 1501.8(b)(3) by striking “on the request of the lead agency” and require a cooperating agency to assume, “unless otherwise requested pursuant § 1501.8(c),” responsibility for developing information and preparing environmental analyses, including portions of the EIS or EA concerning which the cooperating agency has special expertise.

CEQ Response: Section 1501.8(c) requires the cooperating agency, on request of the lead agency, to assume responsibility for developing information and preparing environmental analyses, including portions of the EIS or EA concerning which the cooperating agency has special expertise. It is the lead agency’s responsibility to request the participation of cooperating agencies and coordinate the development of the relevant portions of the EIS or EA with that cooperating agency. Further, the language in the final rule is similar to the 1978 regulations.

Comment: Commenters stated that the proposed rule would complicate the process for State and Federal agencies to prepare joint environmental documents. Commenters also stated that § 1501.8(b)(4) should be clarified if the intent was for cooperating agencies to make support staff available.

CEQ Response: In the final rule, CEQ’s revisions are finalized as proposed to clarify that the lead agency is authorized to request cooperating agency staff support for the development of an environmental document.

Comment: Commenters requested that language in § 1501.8(b)(5) be adjusted to support the continued use of cooperation funding agreements that most States have with agencies to expedite the review and processing of environmental actions.

CEQ Response: The final rule supports cooperation funding agreements and other means of improved Federal coordination with State agencies, as provided for in § 1501.8(b)(5) and § 1506.2.

Comment: Commenters stated that many Tribes would like to, but lack resources to, fully engage in the NEPA process. Commenters stated that the proposed rulemaking would exacerbate these concerns in several areas. First, proposed § 1501.8(b)(5), “Cooperating agencies,” says that cooperating agencies will “normally” use their own funds. Commenters stated that if funding consideration to support Tribal participation in NEPA process are not addressed in the rulemaking, it will create an unfunded mandate for Tribes.

CEQ Response: The final rule does not mandate Tribal participation, but recognizes the value of Tribal participation. The resource limitations that may limit effective Tribal participation should be addressed by the lead and cooperating agencies in accordance with § 1501.8(b)(5) and § 1506.6.

Comment: Commenter proposed revising § 1501.8(b)(7) to strike “environmental” at the end of the sentence. Commenter also suggested inserting “environmental, economic, or social” before “special expertise.”

CEQ Response: CEQ declines to make the requested revisions. In the final rule, CEQ retains § 1501.8(b)(7) as proposed for consistency with § 1503.2, which requires cooperating agencies and agencies that are authorized to develop and enforce environmental standards to comment on statements within their jurisdiction, expertise, or authority.

Comment: Commenters recommended that § 1501.8(b)(7) be revised to provide for a mutually agreed upon schedule rather than the lead agency's schedule for providing comments. Commenters stated that lead agency timelines need to be realistic and based on input in order to provide adequate review and communications between organizations.

CEQ Response: The final rule establishes presumptive timelines for environmental documents, provides for mutually agreed coordination and requires that during scoping, lead agencies invite likely affected Federal, State, Tribal, and local agencies and governments to participate in the development of a schedule and milestones to implement the schedule. If the lead agency anticipates that an agreed milestone will be missed, § 1501.7(j) requires the responsible agencies to elevate the issue to the appropriate officials of the responsible agencies for timely resolution.

Comment: Commenter requested clarification regarding § 1501.8(c) allowing agencies to “opt out” as a cooperating agency, and stated that it appears to conflict with § 1503.2, which identified a duty to comment by cooperating agencies. Commenter also stated that the consequences of an agency “opting out” are not clear and requested guidance on the steps, decision, or consequences if such a determination to “opt out” is made and how it conforms with proposed language at § 1503.2.

CEQ Response: The final rule, at § 1501.8(c), recognizes resource limitations may require cooperating agencies to decline the substantial level of participation that may be

requested by the lead agency under at § 1501.8(b)(3), (4), or (5). In such cases, the final rule still requires the cooperation of such agencies that have jurisdiction or special expertise with regard to the proposed action in accordance with the other aspects of § 1501.8 and related requirements such as § 1503.2.

Comment: Commenters requested guidance for potential cooperating agencies pursuant to § 1501.8(c). Commenters stated that if a cooperating agency has competing programmatic obligations or other constraints that preclude involvement in supporting an environmental review as requested by the lead agency, then that cooperating agency should be precluded from commenting (pursuant to § 1503.3), referring a dispute to the Council (e.g., pursuant to 1504), or otherwise challenging the findings and conclusions of the environmental review.

CEQ Response: There may be resource limitations that cause cooperating agencies to decline to participate. *See* § 1501.8(c). In such cases, the NEPA process would not benefit from excluding the participation of such agencies that have jurisdiction or special expertise with regard to the proposed action or denying them other procedural rights such as commenting or referring disputes to CEQ.

Comment: Commenter asked whether § 1508.1(e) should be revised to reference a cooperating agency's role in preparing the EIS, or to add that the cooperating agency has a role in evaluating the impacts of the action or in preparing the EIS.

CEQ Response: CEQ has drafted the final rule to avoid placing language that provides particular instructions in definitions. Therefore, the roles of the cooperating agency are described in § 1501.8.

Comment: Commenter proposed the following revised language for § 1508.1(e):
“Cooperating agency means either: 1) By agreement with the lead agency, a Federal agency

with jurisdiction by law or special expertise with respect to any environmental impact associated with a proposed action or reasonable alternative under NEPA review, or;

2) By agreement with the lead agency, a State, Tribal, or local government agency with jurisdiction by law or special expertise with respect to any environmental, economic, or social impact associated with a proposed action or reasonable alternative under NEPA review.”

CEQ Response: The roles of the cooperating agency are described in § 1501.8 and the precise contours of the role of each cooperating agency are provided by letter or memorandum from the lead agency pursuant to § 1501.7(c).

Comment: A commenter requested clarification of proposed § 1501.7(f), which states that CEQ shall determine which agency will act as lead agency not later than 20 days after receiving request but gives the potential lead agency a 20–day response time after they receive the request. The commenter specifically asked when the 20 days starts for the responding lead agency.

CEQ Response: The final rule provides that CEQ must make the determination as soon as possible, but not later than 20 days after receiving the request and all responses to it. This process of resolution starts with a written referral to CEQ and requires CEQ to resolve the referral within 20 days of its receipt, meaning the referral may be resolved on the twentieth day if no responses are received within 20 days of the date of CEQ’s receipt of the request.

Comment: Commenters requested CEQ add the following sentence to the end of § 1508.1(h)(2): “When cooperating agency analysis or proposals are incorporated into a lead agency’s environmental document, the source agency for such information shall be disclosed in the document.”

CEQ Response: In the final rule, the disclosure of participants in the development of an environmental document is provided for in § 1506.5(b)(3) and § 1502.18.

Comment: Commenters recommended that CEQ provide for a more pronounced role for cooperating agencies, particularly early on in the NEPA process to develop roles and realistic scheduling. Commenters stated that local governments must be given the opportunity to participate in regularly scheduled cooperating agency meetings throughout the NEPA process in order to develop effective NEPA documents.

CEQ Response: The final rule gives flexibility to the lead agency and its cooperating agencies to arrange the details of their cooperative agreements. Managing coordination with cooperating agencies on a case-specific basis facilitates the efficient use of Federal resources.

Comment: Commenters recommended that CEQ incorporate the following concepts into proposed § 1506.5(c) to ensure that the lead agency on an applicant or contractor prepared EIS follows the same coordination and cooperation requirements as when the lead agency prepares the EIS:

- A requirement that the lead agency adhere to EA and EIS preparation timeframes of one year and two years, respectively (proposed § 1501.10), even when the applicant prepares its own EIS.
- A timeline on both lead and cooperating agency review and input during the NEPA process of no more than 60 days to review and provide input.
- A deadline for the lead agency to issue a final decision document within 60 days of completion of an EA or EIS.

CEQ Response: CEQ declines to add the recommended concepts. Under the final rule, the lead agency must coordinate the overall time period with any cooperating agencies as part of

planning consistent with § 1501.7(i) and (j). The involvement of cooperating agencies in that planning and determining cooperating agency review periods is left to the discretion of the lead agency. The two-year timeframe for completing an EIS includes all cooperating agency review and the ROD. For the EA timeframe, the final result may not include a FONSI, but rather a decision to prepare an EIS.

Comment: Tribes supported the proposed revision in § 1501.8 that would allow Tribes to serve as cooperating agencies. However, they asserted that when Tribes participate as a cooperating agency, agencies must afford them the same privileges as provided to non-Tribal entities including financial compensation.

CEQ Response: Similar to the 1978 regulations, § 1501.8(b)(5) states that a cooperating agency normally use its own funds, and that the lead agency fund those major activities or analyses it requests from cooperating agencies to the extent there are available funds. This provision facilitates coordination regarding the sharing of resources necessary to obtain a timely environmental review.

Comment: Commenters commended CEQ for providing further clarity for the lead and cooperating agencies. However, they suggested further clarification to address the need for a lead agency to oversee efficient coordination and to balance vying agency missions. Commenters also requested that CEQ incorporate a provision into § 1501.8 encouraging agencies to execute MOUs with cooperating agencies with some commenters desiring mandatory MOUs.

CEQ Response: The final rule does not require the specific concurrence mechanism of an MOU, as provided by the OFD Framework Guidance for major infrastructure projects.⁵³ However, § 1501.7(i) of the final rule requires the lead agency to develop a schedule, setting milestones for all environmental reviews and authorizations, that cooperating agencies require for their agency policies and regulatory requirements. While agencies may elect to use an MOU, requiring one for all environmental reviews would elevate the form of coordination over its function, possibly requiring more work than is necessary for simple coordination under NEPA.

Comment: Commenters stated that CEQ should amend § 1501.8(a) to allow Tribes, not just Federal agencies, to appeal any denial of participation as a cooperating agency by the lead agency.

CEQ Response: CEQ declines to extend this provision beyond Federal agencies as the mandate of CEQ regulations applies only to Federal agencies.

Comment: Comments recommended that CEQ should explicitly incorporate a provision into § 1501.8(b) requiring agencies to consult with project proponents. Often project proponents can identify a variety of factors that will affect proposed actions and their effects. Federal agencies should engage with project proponents to ensure alternatives are technically and economically feasible and to ensure that effects are reasonably foreseeable.

CEQ Response: The final rule requires the lead agency to invite project proponents to participate in scoping, and it strengthens the provisions for communication with applicants in a number of respects. In particular, § 1501.7(i) requires lead agencies to set the schedule in

⁵³ *Supra* note 10.

consultation with any applicant and § 1501.2(b)(4) requires agencies to advise and consult with applicants early in the NEPA process.

Comment: Commenters recommended adding language in § 1501.8 to clarify the relationship between agencies when NEPA serves as an umbrella process. Commenters stated that they do not recommend that the regulations require an agency with other statutory jurisdiction (e.g., U.S. Fish and Wildlife Service for ESA consultation) to be a cooperating agency in order to use NEPA as an umbrella process, because doing so would add procedural burdens without changing the outcomes already required by law. However, commenters recommended adding language to this section or issuing guidance on how the agency with jurisdiction over other regulatory requirements typically will be procedurally involved with NEPA to ensure any NEPA document meets other regulatory needs.

CEQ Response: The final rule expands upon the use of NEPA as an umbrella process for coordination of environmental review with required consultations and other authorizations. An agency with jurisdiction over a proposed action must be a cooperating agency if the lead agency so requests, but § 1501.8(c) continues to allow cooperating agencies to decline to assume responsibility for part of the preparation of an environmental document with a notice to CEQ and the supervisory senior agency official.

Comment: Commenters stated that CEQ should include language emphasizing that agencies will respect and support the protection of private property rights to the maximum extent allowed by law, regulations, policies, directives when conducting NEPA. In addition, commenters asked that the regulations require agencies to reach out to affected landowners and allow them maximum opportunities to participate in the NEPA process should they be directly affected by a project or agency decisions.

CEQ Response: The final rule requires that the lead agency make diligent efforts to involve the public and provide notice to affected persons, which would include affected landowners and holders of affected private property rights in the NEPA process. Public involvement may occur through the scoping process, opportunity to comment on environmental documents, and by providing for direct notice to owners and occupants of nearby or affected property under § 1506.6(b). The “takings” Executive order also remains in effect.⁵⁴

Comment: Commenters recommended that CEQ require or encourage a lead agency to consider including at least one representative from a cooperating agency county or local government to participate on the interdisciplinary team in preparation of EISs. Commenters stated that the regulations should authorize Federal agencies to allow State or local governments to draft portions or all of the EAs or CEs to ensure timeliness and cost efficiencies for the implementation of the project proposal. Commenters also stated that CEQ should clarify under what circumstances it is permissible and appropriate for non-Federal agencies to assume such responsibilities.

CEQ Response: As part of the scoping process for an EIS under the final rule, § 1501.9(b) requires the lead agency to invite the participation of likely affected State and local agencies and governments, which may include participation as a cooperating agency by mutual agreement. As part of the EA process, non-Federal agencies may prepare EAs under the supervision of the agency under the 1978 regulations, which may also involve State and local governments. Finally, under the final rule agencies will develop CEs in their agency procedures,

⁵⁴ See E.O. 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights, 53 FR 8859 (Mar. 15, 1988).

and this process would involve invitations to the public to comment, including State and local governments.

Comment: Commenters expressed support for the expansion of joint lead status to local governmental agencies. Commenters stated that coordination with local government agencies is not optional, and the regulations should recognize as such. Commenters requested that CEQ revise the regulations in a way that uses consistency requirements in the Federal Land Policy and Management Act for local resource management plans and other laws, plans, and policies. Commenters stated that the Bureau of Land Management (BLM) includes a provision for consistency review between the State Director and Governor of the State prior to approval of a proposed resource management plan or amendment to a resource management plan. Commenters stated that CEQ should consider a provision that would allow Federal agencies to implement a similar and more formalized consistency review process with the States in which the project is authorized.

CEQ Response: The BLM provision for consistency review by the Governor of a proposed resource management plan or plan amendment is an example of the integration of the NEPA process into agency implementation of the procedural requirements of other statutes, such as the requirement for consistency review under the Federal Land Policy and Management Act, 43 CFR 1610.3-2(e). The final rule in § 1507.3 provides for such integration of consistency review and similar procedural requirements in the development of agency NEPA procedures to implement the final rule.

Comment: Commenters stated that changes to § 1501.8 may conflict with other proposed provisions, particularly § 1501.10 on time limits and § 1502.7 on page limits. Commenters stated that these limits may result in incomplete or insufficient environmental reviews,

particularly if cooperating agencies are not afforded enough time for their concurrent review or cannot include sufficient information in the EA or EIS. Commenters stated that CEQ must ensure that the responsibility for implementing NEPA lies with the Federal agency with jurisdiction, and lead Federal agencies assume full responsibility for the process. Commenters urged CEQ to continue encouraging agency collaboration and coordination, while requiring that agencies with specific, in-depth expertise maintain strong roles in the NEPA process.

CEQ Response: Similar to the 1978 regulations, pursuant to § 1506.5 of the final rule the agency is responsible for the accuracy, scope (§ 1501.9(e)), and content of environmental documents prepared by the agency or by others working under the supervision of the agency. The requirements concerning the role of cooperating agencies, time limits, and page limits, all serve the purpose of an informed decision-making process.

Comment: Commenters stated that the new provisions, which refer to “State” and “local” agencies, do not clearly define what constitutes a “State” or “local” agency. Commenters recommended that CEQ clarify that a “State” or “local” agency includes political subdivisions of a State.

CEQ Response: In practice, State, Tribal, and local agencies are considered to include all political subdivisions of a State or Tribe. The final rule does not limit this practice.

Comment: Commenters requested that CEQ develop guidance to assist agencies in implementing the OFD collaborative processes. Commenters stated that guidance should explain how disagreements among agencies should be transparently addressed.

CEQ Response: CEQ has issued a number of guidance documents relating to implementation of the OFD policy. CEQ will issue new guidance, as needed, consistent with the final rule and presidential directives.

Comment: While commenters supported Tribal governments participating as cooperating agencies, they opposed expanding the purview of Tribes outside of reservations. Other commenters supported Tribal involvement as cooperators outside reservation boundaries.

CEQ Response: The final rule recognizes the existing sovereign rights, interests, and expertise of Tribes by expanding the provisions for Tribal participation in the NEPA process. As discussed in the preamble to the final rule, this is consistent with and in support of government-to-government consultations.

Comment: Commenters recommended that the regulations require Federal agencies to provide weekly updates to cooperating agencies through the development of a NEPA document and regularly explain to cooperating agencies how they are incorporating cooperating agency input into the NEPA document.

CEQ Response: The final rule requires the lead agency to develop a schedule for preparation of the environmental document in consultation with cooperating agencies, but leaves the details of scheduling and identification of milestones on that schedule to the discretion of those agencies.

Comment: Commenters recommended that CEQ clarify that “local agency” includes county governments; an “agency” does not necessarily need to be a division within a State, Tribal, or local government, but could be the governmental entity as a whole; and cooperating agency status is limited to governmental entities.

CEQ Response: A cooperating agency must be a government agency. The references to Federal, State, Tribal or local agency in the final rule are sufficiently clear, and CEQ declines to make further changes.

Comment: Commenters stated that CEQ should encourage Federal agencies to develop a clearinghouse or other mechanism to store their active NEPA work and make it available to cooperating agencies.

CEQ Response: Section 1507.4 provides for online resources and clearinghouse mechanisms to facilitate interagency coordination of their NEPA processes.

Comment: Commenters recommended that CEQ expand the role of cooperating agencies early in the NEPA process and allow them to contract services where needed. Other commenters requested adding enforceable regulations that would restrict the ability of cooperating agencies to hand over their responsibility to an outside consultant.

CEQ Response: Under § 1506.5, lead and cooperating agencies are responsible for the accuracy, scope, and content of environmental documents prepared by the agency or by an applicant or contractor under the supervision of the agency. The agency may require an applicant to submit environmental information for possible use by the agency or authorize a contractor to prepare an environmental document under the supervision of the agency.

Comment: Commenters stated that local government consultation and involvement should begin early in the NEPA process.

CEQ Response: The final rule at § 1501.9 provides for an expanded scoping process that begins before the issuance of the NOI, allowing Federal agencies to engage earlier with local governments on planning that may affect local interests.

Comment: Commenters recommended that the final rule define “interagency cooperation” in § 1500.5, and CEQ clarify whether the definition includes State, Tribal and local governments. Commenters stated that cooperation also should include individuals that have permits, leases and private land owners within the study areas.

CEQ Response: In the final rule, the “interagency cooperation” is provided for in § 1500.5(d) and is more specifically addressed in §§ 1501.7, 1501.8, and 1501.9, relating to lead and cooperating agencies and scoping.

Comment: Commenters recommended that the final rule limit cooperating agencies to those State, Tribal, or local agencies with the jurisdiction to approve, veto, or finance all or part of the proposed action or alternatives. Commenters stated that this would ensure that cooperating agencies are providing Federal decision makers with pertinent information and constructive recommendations related to their own authorities.

CEQ Response: Under the commenter’s proposal, cooperating agency status could be limited for non-Federal agencies to those agencies that have jurisdiction over the proposed action. Because involving agencies with special expertise at the discretion of the lead agency can improve the NEPA process in terms of efficiency and quality of the NEPA review, CEQ declines the recommended change.

Comment: Commenters supported the changes to allow Alaska Native corporations (ANCs) to participate in the EIS process as joint lead and cooperating agencies. Commenters stated that ANCs are some of the largest landowners in Alaska and should be at the table concerning NEPA evaluations affecting their lands. Commenters further stated that the Alaska Native Claims Settlement Act (ANCSA) changed the landscape of Federal Indian law in Alaska by congressionally mandating the creation of regional and village Native corporations to own and manage, for the benefit of their Native shareholders, a portion of the aboriginal lands in Alaska.

CEQ Response: Federal agencies must consult with ANCs on the same basis as Indian Tribes under E.O. 13175.⁵⁵ As part of the scoping process under § 1501.9(b), the lead agency must invite the participation of likely affected Federal, State, Tribal, and local agencies and governments, the proponent of the action, and other likely affected or interested persons. Accordingly, the lead agency must invite the participation of ANCs in any scoping process that would likely affect the interests of their shareholders.

Comment: Commenters recommended that CEQ revise §§ 1500.5(d), 1501.8, and 1500.5(e) to promote interagency coordination and resolution of agency disputes.

CEQ Response: The provisions for interagency cooperation and resolution of issues are in § 1501.7 and § 1501.8. Therefore, CEQ declines to make further revisions and additional detail in the cross-references in § 1500.5 are unnecessary.

Comment: A commenter stated that there is a memorandum of agreement (MOA) between DOI and DOT from 1983 that states that DOI must be the lead on environmental actions. The commenter asked whether the updated NEPA regulations would supersede this MOA so that DOI can use DOT CEs to eliminate the need for DOI to elevate an action to an EA when a DOT CE exists to cover the action.

CEQ Response: In the final rule, § 1506.3(d) provides that an agency may adopt another agency's determination that a CE applies to a proposed action if the action covered by the original CE determination and the adopting agency's proposed action are substantially the same. Under § 1507.3(f)(5), agencies may include a process in their agency procedures to use a CE listed in another agency's NEPA procedures following consultation with that other agency.

⁵⁵ Consolidated Appropriations Act, 2005, Pub. L. 108-447, Div. H., Title V. sec. 518, 118 Stat. 2809, 3267 (2004).

Comment: A commenter suggested revising § 1501.8 to add a reference to a “participating agency” and provide that where the agency does not have the resources to participate as a cooperating agency, it would still be able to see internal drafts and have interagency discussions with the lead and cooperating agencies, as appropriate. The commenter noted that “participating agency” is already defined in § 1508.1.

CEQ Response: The final rule uses the term “participating agency” consistent with its use in Title 41 of the FAST Act, to identify other agencies that participate in the NEPA process. CEQ declines to distinguish the responsibilities of a participating agency as the commenter suggests because it is unnecessarily limiting on agencies.

Comment: A commenter requested that CEQ further define interagency cooperation and include local governments.

CEQ Response: Interagency cooperation includes cooperation with Federal, State, Tribal, and local agencies. The final rule provides direction throughout to encourage better interagency cooperation, including with local governments as appropriate.

Comment: A commenter recommended that CEQ create a “one NEPA handbook,” to align different Federal agency requirements. The commenter stated that cooperating agencies do not defer to the lead agency’s regulations, and therefore the project proponent must satisfy each cooperating agency’s requirements.

CEQ Response: The final rule includes several changes to improve coordination among lead and cooperating agencies. It codifies relevant provisions in E.O. 13807 to strengthen the OFD policy framework (§§ 1501.7 and 1501.8). The final rule in § 1507.3(b) also prohibits agencies from imposing additional procedures or requirements beyond those set forth in the regulations except for agency efficiency or as otherwise required by law.

As discussed in sections II.H.7 and II.K of the final rule, the final rule supersedes previous CEQ guidance and CEQ intends to publish a separate notice in the *Federal Register* listing guidance it is withdrawing. CEQ will issue new guidance, as needed, consistent with the final rule and presidential directives.

Comment: A commenter noted there may be situations when an applicant will find it beneficial to sequence rather than combine the timing of Federal approvals, and environmental review for a project.

CEQ Response: Section 1501.7(g) provides agencies and applicants the flexibility, when necessary, to sequence rather than combine Federal of Federal approvals, and environmental review for a project.

Comment: Commenters requested clarification by CEQ that when Tribal nations participate as cooperating agencies, they will be provided with equitable and fair reimbursement as are other agencies. Commenters also requested explanation regarding how and to what extent a lead agency's decision-making process will incorporate information that Tribes provide. Lastly, commenters requested that CEQ amend the proposed rule to include the requirement that if Tribal comments are not included, the lead agency will provide a full and complete explanation of why Tribes' submitted information was not considered as part of a final EIS.

CEQ Response: As stated in § 1501.8(b)(5) of the final rule, a cooperating agency will normally use its own funds. To the extent available funds permit, the lead agency must fund those major activities or analyses it requests from cooperating agencies and must include such funding requirements in their budget requests. The lead agency determines the extent to which it will incorporate provided information into the decision-making process. Agencies must consider all substantive comments timely submitted during the public comment period (§ 1503.4). In

addition, § 1505.2(b) requires that the decision maker must certify in the ROD that the agency has considered all submitted alternatives, information, and analyses including those submitted by Tribal governments.

8. Scoping (§ 1501.9)

Comment: Commenters note the proposed changes to §§ 1501.9 and § 1503.1, and proposed §§ 1502.17 and 1502.18 would maintain extensive opportunity for the public to comment during the NEPA process.

CEQ Response: CEQ acknowledges the support for these revisions. These revisions will require agencies to provide more information to the public and to solicit more information from the public earlier in the process.

Comment: Commenters stated that under current regulations, some agencies conduct “pre-scoping” prior to the publication of a NOI. They agree that clarification to allow scoping to start prior to the publication of a NOI would obviate the need for agencies to engage in “pre-scoping” work. Commenters also stated that because the two-year timespan for completing an EIS begins with the publication of the NOI, more extensive pre-NOI planning activities will be required for many proposed actions so analysis can be conducted in a reasonable and timely manner.

CEQ Response: The final rule recommends that agencies employ scoping at the earliest reasonable time to ensure agencies consider environmental impacts in their planning and decisions, and to avoid delays later in the process. Early scoping will help agencies to meet the time limits. The early scoping may involve lead agency experts, cooperating agencies, other Federal, State, and local agencies, Tribes, and the public at the discretion of the lead agency.

Comment: Commenters requested that, to encourage the NEPA scoping process to move as quickly as practicable, the regulations establish a 30-day time limit from the date of submission of an application until commencing preparation of an EA or publishing a NOI to prepare an EIS. Commenters further stated that a time limit for this portion of the NEPA process would be consistent with the intent of § 1502.5 that EAs or EISs shall be commenced as soon as practicable after receiving the application.

CEQ Response: CEQ declines to make the requested change to the final rule. Agencies require flexibility, including where an application may be incomplete. Further, the goal of early engagement is to improve the overall predictability and timeliness of the NEPA process, a goal that could be undermined if agencies are limited to a specific time period for commencing environmental documents. In § 1501.9(d) of the final rule, however, CEQ does direct that agencies should publish an NOI as soon as practicable after determining that a proposal is sufficiently developed for meaningful public comment and that an EIS is required.

Comment: Commenters asked whether the term “sufficiently developed” as used in § 1501.9 includes a determination of a reasonable availability of funds to complete a proposal.

CEQ Response: The term “sufficiently developed” generally means that there is sufficient information about the proposal itself, such as objective, purpose and need, and preliminary design elements, for example project location, in order to begin the NEPA process. In some instances, this may include reasonable availability of funding.

Comment: Commenters supported the addition of “likely” to include “affected Federal, State, and Tribal, and local agencies and governments” in section 1501.9(b) and encouraged lead agencies to always consider local conservation districts when scoping a proposed action’s potential agricultural impacts.

CEQ Response: CEQ acknowledges the support for the proposed change and notes that the final rule encourages lead agencies to involve all agencies with jurisdiction by law or special expertise at the earliest practicable time to help scope the proposal and plan necessary analyses and thus may include local conservation districts, as appropriate.

Comment: Commenters requested that CEQ clarify what constitutes adequate information to be a brief presentation of why the proposed action will not have a significant effect on the human environment or providing a reference to environmental review of the proposal in prior documentation.

CEQ Response: CEQ declines to make further changes to the rule. The content of a brief presentation is highly dependent on the circumstances of the particular proposed action. Agencies should apply their discretion in determining the most appropriate means of summarizing those issues that are not significant or have been covered by a prior environmental review.

Comment: Commenters requested that CEQ include a requirement, potentially in § 1501.9, that all comments on issues be raised during scoping and that failure to do so is subject to the exhaustion provisions included in the proposed regulations.

CEQ Response: CEQ declines to make further changes to the rule to apply the principle of exhaustion as requested by the commenters. CEQ does not apply exhaustion at the scoping stage because a fuller understanding of a proposal and its potential impacts may not occur until after the publication of the draft EIS.

Comment: Commenters requested that Federal agencies tailor the scope of the NEPA review to the Federal agency's involvement in the project.

CEQ Response: Aspects of an activity that are beyond a Federal agency's involvement are not subject to NEPA and the final rule clarifies the definition of major Federal action in § 1508.1(q) with regard to this point. *See also* § 1501.1(a)(4). CEQ also clarifies the definition of effects in § 1508.1(g), which do not include effects that the agency has no ability to prevent due to limited statutory authority. CEQ adds that there may be instances where a lead agency chooses to include actions beyond its control and responsibility for the purposes of agency efficiency such as to address legal obligations of cooperating agencies.

Comment: Commenters stated that excluding some issues from the scope of impacts considered under NEPA could greatly reduce the information generated by an environmental review.

CEQ Response: Excluding non-significant issues will improve the quality of environmental review, by ensuring the agency is concentrating on significant issues. The final rule focuses the scoping process on identifying the scope of issues for analysis in the EIS, including by requiring the agency to provide more information at the NOI stage and to request comment on potential alternatives, information, and analyses relevant to the proposed action. § 1501.9(d)(1)-(7). Earlier identification of significant issues and elimination of non-significant issues will improve the efficiency of the process.

Comment: Commenters stated that the rule should be clarified to not allow agencies to characterize communications between an agency and an applicant as scoping unless the public has received notice and has the opportunity to participate.

CEQ Response: CEQ declines to make further changes to the rule in response to the comment. The scoping process varies based on the circumstances of the particular proposed action and may include communication between the applicant and lead agency, between the lead

agency and cooperating agencies, between the lead agency and other agencies, and between agencies and State, Tribal, and local agencies and governments, and the public. Pre-application meetings between an agency and an applicant can be a beneficial and productive way to scope and often redesign a proposal to avoid potential significant impacts. Relevant statutory authorities, facts, and circumstances vary widely and the lead agency should retain the flexibility and discretion to decide how to involve cooperating agencies and the public in its scoping efforts.

Comment: Commenters stated that the proposed changes in § 1501.9 would limit the scope of a NEPA study, further rubber-stamp the process, and significantly limit the ability for stakeholders to meaningfully participate in the NEPA process. Commenters also stated that the changes, along with the reduced timelines, would limit the time for the public and key stakeholders to prepare comments and responses to the proposed project. Other commenters stated that the proposed changes render the NOI as the primary device by which an agency notifies the public of its plan to draft an EIS in the early stages of its development. Without a timing requirement, however, the proposed changes invite agencies to invest substantial resources in selecting a course of action before providing other stakeholders an opportunity to voice their perspective.

CEQ Response: The final rule expands, rather than reduces, public participation in the scoping process. Section 1501.9(b) directs agencies to invite participation of interested stakeholders including interested persons that may be opposed to the proposed action on environmental grounds. Participation may occur both prior to and after publication of the NOI. Public scoping participation constitutes an integral part of the process in addition to agencies soliciting public comments on the draft EIS.

Comment: Commenters stated that § 1501.9(d) requires NOIs to include a summary of the expected environmental impacts. They asserted that any such summary should state that it is speculative and subject to revision based on the results of additional analyses.

CEQ Response: The intent of the summary of expected environmental impacts is to provide the public with information known to the agency at that time, and in doing so provide a more informed starting point for involvement by Federal agencies, States, Tribes, localities, and the public. CEQ anticipates that future NOIs will be more informative than what was prepared under the 1978 regulations because the final rule expands the amount of scoping an agency may conduct prior to publication of the NOI, and the information to be included in the NOI.

Comment: Commenters recommended that CEQ revise the rule in § 1501.9 to clarify that scoping may be started and completed prior to the NOI.

CEQ Response: The scoping process should be tailored to the circumstances of the proposed action, and the final rule provides flexibility to agencies to structure scoping accordingly. The lead agency may start scoping prior to NOI publication and conclude after publication of the NOI publication, or start and conclude scoping after NOI publication. It does not include the option to start and conclude scoping prior to publication of the NOI because engagement with stakeholders through the NOI process is necessary to develop a well-informed draft EIS.

Comment: Commenters indicated that § 1501.9(d) appears to mandate certain information in the NOI. Some commenters do not support the enhanced level of information and detail proposed for a NOI. They noted that pre-NOI scoping activities are not a requirement. Further, to comply with all listed items in § 1501.9(d) the activities would have to occur prior to the NOI, effectively negating the flexibility allowed in § 1501.9(a). While § 1501.9(d) states

that the NOI shall include this information as appropriate, further clarification would ensure agencies continue to retain flexibility.

CEQ Response: The final rule provides discretion for agencies to implement scoping activities prior to publication of an NOI, which allows agencies to tailor scoping to the specific circumstances of a proposed action. CEQ declines to make further changes as requested by the commenters.

Comment: Commenters proposed adding “or are particularly controversial, unusual, or extensive in nature” to the example of circumstances where CEQ encourages scoping meetings in § 1501.9(c).

CEQ Response: The final rule requires agencies to use an early and open process to determine the scope of issues for analysis, which applies broadly to EISs. The illustrative example in § 1501.9(c) is not intended to suggest that proposed actions that are controversial, unusual, or extensive may not also be suitable for scoping outreach. CEQ declines to make the requested revision to the final rule.

Comment: Commenters expressed concern regarding the proposed definition of “similar actions” in § 1501.9(e)(1)(ii). They stated that the definition seemed too vague, particularly the last sentence of the proposed definition: “It should do so when the most effective way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.” Commenters recommended removing this definition, or substantially revising it. Other commenters found the word “effective” to be unclear because maximizing effectiveness is a subjective determination. They suggested clarification or a return to the original language of “best,” which they stated is in line with the statute’s direction to use “all practicable means” to accomplish the statute’s goals in section 101(b).

CEQ Response: In the NPRM, CEQ proposed to move the criteria for determining scope from the definition of scope, 40 CFR 1508.25, to § 1501.9(e). In response to comments, CEQ has further revised scope in the final rule to strike the reference to “similar actions” in proposed § 1501.9(e)(1)(ii). In cases where the question of the consideration of similar actions to determine the scope of the NEPA documentation was raised, courts noted the discretionary nature of the language (use of the word “may” and “should” in 40 CFR 1508.25(a)(3)) and have held that determinations as to the scope of a NEPA document based on a consideration of similar actions were left to the agency’s discretion. *See e.g., Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 1000–01 (9th Cir. 2004). CEQ also notes that the reference to “other reasonable courses of action” in § 1501.9(e)(2) are within the judgement of the agency.

Comment: Commenters recommended insertion of clarifying language in § 1501.9(f)(1), “or which have been covered by prior environmental review” to affirm an obligation to demonstrate that circumstances have not materially changed since the time of prior review, to arrive at a determination that those issues are not necessary to inform decision makers.

CEQ Response: If there is a material change in an issue, an agency may determine that the referenced language in § 1501.9(f)(1) does not apply. A material change could constitute a significant new circumstance or information pursuant to § 1501.9(g) and necessitate the agency to revise a determination under § 1501.9(f). The commenters’ concern has been sufficiently addressed in the final rule and CEQ declines to make further changes.

Comment: Commenters found that the statement in proposed § 1501.9(f)(3) “other EISs which are being or will be prepared that are related to but not part of the scope of the impact statement under consideration” was unclear. They requested clarification as to what was meant

by an action that is related to the proposed action, when actions cannot be divided into constituent parts, and EISs must address interrelated or interdependent actions.

CEQ Response: In the final rule, CEQ makes minor changes to the language at § 1501.9(f)(3) for clarity. It has not been a source of confusion for agencies and, therefore, CEQ declines to make further changes to the final rule.

Comment: Commenters requested that the final rule requires agencies, during the scoping process, to explicitly consider and seek input on whether visual versus text presentation of specific information and issues would better allow the public and other audiences to understand better the issue and its significance, and how presentation affects comprehension and understanding of the totality of the analysis.

CEQ Response: Although agencies may be interested in studying the effectiveness of various forms of public communication, such as visual versus text presentations, such analyses are beyond the scope of this rulemaking.

Comment: Commenters recommended early identification of deficiencies or lack of detail in the description of the proposed action that would prevent commenters from fully addressing potential impacts or alternatives or mitigation when a NOI publishes. Further, commenters stated that it is important that the public and others be asked during scoping how they currently use resources that might be impacted by a proposed action.

CEQ Response: The final rule extends scoping so that it also can occur before publication of the NOI, and CEQ clarifies in § 1501.9(d) that the NOI should be published “[a]s soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment.” The public should be asked how they currently use resources that

might be impacted by a proposed action. These concepts constitute environmental consequences of the proposed action and are addressed in §§ 1502.15 and 1502.16.

Comment: Commenters recommended that CEQ address the topic of “connected actions” in the preamble to the final rule and clarify that actions can be considered connected actions under the CEQ regulations only if both actions are Federal actions (or actions requiring Federal approval). Actions that do not require Federal approval and are not subject to Federal control should not qualify as connected actions. Other commenters asked for clarification that § 1501.9(e)(1)(i) on connected actions will not affect FHWA’s regulations regarding logical termini and independent utility and all the case law on this language.

CEQ Response: Actions that do not require Federal approval and are not subject to Federal control are not connected actions. Agencies should apply the criteria at § 1501.9(e)(1) in their agency procedures to the specific circumstances of their programs.

Comment: Commenters suggested eliminating the words “significant” (and “non-significant”) from proposed §§ 1501.9(a) and 1501.9(f)(1), and substituting different terms to indicate that an issue does not require detailed analysis during the NEPA process. Commenters stated that language such as “not material” or “not worthy of further study” could be used. Commenters also suggested CEQ could also explain that the determination during scoping that a particular issue merits detailed review does not mean that the proposed action will have a significant effect on the human environment.

CEQ Response: An EIS is prepared when a proposed action has significant impacts on the human environment. Using different terms may cause confusion, precisely because § 1501.9 pertains to the scoping of those issues of importance to analyzing the proposed action.

Comment: Commenters requested applying the requirements for scoping at § 1501.9(a) to the preparation of an EA. One commenter recommended that the scoping requirements for EAs shall be consistent with those for EISs. Commenters also requested that scoping for an EA include issuance of a public scoping notice and a minimum of a 30–day comment period.

CEQ Response: An EA is prepared when a proposed action is not likely to have significant effects or the significance of the effects is unknown. Therefore, requiring the same level of detail in terms of scoping is unnecessary and does not meet the purpose of NEPA. Agencies should not pre-determine the preferred alternative.

Comment: Commenters requested that the new language added to section § 1501.9(a) beginning with “eliminating” to the end of the first sentence should be stricken, and § 1501.9(g) should apply to all other subsections of § 1501.9.

CEQ Response: Eliminating non-significant issues is important to ensure that resources are efficiently used. It is not necessary to apply § 1501.9(g) to (a) and (d) in the subpart because neither (a) nor (d) pertain to determinations made by the agency.

Comment: Commenters expressed concern that, without public notice of a proposed action, all interested parties may not be aware of the project or ongoing scoping process, leading to duplicative effort. Although proposed § 1501.9(b) requires agencies to invite participation of agencies and governments that are “likely affected,” commenters stated that the lead agency may not identify all interested entities. Commenters further stated that if additional entities learn about the project after the NOI is issued, then the lead agency must redo its prior work by holding additional meetings and, potentially, adjusting the preliminary alternatives. To avoid both of these concerns, commenters stated that CEQ should revise proposed § 1501.9 so that the

scoping process follows the procedure currently outlined in 40 CFR 1501.7, whereby publication of the notice of intent initiates the scoping process.

CEQ Response: As discussed in the NPRM, CEQ proposed changes in § 1501.9 so that agencies can begin the scoping process as soon as the proposed action is sufficiently developed for meaningful agency consideration. Some agencies refer to this as pre-scoping under the existing regulations to capture scoping work done before publication of the NOI. Rather than tying the start of scoping to the agency's decision to publish an NOI to prepare an EIS, the timing and content of the NOI is an important step in the scoping process itself, thereby obviating the artificial distinction between scoping and pre-scoping. Further, paragraph (c) provides agencies with additional flexibility in how to reach interested or affected parties in the scoping process.

Comment: Commenters expressed confusion and requested clarification on § 1501.9(b). Specifically, commenters wanted to understand whether both proponents and affected and interested persons classified as cooperating or participating agencies should be invited to provide scoping comments. Commenters stated that project proponents are not agencies and should not be afforded participation equivalent to cooperating and participating agencies.

CEQ Response: Project proponents are not equivalent to cooperating agencies with respect to overall participation in the NEPA process. Section 1501.9(b) refers specifically to an agency's obligation to invite various governments, the project proponent, and other likely affected or interest persons to participate in scoping.

Comment: Commenters noted that there can be a disconnect between the NEPA process and the permitting processes. Commenters further stated that significant problems and conflicts

can occur when an applicant revises a permit application without the Federal agency making parallel changes in the EIS document.

CEQ Response: The final rule at § 1501.9(g) requires an agency to revise its determinations if there are substantial changes made in the proposed action or if significant new circumstances or information arise which bear on the proposal or its impacts.

Comment: Commenters recommended striking “interested persons” in § 1501.9(b) and that CEQ eliminate “including those who might not be in accord with the action on environmental grounds.”

CEQ Response: In § 1501.9(b) of the final rule, CEQ has eliminated “on environmental grounds.” It is important to invite interested persons that may not be in accord with the action to participate in scoping, irrespective of whether it is on environmental grounds. Accordingly, CEQ declines to make the requested revisions.

Comment: A commenter recommended that CEQ change the phrase “the lead agency shall invite” to “the lead agency shall make a concerted effort to identify, notify, and invite.”

CEQ Response: CEQ finds the additional language recommended by the commenter is superfluous and declines to make the requested change.

Comment: Commenters requested to replace “interested persons” with “interested persons and organizations” at § 1501.9(b) because organizations, and not simply “interested persons,” need to be allowed to provide input.

CEQ Response: The regulations at 40 CFR 1509.7(a) (1978) included the language “interested persons,” and agency practice has been to include organizations. The requested change is not necessary to ensure interested groups are included in scoping.

Comment: Commenters requested that CEQ clarify its use of “issues” throughout the regulations. The term “issues” is used in the proposed regulations in several forms: at § 1500.4 (e) and (i) the regulations use the term “issues” and “significant environmental issues.” In § 1500.5 (f) the regulations refer to “real issues.” In § 1501.9 the regulations State agencies should identify the “significant issues” and eliminate from further study “non-significant issues.” Also, § 1501.9 (e) states the lead agency shall determine the scope and the “significant issues” to be analyzed in depth in the EIS. Further, some agencies do not use the term in their procedures and practices. Commenters recommended simplifying the regulations by referring to only significant effects and nonsignificant effects.

CEQ Response: The various references to “issues” in CEQ regulations is pursuant to E.O. 11991, which required CEQ to develop regulations that, among other things, would “emphasize the need to focus on real environmental issues and alternatives.” The language in the final rule has been retained from the 1978 regulations.

Comment: A commenter requested that CEQ retain the current definition of NOI because it was helpful.

CEQ Response: As explained in the NPRM, CEQ moved the language that provides instruction regarding the requirements of the NOI to § 1509.1.

Comment: Commenters requested that CEQ require an NOI to include NEPA's purpose, the purpose for preparing an EA/EIS, and the national goals outlined in section 101 of NEPA because many members of the public are completely unacquainted with NEPA and its purpose, let alone the purpose of an EA/EIS.

CEQ Response: The NOI is prepared as part of the procedural requirements pursuant to section 102(2) of NEPA. Referencing section 101 is unnecessary as the NOI is focused on a proposed action and notifying the public of the agency's plans to prepare an EIS.

Comment: Commenters requested that CEQ define and enhance the role of affected parties, including those with long-term contractual agreements or preference grazing rights, and adjacent landowners.

CEQ Response: Section 1501.9(b) requires agencies to notify "likely affected or interested persons" to participate in the scoping process. This language is sufficient to address the commenters' concern.

9. Time Limits (§ 1501.10)

Comment: Commenters expressed opposition to presumptive time limits for EAs or EISs stating that they are arbitrary, capricious, and unnecessary as actions requiring an EA or EIS are infrequent. Some commenters opposing the revisions stated that the new time limits would rush the process causing the public's ability to participate, including Tribal, State, and local governments, and the quality of analyses to decline. Commenters also raised concerns over challenges in meeting the proposed time limits due to project complexity and ability to complete needed studies within a small field season window. Other commenters recommended even shorter time limits than the proposed one year to complete an EA or two years to complete an EIS.

CEQ Response: CEQ is finalizing a presumptive limit of one year for EAs and a presumptive limit of two years for EISs. The time limits are consistent with past CEQ guidance and E.O. 13807. CEQ notes that the Forty Questions stated that an EA should take no more than three months, and in many cases substantially less as part of the normal analysis and approval

process for the action. E.O. 13807 established a policy to make timely decisions with the goal of completing all Federal environmental reviews and authorization decisions for major infrastructure projects within two years. CEQ notes that the time limits are presumptive, so agencies may extend the time limits upon approval of a senior agency official. This additional flexibility will ensure that the time limits do not preclude an agency from otherwise complying with the requirements of NEPA and the final rule.

Comment: Commenters expressed opposition to the role of a senior agency official stating that the proposed revision will further delay the NEPA process and not hold the senior agency official responsible for that delay. Some commenters also stated that the inclusion of this new role would add confusion to the NEPA process and discourage groups, like Tribes, from requesting an extension. Other commenters recommended that senior agency officials include a written statement of reasons in the administrative record explaining why they granted an extension request. Other commenters stated that if a senior agency official may approve in writing a longer time limit, then time frames exceeding the year will become the norm.

CEQ Response: CEQ finds that it is important to make a senior agency official responsible for enforcing page and time limits and, if useful to the decision-making process, to approve in writing an extension to ensure that agencies follow an efficient and effective process. Though this addition will require internal agency deliberations, CEQ's experience is that direct involvement from senior agency officials can reduce unnecessary delays through improved management and attention to unresolved issues.

Comment: Commenters expressed opposition to the role of a senior agency official stating that because the senior agency official may be a political appointee, the process may reduce the credibility of the document with the public.

CEQ Response: CEQ notes that senior agency officials, including appointed officials, oftentimes participate in the NEPA process, and that ultimately most decision makers are delegated their authority from an appointed position such as a Secretary or agency administrator. CEQ acknowledges while this addition will require internal agency deliberations, it has been CEQ's experience that direct involvement from senior agency officials can reduce unnecessary delays through improved management and attention to unresolved issues.

Comment: Commenters stated that Tribal consultation and cultural resource fieldwork should not be rushed to meet arbitrary completion dates. Commenters stated that inadequate scientific and cultural analysis can lead to litigation, project delays and cancellations of projects in the millions of dollars. Adequate time needs to be provided for archaeological inventories and Tribal consultation in order to yield the findings for sufficient and legally defensible decision making while being cognizant of project delivery.

CEQ Response: The final rule contains several changes to strengthen cooperation between Federal agencies and Tribal governments. These changes include identifying Tribal governments alongside State governments and removing references to reservation boundaries in recognition that Tribal interests often extend beyond reservation boundaries. Additionally, the final rule improves the scoping process by requiring agencies to invite State, Tribal, and local governments and the public to identify potential alternatives, information, and analysis relevant to the proposed action. These changes in the final rule will facilitate timely Tribal consultation and involvement as well as timely identification of potential archeological and/or cultural resources. In addition, the timelines contained in § 1501.10 of the final rule allow agencies to approve additional time on a case-by-case basis when appropriate. When determining if

additional time is appropriate, agencies may consider the potential for environmental harm, including harm to archeological and cultural resources.

Comment: Commenters raised concerns that the time limits established in § 1501.10 would constrain commenting time frames and limit the capacity of State, Tribal, and local governments to provide meaningful comments. Commenters stated that State, Tribal, and local governments have limited resources and internal review processes that render providing substantive comments within the timeframes difficult if not impossible.

CEQ Response: The final rule includes a number of revisions which clarify Federal agencies duty to inform and cooperate with State, Tribal, and local governments in a timely manner. For example, § 1501.9 requires agencies to invite the participation of likely affected Federal, State, Tribal, and local agencies and governments during the scoping process. Section 1503.1 requires agencies to request the comments of appropriate State, Tribal, and local agencies. Section 1506.6 establishes requirements for public involvement. Additionally, while § 1501.10 sets presumptive time limits for agency compliance with NEPA, a senior agency official may extend the time limit and the minimum of a 45-day comment period on the draft EIS is unchanged from the 1978 regulations.

Comment: Commenters stated that programmatic EISs should be exempt from the 2-year time limit.

CEQ Response: CEQ has included time limits for all EISs which promotes consistency and predictability in the NEPA process. Under the final rule, the time limits may be extended where approved by a senior agency official.

10. Tiering (§ 1501.11)

Comment: Commenters supported the revisions to clarify when agencies can use existing studies and environmental analysis in the NEPA process, stating NEPA decision making should be based on full recognition of the amount of analysis that has already taken place (e.g., by incorporating by reference previous EISs and EAs) which will reduce duplication, better direct scarce resources and ultimately result in better decision making. Commenters further supported the clarifications that an agency may tier EAs. Commenters indicated that tiering is an important regulatory tool for land planning agencies, and that it is important for CEQ to promote its use and remove existing ambiguities.

CEQ Response: The final rule includes proposed revisions in § 1501.11, “Tiering,” to clarify when agencies can use existing studies and environmental analyses in the NEPA process and when agencies would need to supplement such studies and analyses (consistent with § 1502.23 that agencies are not required to undertake new scientific and technical research to inform their analyses). These revisions will avoid unnecessary duplication, better direct agency resources, and ultimately improve decision making by clarifying that agencies do not need to conduct site-specific analyses at a program level that are not relevant until the decision at the site-specific stage.

Comment: Commenters objected to revisions related to tiering in § 1501.11(a) and revisions in § 1506.4, “Combining documents” that allow combining documents stating current regulations address these matters.

CEQ Response: The final rule includes proposed revisions in § 1501.11 and § 1506.4 that clarify the difference between these provisions. Tiering allows the use of programmatic, policy, or plan EISs to relate statements of broad scope to those of narrower scope, eliminating

repetitive discussions of the same issues while providing for staged decisions. The staged decision-making qualities of tiering distinguish this provision from the simple combination of documents to avoid redundancy.

Comment: Commenters recommended that the regulations should require agencies to indicate how and when they will incorporate new or better information into tiered project- or site-specific EAs or EISs when there is an existing programmatic NEPA document.

CEQ Response: In their EA or EIS and decision documents based on tiering, agencies should indicate how and when they will incorporate additional information into tiered project- or site-specific EAs or EISs and their relationship to existing programmatic NEPA documents. Section 1501.11 provides that tiered environmental documents focus on the actual issues ripe for decision and exclude from consideration issues already decided or not yet ripe at each level of environmental review.

Comment: Commenters stated planning products developed by the lead agency should have a reasonable way to be adopted for purposes of NEPA review, so that the substance of the planning process product(s) does not have to be revisited in the NEPA process.

CEQ Response: In the context of tiered decisions, the final rule at § 1501.11(b) requires the environmental document to state where the earlier document is available and at § 1507.4 the final rule provides for agency websites that maintain planning and environmental documents that are available for tiering.

Comment: Commenters supported the proposed changes in §§ 1501.11 and 1500.4 regarding the use and clarification of tiering to avoid duplicative analysis and specific authorization of this efficient process for use with an EA as well as an EIS.

CEQ Response: CEQ acknowledges the support for the proposed changes.

Comment: Commenters objected to revisions to proposed §§ 1501.11 and 1502.4(d) stating they appear to be in conflict with the NEPA statute. Commenters specifically stated CEQ’s revisions provide that agencies need not conduct site-specific analyses prior to an irretrievable commitment of resources, and that in most cases this will not be until the decision is at the site-specific stage.

CEQ Response: Tiering is a well-established practice from the 1978 regulations. The tiering provisions in the final rule are generally consistent with long-standing case law regarding tiering. *See, e.g., Pac. Rivers Council v. United States Forest Serv.*, 689 F.3d 1012, 1033 (9th Cir. 2012) (“we are satisfied that the Forest Service’s analysis was sufficient, at this stage of the process, given that the EIS provides significant analysis of the environmental effects on amphibians, and that site-specific projects are not yet at issue.”). The final rule’s changes to tiering provisions—moving 40 CFR 1502.20 to § 1501.11 and adding descriptive text in § 1502.4(b)(2)—do not have any effect on the regulations’ application of the “irreversible or irretrievable commitments of resources” requirement of section 102(2)(C)(v) of NEPA. Section 1502.16(a)(4) retains the required EIS discussion of any irreversible or irretrievable commitments of resources that would be involved in the proposal should it be implemented.

Comment: Commenters did not support the statement in proposed § 1501.11 to “eliminate repetitive discussions of the same issues” stating repetitive discussions of important issues can have benefits, such as supporting interagency cooperation, ensuring decision makers consider such information, and increasing public transparency and ease of understanding.

CEQ Response: Neither the 1978 regulations nor the final rule support repetitive discussion of the same issues as it increases time and paperwork and does not lead to better decisions. Improved rule revisions for incorporation by reference and tiered environmental

documents will assist agencies in reducing unnecessary paperwork and delay, while promoting informed decision making.

Comment: Commenters supported revisions to clarify that site-specific EAs and EISs may tier to programmatic EAs and EISs, even when implementation of a program without significant effects at a national level may have a significant impact at a local or project scale.

CEQ Response: The final rule at § 1501.11 and the definition of “tiering” at § 1508.1(ff) add programmatic EAs to make clear that agencies may use EAs at the programmatic stage, when decisions are made without significant effects at the program level, though subsequent decisions may have a significant effect at subsequent local- or project-level stages. This clarifies that agencies have flexibility in structuring programmatic NEPA reviews and associated tiering.

Comment: Commenters objected to the proposed revision to § 1501.11(a) to “focus on the actual issues ripe for decision,” stating that entirely banning those issues from consideration (without consideration of unique circumstances or exceptions) seems unnecessarily restrictive, and contrary to the goal of informed decision making under NEPA.

CEQ Response: The language referenced by the commenter is unchanged from the 1978 regulation at 40 CFR 1502.20 and does not exclude subsequent issues from any consideration. On the contrary, the provision to “focus” the analysis indicates that those issues that are “ripe” for decision should be discussed in the context of the tiered decision-making process.

Comment: Commenters recommended that CEQ consider providing additional guidance on how to appropriately tier from a previous study as well as creating a “library” or repository of earlier studies that would be available to Federal agencies and interested parties. Commenters stated a repository of studies would allow project proponents and agencies to quickly and efficiently find relevant material that can be used during the review process.

CEQ Response: CEQ may provide guidance on implementation of these regulations. Similar to the 1978 regulations, the final rule requires an environmental document to state where the earlier document is available. *See* § 1501.11(b). The final rule also directs agencies to host websites that provide planning and environmental documents, including those necessary for tiering. *See* § 1507.4.

Comment: Commenters recommended that decisions based on an EA used for tiering ensure that public participation is not foreclosed. A commenter also stated that excluding an issue from review because it is considered not yet ripe would have to include a commitment that it be thoroughly considered at a subsequent stage of review.

CEQ Response: Tiering does not foreclose public involvement during subsequent NEPA processes. The final rule does not provide for tiering from or to a determination to apply a CE. Agencies are required to involve the public, relevant agencies, and any applicants to the extent practicable when preparing EAs (§ 1501.5(e)), and therefore a programmatic EA would be subject to public review both at the time of its use in a FONSI and its incorporation into a subsequent tiered environmental document. CEQ declines to require agencies to commit to review unripe issues at a later time because inherent in the nature of an unripe issue is that it may never fully ripen.

Comment: Commenters requested that an agency's use of prior determinations be contingent on those decisions being final and effective (*i.e.*, not under appeal or subject to appeal).

CEQ Response: Similar to the 1978 regulations at § 1506.3(d), CEQ has found it to be appropriate, when an agency adopts an EIS or EA prepared by another agency, that the adopting agency specify if the EIS or EA is not final within the agency that prepared it, the action is the

subject of a referral under part 1504, or the EIS or EA is the subject of a judicial action that is not final. § 1506.3(e). Tiering refers to the coverage of general matters in broader EISs or EAs with subsequent narrower EISs or EAs incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. CEQ therefore declines to make the requested revisions.

Comment: Commenters opposed changes to proposed §§ 1501.11(a), 1501.11(b), and 1502.4(d) stating there are many possible scenarios where review under NEPA could omit important effects because they are not considered “ripe.” This could result in accepting a project without full consideration of its potential operational effects, particularly because of its indirect and/or cumulative effects. Commenters also suggested CEQ eliminate this term because there is no clear definition of “ripe” and it is unclear and undefined.

CEQ Response: If there are significant effects that ripen at a later time in connection with a more specific action that relates to NEPA analysis performed at an earlier and more general stage, then those effects will be considered in the tiered analysis. Effects are addressed in § 1508.1(g) of the final rule. As discussed in the final rule, NEPA actions are reviewable only under the APA and related administrative case law (*e.g., Bennett v. Spear*), and judicial review does not occur until an agency has taken final agency action.

Comment: Commenters requested that CEQ establish a baseline standard for the “adequacy” of a NEPA document (*e.g., an EIS*) to serve as the foundation document for tiering and recommended that CEQ add a sub-section (b)(3) which would state that: tiering is appropriate when an EIS or EA is both current (not more than 10 years old) and relevant to the proposed action.

CEQ Response: The language requested by the commenter is not necessary to include to address the concern because any tiered environmental document must ensure that the preceding document to which it is tiered contains sufficient analysis for purposes of tiering and is relevant to the proposed action. If an EIS is no longer valid, due to change in the action or changed circumstances that are relevant to the environmental effects of the action, tiering does not eliminate the need to supplement the prior environmental document.

Comment: Commenter stated site-specific analyses not only provide information about individual sites, which are always unique to some degree, but also put actions in context. Commenters stated the impact of actions and the best decisions change based on the community that lives next to the affected area, what other actions are ongoing nearby, and the condition of infrastructure needed to access the action location. Commenters further stated that releasing that information late in the process deprives agencies of valuable feedback on the proposed actions and constricts alternative development.

CEQ Response: Rather than release information late in the NEPA process, tiering allows for programmatic decisions that help structure the collection of information for future decisions. Tiering can also assist public and community involvement by structuring decision-making processes and identification of the information needed for subsequent environmental documents prior to final agency action.

Comment: A Commenter recommended CEQ strengthen language to strongly encourage or even require agencies to make use of tiering and adoption where circumstances allow it as noted in current and proposed regulations. Additional commenters stated regulations should specifically direct agencies to tier their environmental documents or incorporate by reference other existing environmental studies and analyses.

CEQ Response: Tiering is an efficiency agencies should consider, as appropriate to their statutory authorities and decision-making processes. Therefore, it is identified with § 1501.9, “Scoping” and other methods listed in §§ 1500.4 and 1500.5 to relate programmatic and narrow actions and to avoid duplication and delay. Agency updates to their NEPA procedures should consider maximum use of tiering in accordance with § 1507.3.

Comment: Commenter stated CEQ should broadly support programmatic reviews where the agency is approving several similar actions or projects in a region or nationwide (e.g., a large-scale utility corridor project) or a suite of ongoing, proposed or reasonably foreseeable actions that share a common geography or timing. Commenter supported that a biological assessment or biological evaluation analysis can and should be incorporated into the NEPA documents stating biological assessments may be completed prior to the release of the EA or EIS and may legitimately inform its outcome or, at the least, prevent needless redundancy and expense.

CEQ Response: Tiering, combined with integration of other environmental review and consultation requirements according § 1502.24 of the final rule, has been used successfully for land management planning actions that need a coordinated approach to their common, incremental environmental impacts.

Comment: A commenter recommended that § 1501.11 explicitly recognize the use of “generic” EISs, or GEISs, which may provide the basis for generic conclusions that are codified in agency regulations. CEQ should expressly acknowledge the value and importance of GEISs in the NEPA review process.

CEQ Response: In the final rule at §§ 1500.4(k), 1502.11(c), 1502.4(b) and 1506.1(c), references to “program” EISs are replaced with “programmatic” environmental documents to

align with common terms in NEPA practice. “Generic” EIS is a term that is particular to a few agencies and should be replaced with terms used in the final rule.

Comment: Commenters stated that use of tiering in EAs could result in the elimination of detailed analysis at stages in agency decision making and necessary site-specific analyses if an agency decides that additional analysis is not necessary in a site-specific EA because of analysis in a programmatic EA. By allowing EAs to tier without detailed review at any stage, it is possible that important issues will be overlooked, and thus valuable and necessary analyses will not be conducted. Commenter recommended agencies should have to consider whether new information is available, or whether circumstances have changed to a degree sufficient to warrant additional analysis.

CEQ Response: Concerns that environmental issues will be overlooked can arise in any NEPA process, and are best addressed through a transparent public process in which the agency assumes responsibility for the accuracy, scope, and content of its environmental documents in accordance with § 1506.5 of the final rule. Tiering further addresses such concerns by ensuring that issues that are not ripe for review early in a tiered decision-making process are identified for subsequent review in a subsequent, transparent decision.

Comment: Commenters stated the standards in this rulemaking appear to conflict with recent actions by the Bureau of Land Management to eliminate preparation of EISs for land use actions and asks for clarification.

CEQ Response: In § 1501.11 of the final rule, CEQ makes clear that agencies may use EAs at the programmatic stage, such as land management planning decisions by the BLM, as well as the subsequent stages. The final rule also amends the definition of “tiering” in paragraph (ff) to refer to an EIS or an EA. Under the final rule, agencies have flexibility in structuring

programmatic NEPA reviews and associated tiering in accordance with their statutory authorities.

Comment: Concerning proposed § 1501.11(c)(2), a commenter objected to replacing “analysis” with “assessment” and stated assessment is a subjective action and applies under the previous addition of the term “environmental assessment.” Analysis refers to an evaluation of the proposed actions and impacts prior to initiating or executing the action.

CEQ Response: The final rule changes “analysis” in § 1501.11(c)(2) to “assessment” to refer to the reference to an EA preceding the term. No less rigor in analysis is implied by this change.

Comment: Commenter requested clarification on whether a site-specific or project-level EIS can tier to a programmatic EA. If the answers to both questions is “yes,” how then does tiering differ from incorporation by reference?

CEQ Response: Tiering differs from incorporation by reference because tiering is a means of staged decision making with a structured relationship between the relevant environmental documents.

Comment: Commenters recommended that CEQ use language found in 43 CFR 46.120 to clarify adoption of analysis through agency developed environmental review procedures and incorporate and use language from 43 CFR 46.140 to clarify that an agency may find a FONSI or, for an EA tiered to an EIS that adequately analyzed a proposal’s significant effects, a “Finding of No New Significant Impact.”

CEQ Response: Tiering differs from a FONSI because the former provides for subsequent analysis to address environmental issues that are expected to become ripe for analysis and decision making at a later stage, while the latter is a means of confirming that subsequent

changes in an action or environmental circumstances do not require supplementation of a prior environmental document. Findings of no new significant impacts are provided for in the final rule at § 1502.9(d)(4).

Comment: A commenter stated that only § 1502.4(a) applies to the preparation of all EISs. Commenters stated that proposed § 1502.4 (b), (c), and (d) pertain exclusively to programmatic EISs and suggests that sub-sections (b), (c), and (d) be moved into a section devoted to programmatic EISs (P-EIS) stating P-EISs provide an ideal tiering platform, and recommending that these subsections be combined with § 1501.11.

CEQ Response: In the final rule, § 1502.4(a) applies generally to the preparation of EISs while subsequent sections refer to programmatic EISs as examples. CEQ moved the tiering provision at 40 CFR 1502.20 (1978) to § 1501.11 to underscore its utility for EAs, but division of § 1502.4 into general and programmatic sections would not clarify its provisions.

11. Incorporation by Reference (§ 1501.12)

Comment: Commenters recommended that CEQ add language to § 1501.12, “Incorporation by Reference,” to clarify that there is no need to attach material that is incorporated by reference to the EIS as an appendix.

CEQ Response: CEQ declines to make the suggested change. Incorporation by reference obviates the need to attach material to the EIS. Rather, agencies may include links or other references to access the incorporated material.

Comment: Some commenters expressed concern that incorporated documents would not be reasonably available during the public comment period, suggesting this requirement could be thwarted by concerns over proprietary information or the redaction of information. Some commenters requested that CEQ modify § 1501.12 to specify that the material incorporated by

reference be made available at the beginning of the comment period, not simply “within the time allowed for comment.”

CEQ Response: CEQ declines to make the requested modifications to the provision. The final rule fully addresses the commenters’ concerns, including the requirements at § 1501.12 that incorporated material be “available for inspection by potentially interested persons within the time allowed for comment” and the prohibition on incorporating material “based on proprietary data that is not available for review and comment.” CEQ notes that § 1501.12 allows incorporation by reference when the effect will be to cut down on bulk without impeding agency and public review of the action.

Comment: Some commenters recommended that CEQ provide guidance to agencies on proper summarization of incorporated information to ensure readable environmental documents and a sufficiently detailed description of the incorporated information. Other commenters recommended that CEQ allow for incorporation by reference without the need to summarize. Some commenters asked CEQ to clarify that agencies may incorporate information into their environmental documents for purposes other than satisfying the requirements of NEPA. Commenters also requested that CEQ include a requirement that environmental documents state the specific sections and paragraphs where the incorporated material can be found to avoid having to sift through voluminous documents.

CEQ Response: Summarization can assist readers by potentially eliminating the need to review all incorporated material. Additionally, CEQ declines to micromanage the agencies’ summarization and description of material incorporated by reference. CEQ notes that information incorporated by reference should be relevant to the decision before the agency.

However, agencies may incorporate other materials for non-NEPA purposes, including where agencies may be using the NEPA review to meet the requirements of multiple statutes.

Comment: Some commenters asked that CEQ clarify the term “proprietary data” and whether that term includes confidential natural and cultural resource information.

CEQ Response: CEQ notes that proprietary data is data in which the owner holds a property interest. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). The principal Federal laws that can protect sensitive information about historic properties and archaeological resources are section 304 of the National Historic Preservation Act, 16 U.S.C. 4702-3 (NHPA) and section 9 of the Archeological Resources Protection Act, 16 U.S.C. 470hh. For example, section 304 of the NHPA restricts the disclosure of certain information that may harm historic properties, as the NHPA has declared the preservation of historic properties to be in the public interest. The Freedom of Information Act may protect natural and cultural resource information from disclosure. It provides that an agency may withhold records “specifically exempted from disclosure by statute” and therefore may not be appropriate for incorporation by reference.

Comment: Some commenters observed the proposed deletion of 40 CFR 1502.21 and questioned whether it had the effect of eliminating the practice of incorporation by reference.

CEQ Response: The final rule moves the provision in 40 CFR 1502.21 to § 1501.12 in the final rule. Incorporation by reference remains available. *See* § 1501.12.

Comment: Some commenters recommended that incorporation by reference apply to public input provided on previous actions and that these comments be incorporated from prior public records.

CEQ Response: CEQ notes that agencies may incorporate by reference publicly available information relevant to the decision, including prior public comments.

Comment: Some commenters recommended that CEQ allow for greater flexibility so that agencies can incorporate by reference content that is similar to the particular action or impacts being assessed in the agency's environmental document.

CEQ Response: CEQ declines to modify the regulations. Decisions on what studies are appropriately incorporated by reference are fact-based decisions made by the agency conducting the NEPA review.

Comment: Commenters recommended that CEQ require agencies to make incorporated material, including referenced tiered documents, as accessible as possible; for example, CEQ could require inclusion of a website link to the material. Other commenters pointed to existing EISs that used incorporation by reference, where the referenced material was not reasonably available as required by the existing regulations.

CEQ Response: CEQ notes that the 1978 regulations require agencies to make any incorporated material reasonably available for inspection by potentially interested persons within the time allowed for comment, and this requirement remains in the final rule in § 1502.12. CEQ declines to specify how agencies make such information accessible but notes that under § 1507.4, linking directly to the relevant text, for purposes of incorporation by reference or tiering, is appropriate and warrants support through the design of environmental documents and the information systems that support their accessibility.

Comment: Some commenters requested CEQ modify the regulations to state that participating agencies and the public may comment on the suitability of existing data, including the age of the information and applicability of newer analyses, methodologies, techniques and technology, while allowing the lead agency to make the determination on the appropriateness of the information.

CEQ Response: CEQ declines to make the requested revision because it is unnecessary. Agencies and the public have the opportunity to comment on the draft EIS, including any aspects of material that is incorporated by reference within the draft EIS.

Comment: Commenters expressed support for incorporating material by reference into NEPA documents. Commenters recommended including a summary of the incorporated material in a technical appendix so that the public may understand the material without having to access the source materials.

CEQ Response: Both § 1501.12 and § 1502.19, “Appendix,” allow for the practice recommended by the commenters.

Comment: Commenters recommended that CEQ allow Federal agencies preparing NEPA analyses to incorporate by reference those analyses prepared by State and Tribal governments when those analyses meet or exceed Federal standards of a NEPA review.

CEQ Response: Under the 1978 regulations and § 1501.12, agencies may incorporate by references analyses prepared by State and Tribal governments so long as they meet applicable requirements in the rule (e.g., § 1506.2). CEQ has made further changes in the final rule to reduce duplication of effort with respect to analyses prepared by State and Tribal governments in § 1501.12 and § 1506.2, “Elimination of duplication with State, Tribal, and local procedures.” For any proposed action, Federal agencies may cooperate with non-Federal entities to conduct environmental analyses that meet the requirements of both NEPA and NEPA-like authorities at the State, Tribal, and local level. Federal agencies may also incorporate planning studies, analyses, and other information into environmental documents by reference, rather than reproducing the entire analysis.

Comment: Some commenters opposed the incorporation by reference provision, noting that use of the practice can reduce the accuracy and clarity of NEPA analyses. Some commenters expressed concern that use of incorporation by reference could result in the use of old outdated studies, especially for cultural resources. They requested that CEQ strengthen the rules for the use of incorporated or referenced material to ensure that the referenced material is timely, accurate, relevant, and uncontested. Other commenters recommended that CEQ require agencies include a statement demonstrating the continuing relevance and applicability of the earlier document to the current review process.

CEQ Response: CEQ notes that incorporation by reference was part of the 1978 regulations and has been a useful practice. All of the information in environmental documents, including information incorporated by reference, is subject to § 1502.23 and the requirement to be reliable.

Comment: Some commenters requested that CEQ should require, whenever possible, that agencies include material in the EIS rather than incorporate it by reference.

CEQ Response: CEQ notes that the purpose of incorporation by reference is to cut down on the bulk of environmental documents while allowing agency and public review of the actions.

E. Comments Regarding Environmental Impact Statements (EISs) (Part 1502)

1. Purpose of environmental impact statement (§ 1502.1)

Comment: Commenters opposed the proposed changes to § 1502.1, “Purpose of environmental impact statement,” and requested CEQ reinstate the phrase that an EIS is “an action-forcing device.” Commenters stated that the proposed changes make EISs purely informational documents, disconnected from any direction on what decisions agencies should make after considering significant effects of various alternatives. Commenters stated the

proposed rule re-characterizes the “primary purpose” of an EIS as ensuring the agencies consider the environmental impacts of their actions in decision making. Commenters stated the proposed rule fails to acknowledge Congress’ stated purpose in NEPA, to infuse the goal of acting as a steward of the environment into all activities of the Federal Government. Commenters stated this is a significant shift in agency’s obligations and undermines NEPA.

CEQ Response: The final rule revises § 1502.1 consistent with changes to § 1500.1 to align these sections more closely with the statutory text. As explained in section II.B, NEPA is a procedural statute, and the purpose of NEPA is satisfied if a Federal agency has considered relevant environmental information and the public has been informed regarding the decision-making process. In contrast to other statutes that provide agencies with authority to require particular results or substantive outcomes, such as the ESA, Clean Air Act, and Clean Water Act, NEPA does not require mitigation. As the Supreme Court has stated, “[o]ther statutes may impose substantive environmental obligations on [F]ederal agencies, [citation omitted] but NEPA merely prohibits uninformed—rather than unwise—agency action.” *Methow Valley*, 490 U.S. at 351. The EIS ensures agencies consider the environmental impacts of their actions in decision making.

Comment: Commenters requested CEQ define the phrase “necessary environmental analyses” in § 1502.1.

CEQ Response: CEQ declines to define the phrase “necessary environmental analyses.” The phrase appears once in the rule and the relevant sentence remains unchanged from the 1978 regulations.

Comment: Commenters requested CEQ add “and the public” to the last sentence in § 1502.1 for clarity.

CEQ Response: The final rule incorporates the requested revision to § 1502.1.

2. Implementation (§ 1502.2)

Comment: Commenters expressed opposition to the proposed changes to § 1502.2 and requested CEQ reinstate the statement that an EIS “shall be analytic rather than encyclopedic.” Commenters stated the proposed changes serve no clear purpose except to infer that analysis is not preferred, and encyclopedic treatment is definitely not preferred. Commenters also stated the proposed rule language implies that agencies can selectively omit information and data if the agency deems it not very significant.

CEQ Response: CEQ makes the proposed changes in the final rule because encyclopedic and analytic are separate issues. This does not change the meaning of either requirement as the commenter suggests. Rather, the change clarifies that EISs must be analytic. Additionally, EISs must be a reasonable length and written in a readable format so that it is practicable for the decision maker and the public to read and understand the issues and alternatives for decision rather than a compendium of available information (*i.e.*, not encyclopedic).

Comment: Commenters requested CEQ clarify or remove the last sentence in § 1502.2(b) that states in pertinent part “there should be only enough discussion to show why more study is not warranted.” Commenters stated a brief discussion of non-significant issues may lead to inadequate analysis of their significance. Commenters also stated reducing discussion may result in reduction of evaluation of issues which in turn may lead to errors in decision making.

CEQ Response: CEQ retains this sentence from the 1978 regulations in the final rule. Consistent with long-standing practice under NEPA, agencies should focus on significant issues and only briefly discuss non-significant issues.

Comment: Commenters requested CEQ amend § 1502.2(d) to remove “to achieve the requirements of sections 101 and 102(1) [of NEPA],” or change “requirements” to “policies.” Commenters stated NEPA’s only “requirements” are procedural.

CEQ Response: CEQ retains this language from the 1978 regulations in the final rule, but clarifies that the regulations interpret the referenced sections of the Act.

3. Major Federal Actions Requiring the Preparation of Environmental Impact Statements (§ 1502.4)

Comment: Commenters supported revisions to further encourage discretion and practicality in the use of “tiering” and “programmatic” NEPA documents that, where appropriate, analyze environmental impacts and mitigation measures for similar projects at a broad policy level. Commenters supported CEQ’s addition to use tiering and other methods to address programmatic or narrower actions and avoid duplication and delay, and further clarify that agencies may defer detailed analysis until elements are ripe for final agency action.

CEQ Response: CEQ acknowledges the support for the proposed changes. Programmatic analyses may be used as a foundation for subsequent analyses and can promote efficiency in appropriate circumstances.

Comment: Commenters objected to language in the preamble interpreting § 1502.4(d), that “site-specific analyses need not be conducted prior to an irretrievable commitment of resources.” Commenters maintained that the NEPA process must be complete and a ROD must be issued before any resources (e.g., the acquisition of land) are committed for an applicable project. Commenters also maintained that the replacement of “shall” with “should” in § 1502.4(b)(iii) inappropriately allows for agencies to authorize irreversible and irretrievable commitment of resources prior to making a programmatic EIS available.

CEQ Response: In the final rule, CEQ has simplified this subsection to provide that agencies may tier their environmental analyses to defer detailed analysis of impacts of specific program elements until such program elements are ripe for final agency action. CEQ removed the clause referencing irretrievable commitment of resources because NEPA review occurs pursuant to the APA and “final agency action,” as construed in *Bennett v. Spear*, is the test for when judicial review can commence. *See* 520 U.S. 154, 177–78 (1997). The replacement of “shall” with “should” is consistent with the discretionary nature of programmatic EISs that provide an efficient means of considering environmental effects in common across a broad program of actions.

Comment: Commenters stated that CEQ should remove the second sentence in § 1502.4(d) in the proposed rule contending that it allows agencies to avoid offering details on subsequent actions that may have additional impacts.

CEQ Response: Section 1502.4(d) recognizes that agencies may prepare programmatic or tiered EISs. Agencies may also prepare site-specific NEPA analysis and defer more detailed analysis of environmental impacts of specific program elements until such program elements are ripe for final agency action. This promotes efficient use of agency resources.

Comment: Commenters objected to the removal of the word “shall” from § 1502.4(b) stating that it would eliminate the requirement for programmatic environmental analysis for Federal or federally assisted research or development demonstration programs for new technology. Commenters maintained CEQ provides no justification for the change noting that NEPA itself identifies “new and expanding technological advances” as one of man’s actions that have profound influences on the environment.

CEQ Response: NEPA does not prescribe any particular framework or procedure for an EIS. Nor does it address the practice of a programmatic EIS. The final rule supports the development of programmatic EISs for new or developing technology, where appropriate. As revised, CEQ has clarified that agencies have the flexibility to conduct NEPA analyses in the most efficient manner as practicable, which involve a programmatic EIS, or otherwise action-specific NEPA analysis. Moreover, CEQ has removed the ambiguous language “are sometimes required,” and substituted in its place, “may be prepared.” This final rule is not specific to federally assisted research or development demonstration programs for new technology.

Comment: Commenters stated that CEQ should more explicitly define in the regulations the types of actions that are appropriately subject to preparation of a programmatic EIS or otherwise provide greater guidance to Federal agencies on when a programmatic EIS should be conducted.

CEQ Response: NEPA analysis is subject to a rule of reason and agencies should use their experience and expertise in conducting NEPA analyses. Decisions on when to select a programmatic EIS are appropriately made at the agency level considering the specific program or policy and availability of agency time and resources.

Comment: Commenters stated that changes in the rule making programmatic EISs discretionary are inconsistent with existing case law stating that in some cases, programmatic EISs are required, citing *Ass'n of Pub. Agency Customer, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1184 (9th Cir. 1997).

CEQ Response: In some cases, preparation of a programmatic EIS may be the most efficient and cost-effective way to review for agencies to assess certain Federal actions, particularly repetitive ones. Agencies have been afforded considerable deference in whether to

prepare a programmatic review, absent a finding that the agency acted arbitrarily and capriciously in choosing not to conduct a programmatic review. *Kleppe*, 427 U.S. at 409–15. “So long as the above described NEPA analysis of the overall program is prepared, we think it of little moment whether that analysis is issued as a separate NEPA statement or whether it is included within a NEPA statement on a particular facility.” *Scientists’ Inst. for Pub. Info., Inc., v. Atomic Energy Comm’n et al.*, 481 F.2d 1079 (D.C. Cir. 1973). As such, the decision to prepare a programmatic review under NEPA is not a compulsory one.

Comment: Commenters stated that CEQ’s proposed rulemaking does not sufficiently encourage “grouping” similarly situated projects under § 1502.4. Commenters argued CEQ should more explicitly revise its regulations to further facilitate agency consideration of related proposed actions in a single impact statement.

CEQ Response: The regulations sufficiently identify the relevant ways agencies may evaluate proposals in § 1502.4(b)(1)(i)-(iii).

Comment: Commenters stated that CEQ’s changes to proposed § 1502.4(d) would encourage agencies to justify improper segmentation of projects referencing: “Agencies may tier their environmental analyses to defer detailed analysis of environmental impacts of specific program elements until such program elements are ripe for decisions.”

CEQ Response: Section 1502.4(b)(2) of the final rule does not encourage or allow segmentation of Federal actions, in contravention of relevant conditions in § 1501.9(e)(1). Section 1502.4(b)(2) (proposed § 1502.4(d)) allows agencies to prepare programmatic documents as appropriate and tier subsequent analysis as necessary. Any improper segmentation is reviewable under the judicial review standards of the APA. 5 U.S.C. 706(2)(A).

Comment: Commenters recommended that CEQ explicitly include a life expectancy for programmatic NEPA documents and ensure that programmatic plans be revisited periodically to ensure they remain valid or determine whether they need revision.

CEQ Response: Programmatic EISs, as a matter of agency discretion, are not required to be reconsidered by the agency. A programmatic analysis, should however, appropriately describe the proposed action and the expected duration for the action is to be implemented or otherwise operate. Federal agencies should use their expertise to determine when and if to revise programmatic EISs, or provide supplementary materials for an analysis that tiers from a prior review.

Comment: Commenters noted that only § 1502.4(a) applies to the preparation of all EISs while § 1502.4 (b), (c), and (d) pertain to programmatic EISs. Commenters suggested subsections (b), (c), and (d) should be moved into a section devoted to programmatic EISs and could otherwise be combined with section 1501.11, “Tiering.”

CEQ Response: While the two sections are related, CEQ has renumbered but retained the sections as proposed because § 1502.4 relates to EISs while § 1501.11 relates to tiering that may involve both EISs and EAs.

Comment: Commenters objected to the requirement that agencies define a proposal “based on the statutory authorities for the proposed action.” (§ 1502.4(a)). Commenters asserted the language bounds consideration of the proposal and its alternatives by the applicable authorities, risking under characterization of some actions.

CEQ Response: The proposed change properly clarifies that agencies should define the proposal that is the subject of the EIS based on the applicable statutory authorities. This revision reflects that in considering a proposed action, agencies must consider their relevant statutory

authorities. Contrary to the commenters concern, a proposal defined based on the applicable statutory authorities is not under characterized. In § 1501.1 of the final rule, CEQ clarifies that the presence and extent of statutory discretion is relevant to NEPA analysis.

4. Timing (§ 1502.5)

Comment: In the first sentence of § 1502.5, commenters requested that CEQ retain the word “shall” rather than replacing it with “should,” as proposed, so that agencies are required to prepare a NEPA analysis as soon as practicable.

CEQ Response: Consistent with the discussion in section II.C.2, the final rule revises § 1502.5 to provide agencies with an appropriate degree of flexibility to determine the timing for initiating an EIS.

Comment: Commenters requested that CEQ amend § 1502.5(a) to apply the requirements concerning timing to tiered assessments and programmatic EISs.

CEQ Response: CEQ declines to add tiered assessments and programmatic EISs to this paragraph because §§ 1501.11 and 1502.4, respectively, address the consideration for their timing.

Comment: Commenters requested that CEQ strike the word “normally” from § 1502.5(d), stating that CEQ’s regulations should require a draft EIS to accompany a proposed rule to inform the decisions associated with the proposed rule.

CEQ Response: CEQ declines to remove “normally” from § 1502.5(d). While under current practices a draft EIS accompanies a proposed rule in most instances, the 1978 regulations are flexible on this point.

Comment: Commenters stated that CEQ’s proposal to change “no later than immediately” to “as soon as practicable” in § 1502.5(b) is unclear regarding whether CEQ intends to change the timing of EIS preparation.

CEQ Response: The revision of “no later than immediately” to “as soon as practicable” in § 1502.5(b) is consistent with other revisions throughout the final rule to change the term “possible” to “practicable” as the more commonly used term in regulations. *See* section II.A. With respect to EIS preparation, CEQ also directs in § 1501.9(d) that agencies should publish an NOI as soon practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment. CEQ addresses time limits for EISs in § 1501.10.

Comment: Commenters requested CEQ replace the word “shall” with “may” in § 1502.5(a) to allow agencies flexibility to decide when to initiate an EIS for a project and when to supplement.

CEQ Response: CEQ declines to make this revision because it is inconsistent with section 102(2)(C) of NEPA and § 1501.2. CEQ notes the timing mandate in § 1502.5(a) remains unchanged from the 1978 regulations and provides agencies with clear direction when to prepare an EIS.

5. Page Limits (§ 1502.7)

Comment: Commenters expressed opposition to presumptive page limits for EISs stating that they are arbitrary, capricious, and unnecessary as actions requiring an EIS are infrequent. Some commenters opposing the revisions believed that the new page limits would set a “one size fits all” approach, rush the process causing the public’s ability to participate, including Tribal, State, and local governments, and cause the quality of the analyses to decline. Commenters also

raised concerns over challenges in meeting the proposed page limits due to project complexity and ability to complete needed studies within a small field season window.

CEQ Response: The core purpose of page limits from the original regulations remains in the final rule. Documents must be a reasonable length and in a readable format so that it is practicable for the decision maker to read and understand the document in a reasonable period of time. Therefore, CEQ is finalizing a presumptive limit of 150 pages for EISs (or 300 pages for proposals of unusual scope or complexity) to reinforce the page limits set forth in the 1978 regulations, while also allowing a senior agency official to approve a statement exceeding 300 pages when it is useful to or necessary for the decision-making process. In an effort to create a more efficient process, Federal agencies have been updating their procedures and policies to reflect the practical utility of page limits. For example, in August 2017, DOI issued Secretarial Order 3355,⁵⁶ which requires that EISs shall not be more than 150 pages or more than 300 pages for projects of unusual scope or complexity. Similarly, in August 2019, DOT issued Page Limits Guidance, which states that Operating Administrations should limit the text of EISs to no more than 150 pages and 300 pages for proposed actions of unusual scope or complexity.⁵⁷ CEQ found that the average length of final EISs across the Federal Government is over 600 pages, which far exceeds the expectation in the 1978 regulations that normally EISs should not exceed 150 pages. Reinforcing the original page limits will encourage agencies to identify relevant

⁵⁶ Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,” https://www.doi.gov/sites/doi.gov/files/elips/documents/3355_-_streamlining_national_environmental_policy_reviews_and_implementation_of_executive_order_13807_establishing_discipline_and_accountability_in_the_environmental_review_and_permitting_process_for.pdf.

⁵⁷ DOT Page Limits Guidance, *supra* note 50.

issues, focus on significant environmental impacts, and prepare concise, readable documents that will inform decision makers as well as the public.

Comment: Commenters requested that the final rule clarify whether the page limits (§ 1502.7) include the summary (§ 1502.12) and the list of preparers (§ 1502.18). Commenters stated the EIS page limits should exclude the summary and the list of preparers.

CEQ Response: The final rule excludes the summary and list of preparers sections from the page limits. Similar to the 1978 regulations, page limits apply to the purpose and need, alternatives, affected environment, and environmental consequences sections.

Comment: Commenters suggested appendices should receive the same page limits as the EA or EIS.

CEQ Response: CEQ determined that the length of appendices should remain flexible, to preserve their essential function of providing a means of inclusion of necessary supporting information without adding unnecessary bulk to the EA provided for the decision maker's consideration. The page length limitations for EISs similarly do not include appendices, 40 CFR 1502.7, for the same reason. Therefore, in establishing a presumptive page length for EAs, CEQ applied the same principle while authorizing a senior agency official to approve in writing an EA to exceed 75 pages.

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

Comment: Commenters objected to the change in § 1502.9(b) regarding EISs from “The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements ...,” to “The draft statement must meet, to the fullest extent practicable, the requirements established for final statements....” Commenters stated that the change allows agencies to avoid developing robust analysis citing that the replacement with “practicable” gives

agencies an out by emphasizing things that are “reasonably capable” of being accomplished, while possible, by contrast, contains no such limitation. Commenters cited the comparison of *Black’s Law Dictionary, Practicable (11th ed. 2019)* (“(Of a thing) reasonably capable of being accomplished; feasible in a particular situation”), with *Ballentine’s Law Dictionary, Possible (2010 ed.)* (“Liable to happen or come to pass; capable of existing or of being conceived or thought of; capable of being done; not contrary to the nature of things.”) because it was determined that something was not “reasonably capable” of being included.

CEQ Response: CEQ has replaced references from “possible” to “practicable” throughout the regulations for consistency and to update the usage to reflect the more modern usage of the term “practicable.” *See* section II.A.

Comment: Commenters supported the clarification in § 1502.9(d)(1) that supplemental statements only need to be prepared if a major Federal action remains to occur. Commenters also supported clarification in § 1502.9(d)(4) that an agency may find new information or circumstances are “not significant” and therefore does not require the preparation of a supplemental EIS. They also supported continued use of and proposed clarifications for applying a Determination of NEPA Adequacy in order to codify the existing practice by some agencies and open opportunities for other agencies.

CEQ Response: CEQ acknowledges the support for the proposed changes. In accordance with revised § 1502.9(d)(1), agencies are required to prepare supplements to either a draft or final EIS if a major Federal action remains to occur, and (i) the agency makes substantial changes to the proposed action that are relevant to environmental concerns, or (ii) there are significant new circumstances. This revision is consistent with Supreme Court case law holding that a supplemental EIS is required only “[i]f there remains ‘major Federal actio[n]’ to occur, and

if the new information is sufficient to show that the remaining action will ‘affec[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered” *Marsh*, 490 U.S. at 374 (quoting 42 U.S.C. 4332(2)(C)); *see also S. Utah Wilderness Alliance*, 542 U.S. at 73 (2004). The final rule, codifying agency practice, further provides that supplemental EISs are only required when a major Federal action remains to occur. If an agency determines that new information or circumstances are not significant, a supplemental EIS is not required, and the agency may document such determinations for the administrative record.

§ 1502.9(d)(4).

Comment: Commenters requested that CEQ clarify the meaning of the phrase “a major Federal action remains to occur.” Commenters expressed concern that as drafted, this phrase could have a range of meanings.

CEQ Response: The summary in section II.D.9 of the final rule provides examples of when a “major Federal action remains to occur.”

Comment: Commenters stated that the reference to “responsible opposing view” is unclear and should be defined or otherwise explained in the regulations or guidance.

CEQ Response: The phrase “responsible opposing view” is unchanged from the 1978 regulations. The draft EIS should discuss all major points of view on the environmental impacts of the alternatives including the proposed action. *See* § 1502.9(b). The reference to “any responsible opposing view” in § 1502.9(c) is self-explanatory.

Comment: Commenters stated that it is unclear in § 1502.9(b) how agencies will know “all major points of view on the environmental impacts of the alternatives” at the time the draft is published. Commenters suggested revising the text to read: “the major points of view on the environmental impacts of the alternatives, including the proposed action, known at the time the

draft EIS is prepared.” Other commenters requested CEQ further elaborate or define “all major points of view” in section § 1502.9(b).

CEQ Response: The phrase “all major points of view on the environmental impacts of the alternatives” is unchanged from the 1978 regulation. The regulations specify that major points of view relates to the environmental impacts of the proposed action and alternatives. *See* § 1502.9(b). In preparing environmental documents, agencies should base such documentation on existing information, and in the final rule, CEQ has clarified that “[a]gencies shall make use of reliable existing data and resources.” *See* § 1502.23. The final rule provides for an expanded scoping process and a summary identifying all submitted alternatives, information, and analyses in the draft EIS. *See* §§ 1501.9, 1502.17.

Comment: Commenters recommended that when an agency prepares a supplemental information report (such as under § 1502.9(d)(4)), CEQ clarify that the agency need not circulate the report to the public.

CEQ Response: Under the final rule, CEQ has provided that agencies should document their findings regarding supplementation consistent with their agency NEPA procedures (§ 1507.3), or, if necessary, in a FONSI supported by an EA. Documentation of a FONSI must be made available to the affected public as specified in § 1506.6. CEQ replaced “circulate” with “publish” a supplement to a statement. *See* § 1502.9(d)(3). Elsewhere in the regulations, CEQ has defined “publish” to mean methods found by the agency to be efficient and effective for making environmental documents and information available, including electronic means. *See* § 1508.1(y).

Comment: Commenters recommended that in § 1502.9(b) that CEQ retain “revised draft” stating that a revised draft EIS following a public comment period is different from a supplemental EIS.

CEQ Response: In the final rule, CEQ has eliminated “revised draft” and replaced it with “supplemental draft” for clarity and consistency with the title of the section and other provisions in the regulations referring to supplemental statements. The term “revised draft” is not found elsewhere in the regulations and these revisions are intended for clarity and consistency.

Comment: Commenters requested CEQ further revise § 1502.9(d)(4) to provide that agencies “may” rather than “should” prepare documentation finding the changes or new circumstances or information relevant to environmental concerns is not significant, and that that the documentation may be “in any other manner deemed appropriate by the agency in its discretion.”

CEQ Response: As discussed in section II.D.9, CEQ added § 1502.9(d)(4), which codifies existing practice of several Federal agencies, while providing that agencies may specify the form of documentation in its agency NEPA procedures (§ 1507.3). Requiring agencies to document determinations under § 1502.9 in accordance with their procedures aligns with agency practice and will promote consistency in agency NEPA documentation.

Comment: Commenters asked CEQ to clarify whether the provisions for a supplemental EIS require a full supplemental EIS when applicants make minor changes and project optimizations during the agency’s NEPA review.

CEQ Response: The final rule provides agencies with flexibility to determine that project changes relevant to environmental concerns are not significant and therefore do not require a supplement. *See* § 1509(d)(4). Where changes are minor and are not significant, agencies may

document the finding consistent with their agency procedures, or if necessary, in a FONSI supported by an EA. *See* § 1509(d)(4).

Comment: Commenters requested CEQ clarify that supplemental information reports such as those prepared under § 1502.9(d)(4) need not necessarily be circulated for public comment in the same fashion as a draft or final statement.

CEQ Response: Under the final rule, agencies have discretion to determine in agency NEPA procedures (§ 1507.3) whether to circulate a finding developed pursuant to § 1502.9(d)(4).

Comment: Commenters requested that CEQ revise § 1502.9(d)(1)(i) to state that: “The agency makes changes in the proposed action that substantially increases the environmental impacts compared to the Draft or Final environmental impact statements.” Commenters suggested the change would allow shifts in alignments for linear projects such as highways to address comments raised by the public or agencies without requiring a supplemental NEPA document if the overall impacts do not increase, thus making the NEPA process more efficient.

CEQ Response: CEQ supports revisions to make the NEPA process more efficient. However, CEQ has not proposed to change the threshold standards for supplementation. Instead, the provisions of the final rule adequately allow for agencies to determine that changes to a proposed action or new circumstances or information relevant to environmental concerns are not significant. *See* § 1502.9(d)(4).

Comment: Commenters suggested CEQ eliminate references to a “supplemental Draft EIS” and eliminate the language that states that “If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and publish a supplemental draft of the appropriate portion.” Commenters stated that it is a difficult standard for agencies to implement,

particularly when evaluating their own NEPA documents and further note that courts have also struggled with interpreting this provision. *See e.g., Nat'l Comm. of the New River v. FERC*, 373 F. 3d 1323, 1328-29 (D.C. Cir. 2004). Commenters requested clarification of whether the standard was enforceable.

CEQ Response: The phrase “so inadequate as to preclude meaningful analysis” was included in the 1978 regulations and CEQ did not propose to revise the phrase in the NPRM. The purpose of this provision is to ensure meaningful opportunity for comment on the draft EIS. Regarding enforceability of this provision, consistent with challenges to agencies’ implementation of NEPA generally, as a procedural statute, it is reviewable under the judicial review standards of the APA. 5 U.S.C. 706(2)(A).

Comment: Commenters suggested the proposed rule add social and economic information to what could be considered when preparing a supplement. Commenters stated that explicit considerations will substantiate agency decisions to consider, or not consider, new information and will streamline the NEPA process.

CEQ Response: In the final rule CEQ has revised the regulations to require consideration of economic information, where applicable, when considering environmental consequences, and has also revised the definition of effects, which includes economic effects, to clarify this may include effects on employment. *See* §§ 1502.16(a)(10) and 1508.1(g)(1). In considering whether to prepare a supplement, agencies should make such a determination in accordance with section § 1502.9(d)(1).

Comment: Commenters stated that subsection (b) should expressly prohibit agencies from omitting the analysis of impact(s) from a draft EIS and postponing that analysis until the

agency releases its final EIS. Commenters stated that this has become a common practice by certain agencies, including for example the Federal Energy Regulatory Commission (FERC).

CEQ Response: Under the CEQ regulations, an EIS must discuss the significant environmental impacts of a proposed action and inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment. *See* § 1502.1. Agencies should prepare draft EISs that present a meaningful assessment of the reasonably foreseeable effects of a proposed action, consistent with the relevant provisions of the regulations.

Comment: Commenters requested that § 1502.9(d)(4) be revised to require agencies to expressly respond to requests from the public for the preparation of a supplemental EIS, instead of allowing decisions based on an agency's discretion and procedures. Other commenters requested clarification that agencies retain discretion in determining whether to prepare a supplemental EIS.

CEQ Response: Agencies should use their experience and expertise in preparing environmental documents, including a supplemental EIS. The final rule requires agencies, where applicable, to publish a supplemental statement for public comment and to document their findings. *See* §§ 1502.9(d)(3) and 1502.9(d)(4).

Comment: Commenters requested the following addition to § 1502.9(d)(4): “If developing procedures for EIS supplementation, agencies should survey the host of guidance documents and assessment ‘keys’ that have been used to determine the need for supplementation (e.g., the BLM OR/WA and Forest Service Region 6 Key for *Assessing ‘Significant New Information’ Under NEPA and ‘New Information Not Previously Considered’ Under ESA for Ongoing Actions* (2008)).”

CEQ Response: Agencies should, where applicable, consult their agency procedures and guidance relevant to supplementation when revising their agency NEPA procedures (§ 1507.3) and making determinations pursuant to § 1502.9(d)(4). The CEQ regulations are not specific to particular agencies, and CEQ has not made the requested revision which relates to guidance for particular agencies. Further, any such existing guidance may need to be withdrawn or revised to comport with revisions to the agency's NEPA procedures.

Comment: Commenters requested guidance on how much change to the proposed action constitutes “substantial” change in relation to § 1502.9 (d)(1)(i). Specifically, commenters stated that supplementation should be required when the agency makes “substantial” changes to any action alternative not just the proposed action.

CEQ Response: Under the final rule, agencies are required to supplement a draft EIS or final EIS if a major Federal action remains to occur and the agency makes substantial changes to the proposed action that are relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. § 1502.9(d)(1). As discussed elsewhere, NEPA analysis is subject to a rule of reason and agencies should use their experience and expertise in determining whether there is a need to supplement.

Comment: Commenters stated that if a draft EIS is fundamentally inadequate, the entire EIS needs to be revised and republished rather than only one particular section of the supplemental EIS.

CEQ Response: Similar to the 1978 regulations, where an agency's draft statement is so inadequate as to preclude meaningful analysis, an agency is required to prepare a supplemental draft of the appropriate portion. *See* § 1502.9(b). Agencies have discretion and should use their

experience and expertise in making a determination regarding the appropriate portion required to be supplemented.

Comment: Commenters stated that the proposed rule related to supplements is contradictory, and that it is inherently contradictory that “significant new circumstances relevant to environmental concerns” could also be “not significant” (therefore not requiring a supplement).

CEQ Response: In the final rule, § 1502.9(d) recognizes that there may be changes to the proposed action or new circumstances or information that are significant and some that are not significant. Where an agency determines they are not significant, § 1502.9(d)(4) provides that an agency may document such a finding consistent with their agency procedures or in a FONSI supported by an EA.

Comment: Commenters objected to use of documentation such as the BLM’s Determination of NEPA adequacy. Commenters stated that where agencies have mechanisms such as programmatic EISs, tiering, incorporation by reference, and CEs that allow them to appropriately streamline multi-tiered decision-making, mechanisms such as Determinations of NEPA Adequacy are unlawful. Commenters specifically opposed Determinations of NEPA Adequacy for specific actions, such as wild horse and burro actions or oil and gas leases on Federal lands.

CEQ Response: As discussed elsewhere, such determinations are well established existing practice at Federal agencies and allow agencies to document their determinations regarding whether a supplemental analysis is required. Mechanisms for tiered decision making (including programmatic EISs, tiering, incorporation by reference, and CEs) do not address the issues of supplementation that arise between publication of a draft EIS and a ROD.

Determinations of NEPA Adequacy for any particular action is beyond the scope of this rulemaking and appropriately addressed by agencies in their agency procedures.

Comment: For proposals of smaller scope, commenters recommended that agencies use simple checklists in lieu of preparing an EA or other determination of NEPA adequacy.

CEQ Response: Under § 1502.9(d)(4), agencies have flexibility to create checklists or forms to determine if supplementation is required. Additionally, some agencies use checklists to evaluate whether a proposed action may be categorically excluded.

Comment: Commenters asked CEQ to clarify whether the provisions for a supplemental EIS require a full supplemental EIS when applicants make minor changes and project optimizations during the agency's NEPA review.

CEQ Response: The final rule provides agencies with flexibility to determine that project changes relevant to environmental concerns are not significant and therefore do not require a supplement in § 1509(d)(4). Where changes are minor and are not significant, agencies may document the finding consistent with their agency procedures, or if necessary, in a FONSI supported by an EA.

Comment: Commenters objected to the elimination of “circulate” in § 1502.9(b) with respect to circulating the draft EIS, stating it is inconsistent with NEPA's public transparency requirements and would allow for agencies to avoid circulating draft EISs based on economic feasibility.

CEQ Response: Under the final rule, CEQ has replaced “circulate” with “publish” a supplement to a statement. § 1502.9(d)(3). Elsewhere in the regulations, CEQ has defined “publish” to mean methods found by the agency to be efficient and effective for making environmental documents and information available, including electronic means. § 1508.1(y).

This revision provides flexibility to agencies to use electronic means and to make environmental documents more accessible to the public, increasing public transparency.

Comment: Commenters objected to the change in § 1502.9(b) from “possible” to “practicable,” stating that it is more consistent with NEPA to require the draft EIS to meet the Act’s requirements to the fullest extent “possible.”

CEQ Response: As discussed in section II.A, the term “practicable” is the more commonly used term in regulations and consistent with notions of feasibility, which the case law has recognized as part of the “rule of reason” governing the NEPA process. The phrase “to the extent possible” is found in section 102 of NEPA, and was used in the 1978 regulations. This provision is addressed in § 1500.6 of the final rule which states that: “The phrase ‘to the fullest extent possible’ in section 102 of NEPA means that each agency of the Federal Government shall comply with that section, consistent with § 1501 [NEPA thresholds].” § 1500.6.

Comment: In relation to § 1502.9(d)(4), commenters seek clarity on what party makes the determination on significance of changes to a proposal.

CEQ Response: Lead agencies should make this decision in consultation with any cooperating agency with jurisdiction by law with respect to determinations relating to supplements.

Comment: One commenter suggested adding to § 1502.9(d)(4) the following at the beginning of the subsection: “If new information or circumstances that are not significant come to light after completion of a draft environmental impact statement, the agency should prepare a final environmental impact statement and disclose this information and the agency’s findings. If such information comes to light after completion of a final environmental impact statement, the

agency should document the finding consistent with its agency NEPA procedures (§ 1507.3), or, if necessary, in a finding of no significant impact supported by an environmental assessment.”

CEQ Response: The final rule in § 1502.9(d)(4) clarifies that agencies may find that new circumstances or information relevant to environmental concerns are not significant and therefore do not require a supplement, and document such findings consistent with their agency procedures, or if necessary in a FONSI supported by an EA. The proposed revision would not provide additional clarification.

Comment: Commenters stated that § 1502.9 (d) (1) and (4) appear to contradict each other, that requiring that a “major Federal action” remains to occur goes against case law on supplementing EISs, and this provision could mean that changes to the proposed action that are small but would have a significant impact on the environment would no longer be evaluated.

CEQ Response: The revisions to § 1502.9(d)(1) in the final rule addressing supplementation of a draft or final EIS and the revisions to § 1502.9(d)(4) clarify that there may be circumstances when there are changes to the proposed action or new circumstances or information relevant to environmental concerns that are not significant and therefore do not require a supplement. Under the revisions, supplements would be required where a major Federal action remains to occur and the agency makes substantial changes to the proposed action that are relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

Comment: Commenters stated with respect to § 1502.9 (b) that NEPA did not require analysis of “all major points of view on the analysis of impacts,” and suggesting this subsection should be revised to simply state a “major point of view” (*i.e.*, strike “all”) or otherwise discuss

why a view was not analyzed. Another commenter suggested striking any reference to major points of view.

CEQ Response: The reference to all major points of view on the environmental impacts of the alternatives including the proposed action was included in the 1978 regulations and CEQ did not propose to revise this text. CEQ has declined to make the revision as requested, but elsewhere in the regulations proposed and has finalized provisions requiring agencies to summarize all alternatives, as well as other information and analyses, submitted by public commenters. *See, e.g.,* §§ 1500.3(b)(2), 1502.17

Comment: Commenters stated that § 1502.9(d)(4) must specify a formal process as to how an agency evaluates the material and reaches its supplementation determination, and that there should be a mechanism for alerting the public to the process, obtaining public input, and notifying the public about the final determination.

CEQ Response: The revisions to § 1502.9(c) specify the process for agencies to publish a supplement to a draft or final EIS, which would be subject to public review and comment, as well as provide that agencies, where they determine that changes to the proposed action or new circumstances or information relevant to environmental concerns are not significant and do not require a supplement, shall document the finding consistent with their agency procedures, or if necessary in a FONSI.

7. Recommended Format (§ 1502.10)

Comment: Commenters supported the changes to reflect electronic preparation and distribution of documents such as the elimination of the keyword index.

CEQ Response: CEQ acknowledges the support for the proposed changes. A keyword index no longer offers a significant reference to readers with the flexibility and utility of computer-assisted searching of electronic documents.

Comment: Commenters supported the ability to use different formats for an EIS as a means of improving the integration of environmental considerations into an agency's decision-making process.

CEQ Response: Similar to the 1978 regulations, the final rule allows an agency to use an alternative format for the EIS if the agency determines it is more effective for communication, consistent with § 1502.10(b).

Comment: Commenters supported the elimination of the distribution list from EISs, which may be incomplete because they only reflect the initial distribution and do not include many who access the EISs online.

CEQ Response: CEQ acknowledges the support for the proposed change. The distribution list is no longer necessary given widely available electronic distribution of NEPA documents.

Comment: Commenters stated that with the elimination of the distribution list, agencies may neglect to notify agencies and organizations that would otherwise have been on the list and routinely receive distribution notifications. They also stated that for administrative record purposes, agencies should be required to maintain a list of agencies, organizations, and individuals that the agency notified during public scoping and on the availability of the draft and final EISs, and post the list on the agency's project webpage or otherwise make the list readily available without requiring a FOIA request. Commenters further objected to the elimination of the distribution list stating that it may be helpful to reviewers to know the other parties that may

be reviewing the document, particularly if the EIS was sent to a party or agency with specific expertise.

CEQ Response: Agencies currently use modern technologies, including electronic communications, to make an EIS available to all interested members of the public rather than sending by hard copy through the mail. The 1978 regulations requiring a list of agencies, organizations and persons to whom the agency sent copies of an EIS is not consistent with agency's current use of modern technologies and CEQ declines to make the requested changes to the final rule.

Comment: Commenters objected to the elimination of the index which may affect stakeholders who are less technologically skilled and requested that CEQ require agencies to include in electronic EISs brief instructions on how to search electronic documents. Commenters stated the change is inconsistent with NEPA's public participation purposes, and that for those that need paper copies, finding key information within the EIS or its appendices becomes very difficult without an index.

CEQ Response: Agencies and the public continue to move away from hard copy and to transition towards greater acceptance of electronic documentation. For example, on October 21, 1998, the Government Paperwork Elimination Act was signed into law allowing individuals the option to submit information or transact with agencies electronically, when practicable, and to maintain records electronically, when practicable. Since that time, agencies have transitioned to electronic or "paperless" government.⁵⁸

⁵⁸ See Memorandum for Heads of Executive Departments and Agencies, Transition to Electronic Records (2019), <https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-21.pdf>.

Elimination in the final rule of the requirement for an EIS index improves agency efficiencies in preparation of documents. CEQ notes that even when substantial resources are dedicated, indexes may not be fully exhaustive of every keyword a stakeholder may wish to search. Should a member of the public require additional assistance with searching a hardcopy document, § 1502.11(c) continues to require agencies to provide the public with the name and telephone number of a knowledgeable individual at the agency who may be available to assist the stakeholders and provide further information.

Comment: Commenters requested that CEQ direct agencies to use visual and interactive materials in place of text and clearly articulate that CEQ finds it acceptable to replace textual descriptions with visual aids and interactive materials. Additionally commenters requested CEQ encourage the use of hyperlinks in text and the use of supplementary materials such as audio or video recordings of decision makers or expert staff. Finally commenters requested limits on plain language writing (*i.e.*, at a 10th grade reading level). A commenter requested CEQ direct agencies in § 1502.8 to include maps using State cadastral survey to convey information visually.

CEQ Response: While visual aids or interactive measures may be useful to communicate information to the public or decision makers where appropriate, the Act and the regulations require that agencies prepare a detailed statement on the environmental impact of a proposed major Federal action. The final rule does not prohibit the use of visual representations such as charts, graphs, pictures, maps, or other audio or video aids. When appropriate, hyperlinks to supplementary materials may assist the reader of electronic documents quickly locate other electronic materials and primary documents. The final rule provides agencies with discretion to determine the appropriate timing and use of such visual aids. CEQ encourages agencies to use

plain language such that the public and decision makers can reasonably understand the environmental effects of a proposal and its alternatives.

Comment: Commenters requested that CEQ develop an exemption process in which agencies can deviate from the format described in § 1502.10 including consideration of where visual and interactive materials offer a better approach to conveying information.

CEQ Response: Section 1502.10 expressly allows agencies to use an alternate format, providing that “[a]gencies should use the following standard format for environmental impact statements unless the agency determines that there is a more effective format for communication.”

Comment: Commenters requested that CEQ provide additional regulatory text or guidance for what is necessary to meet the requirements under §§ 1502.10(a)(1)–(9) relating to the format of the EIS.

CEQ Response: CEQ has made only minimal revisions to §§ 1502.10(a)(1)–(9), and is not aware of any limitations that would prevent compliance with this section. Should agencies have further questions or difficulty complying with these long-standing provisions, agencies can consult with CEQ.

Comment: Commenters requested that CEQ simplify the requirements for the EIS format. Commenters stated that the recommended format in § 1502.10 has more requirements than the statute, which does not have requirements such as a cover; summary; table of contents; purpose and need; affected environment; submitted alternatives, information, and analyses; and list of preparers. All of these sections should be optional (suggestive) rather than required.

CEQ Response: The long-standing format of an EIS is well established and use of a standard format promotes consistency across Federal agencies. In the final rule, however, CEQ has provided that an agency may utilize an alternate format in accordance with § 1502.10.

Comment: Commenters requested that § 1502.10 be revised to explicitly recognize the option of preparing “issue based” NEPA documents as a way of streamlining the documentation. An issue-based NEPA analysis would concentrate on issues that are most germane to the decision maker—namely those that are central to the proposed decision or are of material interest to the public, rather than automatically addressing the list of standard resources as is done in the vast majority of EISs.

CEQ Response: The final rule includes several ways for agencies to reduce duplication of effort in preparing environmental documents. Agencies may adopt documents where the proposed action is substantially similar (§ 1506.3), incorporate by reference (§ 1501.12), combine documents (§ 1506.4), and substitute other documents that satisfy their obligations under the final rule (§ 1507.3(c)(5)).

8. Cover (§ 1502.11)

Comment: Commenters stated that § 1502.11 requires more information than can be reasonably placed on an EIS cover and suggested keeping this information on one page will be too difficult, especially if a larger font size is required to meet Americans with Disabilities Act requirements. Commenters further recommended that the cover page be renamed as a “Title” page or otherwise split into a “cover” page and a “title” page dispersing the information required under § 1502.11 between the two pages.

CEQ Response: CEQ has made minimal changes to § 1502.11 and is unaware of any impediments to compliance. If an agency is unable to present the information required on the cover, it may use an alternate format in accordance with § 1502.10.

Comment: Commenters supported the requirement to provide total costs of preparing the NEPA document, stating that it would provide transparency on the costs incurred by the agency.

CEQ Response: CEQ acknowledges the support for this revision. The addition to include cost estimates on the cover of an EIS provides transparency to the public on the costs of EIS-level NEPA reviews.

Comment: Commenters suggested the following revision after the first sentence: “The estimated total cost of preparing the environmental impact statement, including the costs of agency full-time equivalent (FTE) personnel hours, contractor costs, and other direct costs. The agency may include in an appendix any explanation to give perspective to those costs. Such explanation shall be provided for work that has to be redone due to the failure to consider all reasonably foreseeable environmental effects/impacts, failure to consider all reasonable alternatives, or both. If, pursuant to § 1506.13, an agency decides to apply the regulations on or after the effective date of the final rule to ongoing activities and environmental documents begun before the effective date of the final rule, the agency shall set forth the costs incurred prior to the effective date of the final rule, new costs incurred as a result of changing processes because of changes to the regulations in parts 1500 through 1508, and the remainder of the costs in completing the NEPA process.”

CEQ Response: The final rule in § 1502.11(g) requires, as CEQ had proposed, that agencies provide the estimated total cost of preparing both the draft and final EIS, including the costs of agency full-time equivalent (FTE) personnel hours, contractor costs, and other direct

costs. The final rule also clarifies that if practicable, and noted where not practicable, agencies should also include costs incurred by cooperating and participating agencies, applicants, and contractors. Where appropriate, an agency may provide context or breakdowns of the costs incurred for a specific review.

Comment: Commenters requested clarity on which costs should be included as part of the agency's estimate. Specifically, commenters asked if an agency's cost estimate includes those activities performed through release of the draft EIS, the interim period from the draft EIS to final EIS, the total cost through completion of the ROD, the total cost incurred through completion of the final EIS, or some other metric. Commenters also asked whether survey coverage, preliminary engineering, right-of-way, utility, and final design, be included in this estimate as well, particularly in cases where the agency is sponsoring the proposed action. Other commenters stated that costs listed on the cover should be broken down by cooperating agency participating in the review of the EIS rather than one lump sum.

CEQ Response: In the final rule CEQ has clarified that the estimated costs should include the costs of both the draft and final EIS and include costs of agency full-time equivalent (FTE) personnel hours, contractor costs, and other direct costs. The final rule also adds a sentence to clarify that agencies should include the costs of cooperating and participating agencies if practicable. If not practicable, agencies must so indicate. For integrated documents where an agency is preparing a document pursuant to multiple environmental statutory requirements, it may indicate that the estimate reflects costs associated with NEPA compliance as well as compliance with other environmental review and authorization requirements. Agencies can develop methodologies for preparing these cost estimates in their implementing

procedures. Finally, if the agency is sponsoring the action, it should report all costs incurred to comply with the NEPA process including costs to complete necessary environmental surveys.

Comment: Commenters stated that in the total cost estimate, agencies should include costs borne by the applicant to prepare application materials.

CEQ Response: The final rule clarifies that if practicable, and noted where not practicable, agencies should also include costs incurred by cooperating and participating agencies, applicants, and contractors.

Comment: Commenters expressed concerns regarding the requirement to include a cost estimate, stating that it is unreasonably time consuming and has no bearing on NEPA's "informed decision-making" purpose. Furthermore, commenters stated the requirement is contrary to CEQ's stated goals to simplify and accelerate the NEPA review process, and falls outside of the intent of the Act.

CEQ Response: Preparing a cost estimate is responsive to concerns raised by the U.S. Government Accountability Office (National Environmental Policy Act: Little Information Exists on NEPA Analyses; GAO-14-370: Published: April 15, 2014) that agencies are not tracking and generally unaware of the costs associated with development of NEPA analyses. Additionally, OMB has directed Federal agencies to calculate the cost of environmental reviews and authorizations for major infrastructure projects pursuant to E.O. 13807.⁵⁹ As discussed in section II.D.11, agencies can develop methodologies for preparing their cost estimates in their agency procedures. Cost estimates will help better inform the public, as well as the Congress

⁵⁹ M-18-25, Modernize Infrastructure Permitting Cross-Agency Priority Goal Performance Accountability System (Sept. 26, 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/09/M-18-25.pdf>.

and the Executive branch, about the taxpayer resources being utilized in the development of NEPA documents.

Comment: Commenters suggested revisions to §1502.10 to briefly provide direction for preparing the Table of Contents.

CEQ Response: The provision regarding table of contents remains unchanged from the 1978 regulations. CEQ is unaware of any challenges in preparing adequate tables of contents and accordingly declines to provide more detail regarding tables of contents.

Comment: Commenters recommend consistently titling the proposed outline in Section 1502.10(a)(7): “Submitted, alternatives, information, and analyses.” With the corresponding description section in Section 1502.17: “Summary of Submitted, Alternatives, Information, and Analyses.”

CEQ Response: In the final rule, CEQ has corrected the title to eliminate the comma after “Submitted.”

Comment: Commenters stated that EIS costs are not likely to be representative and to be misleading, particularly for large infrastructure projects where applicants may change the project design necessitating re-evaluation, and optically inflating agency costs.

CEQ Response: The final rule clarifies that if practicable, and noted where not practicable, agencies should include costs incurred by cooperating and participating agencies, applicants, and contractors. To ensure estimates are representative of the costs, agencies can develop methodologies for preparing cost estimates in their agency procedures. If project design changes and additional NEPA analysis is required, that is a cost of interest to CEQ and the public.

Comment: Commenters stated that agencies should incorporate or otherwise estimate any mitigation costs or environmental compliance and inspection costs that would be borne by the agency into the cost estimate required on the cover.

Comment: Commenters state that agencies should incorporate or otherwise estimate any mitigation costs or environmental compliance and inspection costs that would be borne by the agency into the cost estimate required on the cover.

CEQ Response: CEQ declines the requested revisions because the purpose of 1502.11(g) is to ensure that the document reflects the costs of complying with NEPA's procedural requirements, and not the costs associated with agency's compliance with other legal requirements.

9. Summary (§ 1502.12)

Comment: Commenters objected to the proposed replacement of “areas of controversy (including issues raised by agencies and the public),” with “areas of disputed issues raised by agencies and the public)” in § 1502.12. Commenters stated that the revision would not make the text more concise, and CEQ did not explain what “areas of disputed issues” may be.

CEQ Response: CEQ has replaced the word “controversy” in § 1502.12 consistent with other sections to improve readability and provide greater clarity for Federal agencies, States, Tribes, localities, and the public and eliminate misconceptions related to proposed actions that may be “controversial” and generate numerous views of support or opposition. Areas of disputed issues are those related to scientific analysis of the environmental effects of a proposed action and alternatives.

Comment: Commenters stated that the summary section of the EIS should clearly identify both the agency's preferred alternative and the environmentally preferable alternative(s) in the draft EIS.

CEQ Response: Section 1502.12 requires that EISs shall contain a summary of the major conclusions, which would include the preferred alternative and the environmentally preferable alternative(s), if known, and any issues to be resolved, including the preferred alternative and the environmentally preferable alternative(s), if unknown (including the choice among all reasonable alternatives). Therefore, CEQ does not need to make any revisions to this section in the final rule.

10. Purpose and Need (§ 1502.13)

Comment: Commenters expressed support for CEQ's proposed addition to § 1502.13 clarifying that agencies must base purpose and need statements on the applicant's goals and the agency's statutory authority. They stated that the revision will result in more consistent and predictable reviews.

CEQ Response: For an applicant-proposed project, it is important for the purpose and need statement to be based on the applicant's goals and the agency's statutory authorities for consideration of that application. If it were not for the proposed project and agency authority to consider the proposal, there would be no permit application and no need for NEPA review in the first place. This interpretation is consistent with case law holding that "[a]gencies may not define a project's objectives so narrowly as to exclude all alternatives" but "[w]here a private party's proposal triggers a project, the agency may 'give substantial weight to the goals and objectives of that private actor.'" *Biodiversity Conservation Alliance v. Bureau of Land Mgmt.*, 608 F.3d 709, 715 (10th Cir. 2010); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190,

196 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991) (“When an agency is asked to sanction a specific plan, see 40 CFR 1508.18(b)(4), the agency should take into account the needs and goals of the parties involved in the application Perhaps more importantly, an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency’s statutory authorization to act, as well as in other congressional directives”). Accordingly, where the agency action is in response to an application for permit or other authorization, 40 CFR 1508.1(q)(3)(iv), the agency should consider the applicant’s goals based on the agency’s statutory authorization to act, as well as in other congressional directives, in defining the proposed action’s purpose and need.

Comment: Commenters supported revisions that limit consideration to alternatives that are within the control and jurisdiction of the lead agency and can be implemented by the applicant. Commenters noted that the no action alternative may serve as an environmental baseline but in some circumstances may not be a legal option or a selectable alternative.

CEQ Response: CEQ acknowledges the support for the proposed revisions.

Comment: Commenters requested that CEQ clarify that an EIS should have a single, integrated purpose and need statement.

CEQ Response: An EIS should have a single, integrated purpose and need statement. The purpose and need statement should briefly set forth the underlying goals and or objectives of a proposal. Where a proposal has more than one objective it should be stated as such, including whether multiple aspects are critical objectives to the proposal, or merely secondary, such that the agency can appropriately evaluate alternatives that meet each of the stated objectives.

When more than one agency is involved and has a NEPA component, the lead agency should coordinate with its cooperating agencies to ensure that the purpose and need statement

may accommodate the requirements of each subject agency, such that the EIS may have a single discussion of purpose and need.

Comment: Commenters note that “purpose and need” have long been described in NEPA documents as either a single concept or separate concepts and ask that CEQ clarify this ambiguity. Most references to purpose and need in the proposed rulemaking treat it as a single concept, *i.e.*, “the purpose and need.” It is unclear whether this is the intent in the proposed rulemaking. Commenters recommend that CEQ replace “purpose and need” with “need” or otherwise, CEQ should explain the differences between the “purpose” and the “need” for a proposed action.

CEQ Response: For the purposes of describing the underlying project objectives in an EIS, purpose and need are generally considered as a single concept. Purpose and need are often described as the means for accomplishing the objectives for the proposal. However, because of the broad range of Federal actions and applicable authorities, purpose and need may be described differently depending on individual agency authority and the type of proposal. Often times, equating “need” is misconstrued with ensuring that a proposal is in the “public interest.” While some agencies may be required to make public interest assessments, NEPA requires no such determination. For the aforementioned reasons, CEQ declines to replace “purpose and need” with “need.”

Comment: Commenters recommended that CEQ include a statement that agencies should presume an applicant’s stated purpose and need is genuine and legitimate, absent information to the contrary.

CEQ Response: It is unnecessary to include a statement of presumption that an applicant’s stated goals are legitimate. The requirements of § 1502.13 clearly state that the

purpose and need statement shall be based upon an applicant's stated goals, when applicable. CEQ expects that agencies will need to coordinate closely with applicants to gain a clear understanding of the underlying objectives of a proposal to develop an appropriate purpose and need statement. As with any application materials submitted to an agency, they may be subject to reasonable and appropriate verification and review, and as such, statements of project objects may be similarly subject to reasonable scrutiny.

Comment: Commenters requested that CEQ revise proposed § 1502.13 to state that “the agency shall base the purpose and need on the goals of the applicant and the agency's authority, but not define the purpose and need so narrowly as to define only the applicant's proposal to the preclusion of reasonable alternatives.”

CEQ Response: CEQ declines to make the requested changes in the final rule. As CEQ has explained elsewhere, agencies must not narrow purpose and need statements to foreclose consideration of alternatives to the proposed action. CEQ finds it unnecessary to clarify that it is not appropriate to narrow a statement impermissibly, or to write statements so broad that a universe of potential alternatives may not satisfy the action's objectives.

Comment: Commenters stated that, when defining purpose and need, the proposed action should be the agency's action and not that of the applicant or project sponsor (which in cases of a private application commenters stated is simply financial gain) and therefore inappropriate to require basing purpose and need on applicant goals. Some commenters suggested the following text replace the last sentence of § 1502.13: “When an agency's statutory duty is to review an application for authorization, the purpose and need for action is to respond to an applicant's proposal. The applicant's need for the project should be disclosed in the environmental impact

statement along with a reasonable range of alternatives to meet the agency’s purpose, need and objectives.”

CEQ Response: The purpose and need refers to the purpose and need of the proposed action and not the act of the agency responding to the proposed action. Because the purpose and need statement is used to evaluate alternatives, it must also be based on the proposal itself; basing the analysis of alternatives solely on the agency’s statutory authorities may not produce an informed assessment of reasonable alternatives. Section 1502.13 recognizes that NEPA does not only apply to applicants requesting permission to take some action and in other situations the agency fully defines the purpose and need of the underlying action.

For the purposes of simplicity and better organization, CEQ has removed the references to “alternatives,” from § 1502.13 and consolidated the discussion of alternatives fully within § 1502.14. Therefore, further discussion of alternatives are not included in § 1502.13.

Comment: Commenters suggested the following text be incorporated into § 1502.13: “The statement shall briefly specify the underlying purpose and need for the proposed action. When the agency’s statutory or regulatory duty is to review an application for authorization, the agency shall base the purpose and need on the goals of the applicant and the agency’s authority statement shall:

(a) Specify that the underlying need to which the agency is responding is the need to make a decision, in response to the application, of whether or under what conditions to grant the authorization; and

(b) Describe the specific purpose(s) or goal(s) that the applicant would achieve if the authorization is granted and other objectives that the proposed action is intended to achieve.”

CEQ Response: As revised, the final rule requires agencies to base purpose and need, where applicants are involved, upon applicant goals and the authorizing agency's authorities. As explained elsewhere, the purpose and need refers to the underlying goals that would be achieved pursuant to the proposed action, as opposed to the act of an agency reviewing a proposed action.

Comment: Commenters requested improved guidance on the key elements to include in a purpose and need statement.

CEQ Response: CEQ acknowledges the comment. CEQ will consider the need for additional guidance at a later date.

Comment: Commenters objected to basing the purpose and need statement upon the goals of the applicant, stating that it violates NEPA, exceeds CEQ's authority, and preordains project approval. Commenters stated that the purpose of the Act is not to benefit private developers but rather the public interest and that it is inconsistent with NEPA's intent to require decision makers across the government to "attain the widest range of beneficial uses of the environment without degradation."

CEQ Response: The revisions to § 1502.13 are not contrary to the Act nor would they preordain approval of a proposed action. The final rule requires agencies to evaluate reasonable alternatives, including the no-action alternative, and agency decision makers are responsible for making a decision to authorize an action as proposed, deny it, or select a reasonable alternative. When an applicant proposal is involved, basing the purpose and need statement upon the goals of the applicant merely ensures that an agency considers the underlying objectives of a proposal to which they are responding. Finally, relevant case law supports consideration of applicant objectives, "In deciding on the purposes and needs for a project, it is entirely appropriate for an

agency to consider the applicant's needs and goals." *Webster v. United States Dep't of Agriculture*, 685 F.3d 411, 423 (4th Cir. 2012).

Comment: Commenters stated that the proposed changes to "purpose and need" would limit the alternatives analysis in future NEPA documents, and allow private project sponsors the ability to strategically define the purpose and need very narrowly, thereby limiting the number of reasonable alternatives that exist. Commenters also stated that the narrowing of purpose and need skew the environmental review to focus on how likely and at what cost a project sponsor can complete the project, while ignoring environmental impacts. Commenters expressed specific concerns with respect to the proposed changes preventing Federal land managing agencies from taking a "hard look" at the myriad impacts of proposals for development on public lands.

CEQ Response: As CEQ has explained elsewhere, and consistent with case law, agencies must not narrow purpose and need statements to foreclose the consideration of reasonable alternatives to the proposed action. However, failure to fully consider the goals of the project sponsor may produce alternatives that are not implementable and thus unreasonable. Agencies are ultimately responsible for ensuring that the purpose and need statement is appropriately defined.

Comment: Commenters stated that CEQ's proposed change to require agencies' to consider the purpose and need exclusively "based on" the project sponsor's stated goals and objective is prohibited by existing case law citing *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664 (7th Cir. 1997) ("An agency cannot restrict its analysis to those alternative means by which a particular applicant can reach his goals."). *See also Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058 (9th Cir. 2010).

CEQ Response: The final rule does not base the purpose and need exclusively on an applicant's objectives but rather the "needs and goals of the applicant and the agency's authority." Further, the final rule does not allow agencies to narrow the purpose and need statements to the point that they foreclose consideration of reasonable alternatives to the proposed action. For this reason, the final rule is not in conflict with the court's holding in *Simmons v. U.S. Army Corps of Eng'rs*.

Comment: Commenters argued that the statement of purpose and need is inextricably linked to alternatives and therefore the language should not have been stricken from § 1502.13. In support, commenters argued that case law supports their position, citing *Webster v. US. Dep't of Agric.*, 685 F.3d 411, 422 (4th Cir. 2012), and stating that "Only alternatives that accomplish the purpose of the proposed action are considered reasonable, and only reasonable alternatives require detailed study. So how the agency defines the purpose of the proposed action sets the contours for its exploration of available alternatives."

CEQ Response: Purpose and need is closely linked to the development of reasonable alternatives. The purpose and need statement is an essential component that, under the final rule, continues to set the framework upon which the agency evaluates alternatives. However, the agency must first define the purpose and need before developing and considering alternatives. The final rule addresses alternatives in § 1502.14.

Comment: Commenters stated that CEQ's reliance on its previous Connaughton Letter⁶⁰ is insufficient to justify the revision to the purpose and need statement. The specific quotation

⁶⁰ Letter from the Hon. James L. Connaughton, Chairman, Council on Environmental Quality, to the Hon. Norman Y. Mineta, Secretary, Department of Transportation (May 12, 2003) ("Connaughton Letter"), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-DOT_PurposeNeed_May-2013.pdf.

from that letter is that, “Thoughtful resolution of the purpose and need statement at the beginning of the process will contribute to a rational environmental review process and save considerable delay and frustration later in the decision[-]making process.” Commenters argued that the entire letter is in the context of transportation projects where local and State governments have specific statutory roles in the planning process and that it does not address purpose and need in the context of an applicant from the private sector. Commenters further noted that the Connaughton Letter cautions that agencies must not “put forward a purpose and need statement that is so narrow as to ‘define competing “reasonable alternatives” out of consideration (and even out of existence),”

CEQ Response: CEQ has not based the changes to § 1502.13 on the Connaughton Letter but rather referenced it in the NPRM to illustrate the need for brevity with respect to purpose and need statements, and the coordination required between lead and cooperating agencies in developing them.

Comment: Commenters stated that the purpose and need for a project (for example airport projects) cannot be articulated in a meaningful way to the public in just one or two paragraphs, noting that purpose and need is the root of much NEPA litigation as it drives the alternatives analysis.

CEQ Response: For purposes of informing the decision maker and stakeholders, that purpose and need can be sufficiently described in one to two paragraphs. This provision, unchanged as part of the 1978 regulations remains in the final rule, “The statement shall briefly specify the underlying purpose and need...” Should an agency require, subject to its own regulations, additional information to determine need, such as traffic studies, it may conduct them, and summarize the relevant information in the purpose and need statement in the EIS.

Exhaustive discussions of the merits of a proposal are not necessary and overly complex statements of purpose and need do not contribute to better development of reasonable alternatives.

Comment: Commenters stated that with the revisions to § 1502.13 in conjunction with § 1506.5(c) applicants will be able to draft the statement of purpose and need. Thus, a potential alternative will only be deemed reasonable if the applicant approves of it.

CEQ Response: The lead agency continues to be responsible for developing and drafting the purpose and need statement in conjunction with any cooperating agencies. In situations where an entity is seeking an authorization from an agency, the lead agency shall give weight to an applicant's stated goals and objective in developing the purpose and need statement for the EIS. Agencies should not develop purpose and need statements that are inconsistent with an applicant's objectives. In cases where an applicant is preparing a draft environmental document, the agency should ensure that it provides guidance and technical support so that an appropriate purpose and need statement may be used by the agency. § 1506.5. The final rule provides no regulatory authority to applicants to approve of or disapprove of an agency's purpose and need statement.

Comment: Commenters stated that in cases where project proponents are applying for permits, the underlying purpose and need for the project itself ("a metal mine, a transmission line, a port expansion") are sometimes not able to be based on the permitting agency's authority.

CEQ Response: The goals of a specific project may not necessarily align with the "mission statement" of a particular regulatory or permitting agency, however, activities associated with the proposal can still fall within the agency's regulatory authority. The purpose and need statement should be based on the goals and objectives of the project sponsor, while also

being consistent with the jurisdiction of the authorizing agency. If a project sponsor seeks a permit or authorization from an agency, the project should be consistent with the regulatory authority provided by the permit or authorization.

Comment: Commenters stated that CEQ's revisions to purpose and need redirect the attention of reviewing agencies from the particular issue the project is trying to solve, to the analysis of solely technical alternatives to the project and focus on the proposed action specifically.

CEQ Response: The commenters' interpretation of the impact of the regulations is incorrect. Agencies are still required to assess alternatives to the proposed action. The purpose and need statement must still address the underlying objective of a proposal, *i.e.*, the goals that would be accomplished. The changes do not redirect agency resources to only the proposed action.

Comment: Commenters stated that by listing the goals articulated by an applicant prior to that of the agency's authority, CEQ is attempting to subjugate an agency's authority to the outcome sought by an applicant. Accordingly, commenters stated the change should be revoked.

CEQ Response: The order in which the phrases appear within § 1502.13 bear no consequence on the priority of each element. Moreover, § 1502.13 clearly recognizes that the purpose and need statement must be consistent with the agency's authority.

Comment: Commenters stated that CEQ should reorder the title of § 1502.13 to state "Need and Purpose" to emphasize commenters stated position that Federal agencies should prioritize evaluation of need over project purpose.

CEQ Response: Reordering "purpose" and "need" in the title is not necessary and would not change how the section is implemented.

Comment: Commenters requested that CEQ revise the regulatory text as follows: “The statement shall briefly specify the underlying societal need for the proposed action, and state each potential alternative’s purpose in meeting that underlying need. When the agency’s statutory duty is to review an application for authorization, the statement shall briefly specify the underlying societal need addressed by the agency’s review authority for the proposed action, and state each potential alternative’s purpose in meeting that underlying need along with consideration of the applicant’s goals for the action.”

CEQ Response: The commenters misunderstand the meaning of “need,” which is the need of the proposed action and not society’s needs for the proposed action. CEQ declines to make the requested revision.

Comment: Commenters stated that a new subsection needs to be added to the purpose and need section stating that many people affected by the action are unaware of NEPA and have little or no experience with EISs. Commenters stated that the new section should define (i) NEPA’s purpose; (ii) the national environmental goals established in section 101 of NEPA; and (iii) the purpose and use of an EIS.

CEQ Response: The purpose and need section is prepared as part of the procedural requirements pursuant to section 102(2) of NEPA. While agencies need not restate statutory provisions in their regulations, the policy and purpose of the Act are addressed in § 1500.1 of the final rule.

11. Alternatives Including the Proposed Action (§ 1502.14)

Comment: Commenters supported CEQ’s proposed modifications to § 1502.14 removing the word “all” before “reasonable alternatives” to reflect NEPA’s “rule of reason” that agencies

analyze an appropriate range of alternatives, not every alternative imaginable nor alternatives that were previously considered and rejected.

CEQ Response: CEQ acknowledges the support for the proposed revisions and makes these changes in the final rule.

Comment: Commenters objected to the removal of the word “all” from the evaluations of reasonable alternatives to the proposed action. Commenters stated that CEQ has not justified the change and CEQ has not cited instances where an agency or project was subject to an unreasonable number of alternatives. Other commenters raised concerns that it would lead to poor decision making.

CEQ Response: As discussed in section II.D.14 of the final rule, it is CEQ’s view that NEPA’s policy goals are satisfied when an agency analyzes reasonable alternatives, and that an EIS need not include every available alternative where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum. The reasonableness of the analysis of alternatives in a final EIS is resolved not by any particular number of alternatives considered, but by the nature of the underlying agency action. The discussion of environmental effects of alternatives need not be exhaustive, but must provide information sufficient to inform agency evaluation of available reasonable alternatives, 40 CFR 1502.14(a), including significant alternatives that are called to its attention by other agencies, organizations, communities, or a member of the public.

As discussed in section II.C.9 of the final rule, to aid agencies in identification of alternatives, § 1501.9, “Scoping,” requires agencies to request identification of potential alternatives in the NOI. Analysis of alternatives also may serve purposes other than NEPA compliance, such as evaluation of the least environmentally damaging practicable alternative for

the discharge of dredged or fill material under section 404(b)(1) of the Clean Water Act, 33 U.S.C. 1344(b)(1).

Comment: Commenters objected to removal of the phrase “rigorously explore and objectively evaluate” from § 1502.14(a) claiming that it would downgrade the importance of the alternatives analysis. Commenters cited CEQ’s direction to agencies to rigorously explore and objectively evaluate alternatives since at least April 1970.

CEQ Response: All analysis under NEPA, including analysis of alternatives, is subject to a rule of reason. To avoid confusion, CEQ eliminates this language from the final rule. Sections 1502.21 and § 1502.23 address the obligations for agencies where information is incomplete or unavailable, and methodology and scientific accuracy.

Comment: Commenters stated that CEQ should not eliminate § 1502.14(c) of the 1978 rules, which required agencies to “include reasonable alternatives not within the jurisdiction of the lead agency.” Commenters stated that jurisdictional limits on the alternatives considered in environmental reviews would violate Congress’ intent in enacting NEPA to change agency culture and to make the Federal decision-making process more democratic. Further, commenters argued that the change is inconsistent with case law stating that agencies cannot dismiss evaluation of alternatives outside their jurisdiction. *See Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

CEQ Response: As discussed in section II.D.14 of the final rule, in response to CEQ’s ANPRM, some commenters urged that the regulations should not require agencies to account for impacts over which the agency has no control, including those resulting from alternatives outside its jurisdiction. CEQ proposed and in the final rule is striking 40 CFR 1502.14(c) requiring consideration of reasonable alternatives not within the jurisdiction of the lead agency for all EISs

because it is not efficient or reasonable to require agencies to develop detailed analyses relating to alternatives outside the jurisdiction of the lead agency. Nor is it efficient to require agencies to consider alternatives outside their jurisdiction regardless of whether those alternatives also meet the purpose and need of the proponent. Agencies should evaluate alternatives that reasonably serve the identified purpose and need, as well as the alternative of no action, for their effect on the environment. This goal is not met by evaluating alternatives outside of an agency's authority, because the agency has no means by which to address the impacts of those alternatives. This is particularly clear for proposals that are narrow, small in scope, or defined to meet a discrete objective. Furthermore, alternatives should be limited to those available to the decision maker at the time the decision is made.

The approach CEQ adopts in the final rule is consistent with the Supreme Court's recognition in such cases as *Public Citizen*, 541 U.S. at 770, that agencies have no duty under NEPA to evaluate tasks that they have no choice but to perform. By similar analysis, an agency has no duty to evaluate an alternative that could only be feasible at the instance of an independent third entity. The approach CEQ adopts is also consistent with the Supreme Court's observation in *Metropolitan Edison Co.* that "[t]he scope of [an] agency's inquiries must remain manageable if NEPA's goal of '[insuring] a fully informed and well-considered decision' . . . is to be accomplished." 460 U.S. 766, 776 (1983) (quoting *Vt. Yankee*, 435 U.S. at 558).

NRDC v. Morton predated *Public Citizen* by more than three decades and predated *Metropolitan Edison* by over a decade. In addition, the *NRDC v. Morton* court itself recognized that "the requirement in NEPA of discussion as to reasonable alternatives does not require 'crystal ball' inquiry." 458 F.2d at 837. *See id.* at 841 (MacKinnon, J., concurring in part and dissenting in part) ("I see no evidence in the statute that Congress intended to require a

discussion of remote or speculative alternatives, or alternatives that were not presently available.”).

Comment: Commenters stated that under the proposed rule, the range and scope of alternatives would be controlled by the applicant, based on the applicant’s own purpose, need, and goals, and determined by what is technically and economically feasible. Commenters stated that Federal agencies should not delegate their statutory responsibilities to private entities with interest in projects.

CEQ Response: Under the final rule, the scope and content of an EIS (including the determinations of the reasonable range of alternatives) remains solely the responsibility of the Federal agency or agencies preparing it. CEQ recognizes that the changes finalized in the final rule will reduce the resources invested in analyzing alternatives that do not meet the goals of the project applicant and are technically or economically infeasible. These changes, however, do not constitute a delegation of statutory responsibilities to private entities. Rather, the changes ensure a more efficient, productive, and timely NEPA process that focuses on analyzing alternatives that are capable of being implemented.

Comment: Commenters stated that while every alternative need not be considered, it is not administratively burdensome to consider “all reasonable” alternatives. Commenters recommended CEQ not make this change in the final rule and clarify that if an alternative is not feasible, it is unreasonable.

CEQ Response: Agencies should devote their resources to analyzing the reasonableness of alternatives based on each alternative’s technical and economic feasibility, the range of alternatives in terms of project design and environmental effects, and the total number of alternatives. When numerous reasonable alternatives may be proposed, the agency should screen

the alternatives and evaluate the most appropriate alternatives for consideration in detail. As noted above, agencies may also use bounding alternatives that allow for the consideration of a spectrum of intermediate outcomes as an inherent outgrowth of that approach. For those excluded from detailed analysis, the agency should describe its reasons for their elimination.

CEQ declines to make the commenter's recommended change because it is unnecessary and redundant. With the revisions to the definition of "reasonable alternatives" at § 1508.1(z), any alternative that is technologically or economically infeasible is not practical to evaluate and therefore need not be considered by the agency. Permitting agencies the discretion to determine the most appropriate alternatives for consideration in detail recognizes that infinite analysis is neither available nor a prudent use of agency resources.

Comment: Commenters stated that GAO-06-15⁶¹ encourages Federal agencies to collaborate to achieve important national outcomes, such as environmental restoration, and that acting collaboratively may open up reasonable alternatives so that the purpose and policy of NEPA can be better satisfied. Commenters asserted that such an approach is also consistent with section 102(2)(A) of NEPA ("all agencies of the Federal Government shall — utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment"). Commenters recommended revising § 1502.14 to state that nothing in the section would preclude an agency from proposing alternatives outside the lead agency's jurisdiction with the agency who has such jurisdiction to see if collaboration with the other agency presents a reasonable alternative.

⁶¹ U.S. Gov't Accountability Office, GAO-06-15, Results-Oriented Government: Practices That Can Help Enhance and Sustain Collaboration among Federal Agencies (Oct. 21, 2005), <https://www.gao.gov/products/GAO-06-15>.

CEQ Response: CEQ declines to make the proposed revision because it is unnecessary and duplicative, and the commenters' recommendations are substantively addressed under §§ 1503.1 and 1503.2, as well as under §§ 1501.8 and 1501.9. The final rule encourages interagency collaboration and coordination at the earliest stages of a proposed action. The most meaningful engagement is typically early in the process where beneficial changes to a proposal can be more easily incorporated. Under the final rule, any agency or stakeholder may propose an alternative for the consideration of the lead agency. However, the lead agency is only required to devote detailed analysis to those alternatives within its jurisdiction. Nothing in the final rule prohibits a sponsor from revising their proposal to satisfy the jurisdictional authority of another agency. Elsewhere in this Final Rule Response to Comments document, CEQ provides further response on the issue of alternatives outside of agency jurisdiction, which is incorporated here by reference.

Comment: Commenters stated that the regulations already enable Federal agencies to limit detailed analyses to alternatives within the jurisdiction of the lead agency and dismiss those alternatives from detailed analysis that are outside the lead agency's jurisdiction.

CEQ Response: In the 1978 regulations, 40 CFR 1502.14(c) explicitly requires that agencies include reasonable alternatives not within the jurisdiction of the lead agency. CEQ eliminates this paragraph in the final rule.

Comment: While some commenters did not oppose CEQ's changes in § 1502.14, they expressed concern that limiting the number of alternatives that agencies analyze would limit the opportunities to mitigate impacts to communities, Tribal entities, and natural and cultural resources.

CEQ Response: Under the final rule, agencies must consider mitigation associated with the proposed action and the reasonable range of alternatives selected for analysis.

Comment: A commenter recommended that CEQ add a paragraph (f) to § 1502.14 requiring a summary of the opposing scientific evidence or views.

CEQ Response: CEQ declines to make the proposed addition because discussion of opposing scientific evidence or views are addressed in other sections of the final regulations, including § 1502.9, “Draft, final and supplemental statements” and § 1502.23, “Incomplete and unavailable information.”

Comment: A commenter requested that, for projects sponsored by a Tribe on its own reservation, CEQ limit the scope of “reasonable alternatives” to only those alternatives that are supported by the affected Tribe.

CEQ Response: In the final rule, a reasonable alternative is defined as one that is technically and economically feasible, meets the purpose and need for the proposed action, and, where applicable, meets the goals of the applicant. This definition is sufficient to address the commenter’s concern.

Comment: Commenters objected to setting a maximum number of alternatives. Some commenters stated it would be shortsighted and could arbitrarily limit the analysis of environmental impacts. Other commenters stated that CEQ should allow agencies the flexibility to include the appropriate number of alternatives in the analysis. Other commenters noted that, for projects with few or no logical alternatives, a maximum limit could have the unintended consequence of agencies analyzing more alternatives than necessary such that the “maximum” becomes the new “norm.” As an example, commenters pointed to proposals with few or no impacts, and stated that in such cases, agencies may still feel compelled to analyze “strawman”

alternatives to “prove” that the proposed action is superior, even when no objections or issues are raised. Commenters recommended that CEQ state that agencies evaluate the number of alternatives sufficient to analyze of significant environmental impacts. Additionally, commenters suggested that limiting the number of alternatives would be inconsistent with case law or would undermine judicial review of agency decision making.

CEQ Response: In response to comments, the final rule does not set a maximum number of alternatives. However, it is important that agencies take a reasonable approach to evaluating both the total number of proposed alternatives they will analyze and the technical and economic feasibility of those alternatives. Agencies should consider both aspects when developing alternatives. For this reason, CEQ adds the new § 1502.14(f) requiring agencies to limit consideration of alternatives to a reasonable number. To comply, agencies should focus on a range of alternatives that is appropriate to evaluate the proposed action. Where many alternatives are proposed by stakeholders, agencies should consider the alternatives to determine which are the most appropriate, and briefly describe why alternatives have been eliminated from detailed analysis in accordance with § 1502.14(a). Emphasis should be placed upon alternatives that address significant issues or attempt to resolve clearly identified significant environmental effects. As discussed elsewhere, detailed analysis of every alternative is not necessary, and agencies should devote their resources to evaluating those alternatives that are the most appropriate.

Comment: Some commenters suggested that a maximum of four to five alternatives represents a reasonable maximum for large and complex projects requiring the preparation of an EIS. Specifically, commenters stated that for most complex projects, a reasonable range of alternatives would include an analysis of the proposed action, two optional action alternatives,

and the no Action (status quo) alternative. Other commenters stated that most EISs can sufficiently analyze the purpose and need of a proposed action through a range of alternatives including the no action and two additional alternatives, and that anything beyond this range would only increase time and costs and would not add significant value.

CEQ Response: In response to comments, the final rule does not set a maximum number of alternatives, but provides in § 1502.14(f) that agencies should limit their consideration to a reasonable number of alternatives.

Comment: Commenters objected to the elimination of “this section is the heart of the EIS,” from the description of alternatives and stated that its removal weakens agencies’ treatment and consideration of alternatives.

CEQ Response: In the NPRM, CEQ proposed to revise the introductory paragraph to remove colloquial language, including “heart of” the EIS. As revised, § 1502.14 of the final rule requires agencies to present the proposed action and alternatives to it in comparative form. For example, an agency may use tables to compare quantitative and qualitative impacts among the proposed action and alternatives. Presentation in a comparative format highlights the important information that the decision maker must consider. CEQ intends to provide agencies with clear direction on how to develop their assessments and make a reasoned choice among alternatives.

12. Affected Environment (§ 1502.15)

Comment: Commenters objected to CEQ’s proposal to allow the combination of §§ 1502.15 and 1502.16. In support, commenters argued that conflation of an EIS’s description of baseline conditions and its analysis of environmental consequences would obfuscate rather than clarify analyses. Further, commenters stated that, without establishing the baseline conditions, there is no way to determine what effect the proposed action will have on the

environment. Commenters also stated that, while this approach sounds reasonable for the simplest of projects, it is not appropriate for more complex, large-scale projects with various resource issues than cannot be encapsulated in a paragraph.

CEQ Response: The final rule codifies a NEPA best practice at § 1502.15 by allowing for the combination of affected environment and environmental consequences sections to ensure that the description of the affected environment is focused on those aspects of the environment that the proposed action will affect. This “affected environment” focus will improve the comparison of the impacts of the proposed action and alternatives to the current and expected future conditions of the affected environment in the absence of the action. The “no action” alternative remains a foundational element of the consideration of baseline conditions and the comparison of that evolving baseline to the effects of the proposed action and other alternatives.

See OMB Circular A-4.⁶²

Comment: Commenters stated that CEQ’s proposal to combine the description of the environment and environmental consequences sections in an EIS is practical and sensible, and allows the description of the affected environment to be combined with the evaluation of the environmental consequences required by § 1502.16. Commenters stated that the U.S. Bureau of Land Management has taken this approach with recent EISs for Alaska oil and gas-leasing related actions, and the Alaska Oil and Gas Association (“AOGA”) has generally found the format to be effective. *See, e.g.,* Bureau of Land Mgmt., Coastal Plain Oil and Gas Leasing Program Environmental Impact Statement (2019).⁶³

⁶² 68 FR 58366 (Oct. 10, 2003).

⁶³ <https://eplanning.blm.gov/eplanning-ui/project/102555/570>.

CEQ Response: This revision improves the NEPA process by allowing agencies to eliminate duplicative discussions and prompt agencies to focus on the proposed action's effects in the context of the relevant environment.

Comment: Commenters recommended CEQ revise the first sentence of § 1502.15 to clarify the appropriate extent of the affected environment. Specifically, commenters recommended the EIS succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration, based, if applicable, on information identified in an applicant's studies or reports.

CEQ Response: CEQ declines to adopt the recommended language. CEQ provides for consideration of information submitted by applicants throughout the final rule. In particular, under § 1506.5 applicants and contractors will be able to assume a greater role in contributing information and material to the preparation of environmental documents, subject to the supervision of the agency.

Comment: Commenters stated that § 1502.15 should clarify that the action areas must be consistent with the proposed definition of effects in § 1508.1(g). Commenters stated that the "affected environment" should capture the area with effects that are reasonably foreseeable and have a close causal relationship with the proposed action or alternatives.

CEQ Response: The "affected environment" should describe the area of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. The final rule at § 1502.15 allows for the combination of the affected environment and environmental consequences sections to ensure that the description of the affected environment is focused on those aspects of the environment that the proposed action affects. This "affected environment" focus should improve the comparison of the impacts of the

proposed action and alternatives with the current and expected future conditions of the affected environment in the absence of the action.

Comment: Commenters stated that there needs to be more clarity in § 1502.15. Specifically, commenters requested clarification of the environment being referenced: *i.e.*, whether it is the natural and physical environment, the human environment, or the natural and physical environment and the human environment.

CEQ Response: The final rule requires analysis of the “affected” environment based on the comprehensive definition of “effects” § 1508.1(g) and the definition of “human environment” cross-references to the definition of “effects or impacts.” *See* § 1508.1(m). The final rule includes the reasonably foreseeable environmental trends and planned actions in the area(s) to ensure that the affected environment section of an EIS captures the changing aspects of the environment that are relevant to consideration of the environmental consequences of the proposed action and alternatives.

Comment: A commenter stated that CEQ should reconsider what was meant by “useless bulk” and consider if separate direction is needed for land use plans as compared to project plans when Federal land management agencies may need to provide additional background context on the existing environment.

CEQ Response: The final rule does not elaborate on the phrase “useless bulk” because the regulation explains the term by reference to descriptions of the affected environment. Instead, the final rule requires senior agency official supervision of any exceedance of the page limits. The consideration of the need to integrate NEPA analysis with Federal land management planning requirements should be addressed by land management agencies on an action-specific

basis and in updating their NEPA procedures to provide for efficient integration of environmental documents with land use planning documents under § 1507.3(c) of the final rule.

Comment: A commenter suggested replacing “important issues” with “significant issues” in § 1502.15 to avoid confusion.

CEQ Response: Section 1501.3 discusses the criteria for determining significant effects. The use of “important issues” in § 1502.15 is unchanged from the 1978 regulations and has not been a source of confusion, CEQ declines to make the requested revision.

Comment: A commenter recommended that CEQ replace “environmental impact statement” with “environmental document” so that the requirements for an EIS are also applicable to an EA.

CEQ Response: The requirements of § 1502.15 only pertain to an EIS. Agencies prepare an EA when there likely is no significant effect; therefore EAs do not have the same level of detail as an EIS. After completing an EA, if an agency determines there are significant effects, then it would prepare an EIS and comply with the requirements at § 1502.15.

13. Environmental Consequences (§ 1502.16)

Comment: Commenters requested that §§ 1502.16 and 1501.5 include the “no action” baseline as the metric against which agencies compare the effects of the proposed action and alternatives. Commenters stated that inclusion in both places would create an explicit, consistent baseline for use in both EAs and EISs.

CEQ Response: The affected environment and environmental consequences sections form the scientific and analytic basis for the comparisons of alternatives including the “no action” alternative under § 1502.14(c). An EA must document consideration of the

environmental impacts of the proposed action and alternatives as required by section 102(2)(E) of NEPA, which serve the analytical function of the “no action” alternative in an EIS.

Comment: Commenters objected to the proposed elimination of 40 CFR 1502.16 (a) and (b) and stated that direct and indirect effects are critical elements of the evaluation of potential environmental effects. Commenters stated that such consideration is important under the statutory language of NEPA. Commenters also stated that the final rule should add “cumulative effects” and should preserve direct and indirect effects.

CEQ Response: As explained in CEQ’s NPRM, NEPA refers to environmental impacts and environmental effects but does not subdivide those terms into direct, indirect, or cumulative. In the final rule, the definition of effects in § 1508.1(g) requires agencies to focus on changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives. Consistent with proximate cause analysis, agencies generally do not need to analyze effects if they are remote in time, geographically remote, or to the product of a lengthy causal chain. The removal of the references to direct, indirect, and cumulative effects, and repeal of cumulative impact, streamlines the NEPA process and avoids overextending causation analysis in a fashion inconsistent with proximate cause considerations. It is not practicable and useful to agency decision making to analyze effects that are not reasonably foreseeable and do not have a reasonably close causal relationship to the proposed action.

Comment: In § 1502.16, commenters suggested adding “as appropriate” after “The discussion shall include,” because a number of the considerations in § 1502.16 (a)(1)–(8) do not

apply to many actions. Commenters stated that agencies typically either do not include discussion about “the relationship between short-term uses of man’s environment and the maintenance and enhancement of long-term productivity” or “natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.”

CEQ Response: The 1978 regulations required the analysis of the factors referenced by the commenter at 40 CFR 1502.23, and CEQ has added, as applicable, considerations of economic and technical feasibility, consistent with 102(2)(B). CEQ declines to make the requested revision.

Comment: Commenters supported the inclusion of the term “Tribal” in § 1502.16(a)(5) and further requested clarification that “plans, policies, and controls” also includes Tribal laws, policies, and regulations.

CEQ Response: The final rule at § 1502.16(a)(5) applies to possible conflicts between the proposed action and the objectives of “Tribal . . . plans, policies and controls” that are based on Tribal laws, policies, and regulations for the area concerned.

Comment: Commenters stated that there is no statutory authorization to allow for the inclusion of “Tribal” in § 1502.16(a)(5), and that E.O. 13175, as cited in the preamble of the proposed rule, deal only with the development of Federal policies that have direct Tribal implications, *i.e.*, that impact activities on the reservation. Accordingly, commenters requested the addition of “environmental” protection objectives further stating that is not appropriate to expand the jurisdiction of Tribes beyond reservation boundaries in the NEPA context.

CEQ Response: NEPA imposes a procedural requirement that ensures that Federal agency decisions makers consider the environmental impact of their proposed actions according

to a national policy of cooperation with State and local governments, and other concerned public and private organizations, as stated in section 101 of NEPA. As stated in CEQ's NPRM, the addition of "Tribal" to the phrase "State and local" is based on the recognition that Federal policies include regulations that have substantial direct effects on Tribes, on the relationship between the Federal Government and Tribes, or on the distribution of power and responsibilities between the Federal Government and Tribes. While the final rule is not a regulatory policy that has Tribal implications, the rule supports E.O. 13175's expansion of the recognition of the sovereign rights, interests, and expertise of Tribes in the NEPA process. Consideration of potential conflicts with Tribal plans, policies, and controls supports coordination between Tribal governments and agencies and improves the analysis of a proposed action's potential effects on Tribal lands, resources, or areas of historic significance as an important part of Federal agency decision making.

Comment: Commenters recommended revising § 1502.16(a)(5) to add "environmental protection" before "objectives of Federal, regional, State, Tribal, and local land use plans, policies and controls for the area concerned."

CEQ Response: The addition of "environmental protection" would unnecessarily constrain the analysis of conflicts with other land use plans, policies, and controls for the area concerned. Further, it would create an inconsistency with the cross-reference to § 1506.2(d), which requires discussion in the EIS of "any consistency of a proposed action with any approved State, Tribal, or local plan or law (whether or not federally sanctioned)." Moreover, the purpose of § 1506.16 is to ensure agencies consider environmental consequences. Adding a reference in § 1502.16(a)(5) to "environmental protection" is unnecessary.

Comment: Commenters stated that the proposed rule did not further define the generic term “cultural,” referenced in paragraph (a)(5) to make it clear that a Tribal cultural resource can be a “cultural resource” under NEPA. While the proposed rule parenthetically clarifies the term “economic” (to refer to effects on “employment”), the proposed rule does not do the same for the term “cultural.”

CEQ Response: As stated in CEQ’s NPRM, the addition of “Tribal” to the phrase “State and local” is based on potential effects of Federal agency actions on Tribal lands, resources, or areas of historic significance as an important part of Federal agency decision making. Cultural resources under § 1502.16(a)(8) includes Tribal cultural resources and cultural effects are referenced in the definition of “effects” in § 1508.1(g)(1). The addition of “Tribal” throughout the final rule supports this consideration of Tribal cultural resources.

Comment: A commenter requested further clarification in § 1502.15(a)(5) concerning how local land use plans are considered in a NEPA document. The commenter requested further changes to expressly require consultation with local governments to determine whether there is a possible conflict with land use plans, policies, and controls for the area concerned.

CEQ Response: The final rule provides numerous opportunities for coordination and consultation with State, Tribal, and local governments. *See* § 1501.9. An express requirement to consult under § 1502.16(a)(5) is not necessary to ensure close coordination with non-Federal governments.

Comment: Commenters recommended the final rule revise § 1502.16(a)(6) to add “energy” before “conservation” to remove any confusion or ambiguity.

CEQ Response: CEQ did not propose to limit the consideration of the conservation potential of alternatives and mitigation measures to energy conservation, and the proposed

addition of a second reference to “energy” would be unnecessarily limiting. Energy conservation is necessarily included in the consideration of energy requirements and conservation potential, so the proposed addition of “energy” would only exclude other aspects of conservation that are necessarily included in the definitions of reasonable alternatives and mitigation.

Comment: A commenter requested that CEQ further clarify and define the use of “energy” at § 1502.16(a)(6) and whether the reference was specific to the sources of oil and gas.

CEQ Response: CEQ did not propose revisions to this subsection. The final rule refers to energy generally and includes all energy sources.

Comment: A commenter requested to revise § 1502.16(a)(6) to require quantification of greenhouse gas (GHG) emissions and analysis of potential global warming and climate change.

CEQ Response: As discussed in the NPRM, CEQ’s view is that it is not appropriate to address a single category of impacts in the regulations. CEQ declines to make the requested revision.

Comment: Commenters stated that CEQ should define what is meant by “natural or depletable resources” in paragraph (a)(7) which is not defined in § 1508.1.

CEQ Response: In the responses to the ANPRM, commenters did not identify the term “natural or depletable resources” as a significant ambiguity that required further definition. The term appears to be generally understood to reference “depletable resources,” equating them with finite resources and thus to involve an implicit contrast with renewable sources. Some natural resources are renewable.

Comment: Commenters requested that § 1502.16(a)(8) be revised to add “and rural” after “urban”, explaining that it is necessary to shift the focus from primarily urban settings to one

where the relationship between urban centers and their surrounding rural settings are considered together.

CEQ Response: CEQ acknowledges the need to consider the effects of proposed Federal agency actions on the quality of the rural environment, and the final rule updates § 1506.6, “Public involvement,” to clarify that agencies should consider the ability of affected persons and agencies to access electronic media, such as in rural locations. However, the “environment” is commonly considered to include rural areas. CEQ did not propose to change § 1502.16(a)(8) and declines to make revisions in the final rule.

Comment: Commenters stated that NEPA regulations must explicitly mandate in § 1502.15(a)(8) that use of sacred sites and ceremonial lands receive due consideration even when the land does not qualify as a historic property under the NHPA or other Federal protections.

CEQ Response: Cultural resources under § 1502.16(a)(8) includes Tribal cultural resources and cultural effects are referenced in the definition of “effects” in § 1508.1(g)(1). As stated in the proposed rule, the addition of “Tribal” throughout the rule facilitates full consideration of Tribal cultural resources and potential effects of Federal agency actions on Tribal lands, cultural resources, and areas of religious or ceremonial significance.

Comment: A commenter stated that the reference to mitigation in proposed § 1502.16(a)(9) was too limited because it does not allow for mitigation measures that may be needed for economic and social impacts. The commenter stated that the scope of the definition forecloses possible economic or social mitigation measures when decisions negatively impact the local economy and social values. The commenter recommended expressly mentioning economic and social impacts.

CEQ Response: The referenced language does not preclude consideration of economic or social mitigation measures. Section 1502.16(a)(9) cross-references § 1502.14(e) of the final rule, which requires agencies to “include appropriate mitigation measures not already included in the proposed action or alternatives.” The intent of § 1502.16(a)(9) is to require agencies to discuss which mitigation could offset adverse environmental impacts if not fully addressed in the discussion of alternatives.

Comment: Commenters supported the requirement to consider economic benefits of a proposed action as proposed in § 1502.16(a)(10) and requested that the provision consider economic impacts or costs associated with a proposed action. Commenters stated that the provision is important for the agency to discuss and give appropriate consideration to economic impacts of a decision when the natural and economic impacts are interrelated. Commenters noted that economic benefits of a proposal are a critical part of the “human environment” and must be considered.

CEQ Response: The final rule codifies the consideration of economic effects as proposed in § 1502.16(a)(10), requiring that EISs give appropriate consideration to interrelated economic and environmental effects on the “human environment.” Moreover, the final rule at § 1508.1(g) defines “effects or impacts” as “changes to the human environment” from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternative. Likewise, the final rule definition of “human environment” cross-references to the definition of “effects or impacts.” *See* § 1508.1(m).

Comment: Commenters stated that additional guidance will be needed about consideration of “economic and social effects” under § 1502.16(a)(10).

CEQ Response: The phrase “economic and social effects” is not used in § 1502.16(a)(10). This subsection references consideration of economic and technical considerations, including economic benefits of a proposed action. The phrase “economic or social effects” used in § 1502.16(b) was used in the 1978 regulations and has not been a source of confusion.

Comment: Commenters requested that the final rule rephrase § 1502.16(a)(10) to add “costs” and “alternatives.” Other commenters recommended that analysis be given to economic consequences and benefits. Other commenters asserted economic benefits are beyond the scope of the Act, and therefore, the final rule should not include them.

CEQ Response: The final rule does not exclude considerations of cost as part of economic considerations, nor does it support giving greater weight to benefits over costs of a proposed action. In the final rule, § 1502.22 addresses cost-benefit analysis.

Comment: Commenters objected to proposed § 1502.16(a)(10) suggesting that it violates NEPA because it subordinates science to economics. Commenters further stated that CEQ failed to sufficiently justify in the preamble of the proposed rule how section 102(2)(B) of NEPA supports the addition of this requirement.

CEQ Response: In the final rule, CEQ adds § 1502.16 (a)(10) to include economic and technical considerations only where applicable. Section 102(2)(B) of NEPA, as applied in § 1502.22 of the final rule, provides for this consideration of the interrelationship between environmental and economic considerations. Section 102(2)(B)’s reference to “along with economic and technical considerations” makes clear that agency decision making includes economic and technical considerations and the change better aligns the regulations with the Act. Judicial decisions that overlooked this point misapprehended the statute.

Comment: Commenters objected to proposed § 1502.16(a)(10) and stated that it would be contrary to CEQ’s policy goals of improving and streamlining the NEPA process. Specifically, commenters stated that it could add an additional avenue for legal challenges for insufficient analysis of employment or other non-environmental impacts (*i.e.*, only economic and social impacts). Accordingly, commenters requested that the final rule not include it or, at a minimum, delete the phrase “give appropriate consideration to” from the sentence.

CEQ Response: In the final rule, CEQ adds economic considerations where “applicable,” in § 1502.16(a)(10), and “appropriate” in § 1502.16(b). These considerations are made explicit in § 1502.16 (a)(10) and (b) but were already included in section 102(2)(B) of NEPA, as applied in 40 CFR 1502.23, (§ 1502.22 in the final rule) and the definition of the “human environment” under 40 CFR 1508.14. The addition of “applicable” and “appropriate” limitations is consistent with the statute, NEPA’s “rule of reason,” and does not increase litigations risk.

Comment: Commenters objected to proposed § 1502.16(a)(10) stating that the requirement to discuss “economic and technical considerations” along with environmental impacts is aimed solely at diluting the environmental analysis and eliminating less environmentally impactful alternatives.

CEQ Response: CEQ’s addition of economic and technical considerations in § 1502.16 (a)(10) makes explicit what was already included in section 102(2)(B) of NEPA, as applied in 40 CFR 1502.23(§ 1502.22 in the final rule). In the final rule, agencies only need apply these considerations to the extent that they are applicable.

Comment: Commenters objected to proposed § 1502.16(a)(10) stating that technical considerations are not really “effects,” but would normally be part of an agency’s assessment as to whether an alternative was a reasonable alternative. Accordingly, commenters stated that the

final rule should limit consideration in the discussion of alternatives. Commenters also noted that the discussion under this provision may be duplicative of the alternatives section of an EIS.

CEQ Response: As with the 1978 regulations, § 1502.14 of the final rule recognizes the interrelationship between the alternatives analysis “based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§ 1502.16)” and the specific discussion of factors listed in § 1502.16(a). Therefore, § 1502.16(a) retains the statement in the 1978 regulations that this section should not duplicate discussions in § 1502.14. To the extent that a technical consideration is more appropriately addressed as a factor in alternatives analysis rather than in environmental consequences, it should be addressed in that section with appropriate cross-reference in the discussion of environmental consequences.

Comment: Commenters stated that it is unclear which part of NEPA CEQ has drawn upon to propose the addition of economic impacts under § 1502.16(a)(10) and commenters requested CEQ’ justification.

CEQ Response: Section 102(2)(B) of NEPA, as applied in § 1502.22, provides for consideration of the interrelationship between environmental and economic considerations. In the final rule, § 1502.16(a)(10) includes economic and technical considerations only where applicable, with the applicability of those considerations governed by their interrelationship to environmental considerations.

Comment: A commenter requested that § 1502.16(a)(10) be revised to expressly include the cost of mitigation

CEQ Response: Mitigation is addressed in § 1502.16(a)(9). As proposed § 1502.16(a)(10) requires economic and technical considerations generally, as applicable. In the final rule, CEQ declines to make further revisions, as additional specification is not necessary.

Comment: Commenters requested that in the final rule, § 1502.16(a)(10) and (b) require the analysis of economic impacts in every EIS. Specifically, a commenter requested the final rule revise § 1502.16(a)(10) to state “unless not applicable,” rather than “where applicable” and “economic consequences” rather than “economic benefits” as proposed. Some commenters were specifically interested in impacts to State or local economies and recommended that CEQ revise § 1502.16(b) to require consultation with State and local governments and cooperating agencies.

CEQ Response: The final rule requires agencies to consider economic and technical considerations whenever applicable. This requirement encompasses impacts to State and local economies. Further, the final rule provides numerous opportunities for coordination and consultation with State, Tribal, and local governments. *See* § 1501.9. An express requirement to consult under § 1502.16(b) is not necessary to ensure close coordination with non-Federal governments.

Comment: Commenters supported the requirements of § 1502.16(b) stating that actions that take place on public lands are often very impactful to local communities and citizens, and should be clearly identified in the NEPA analysis.

CEQ Response: CEQ expects that § 1502.16(b) will ensure that public land management agencies give appropriate consideration of interrelated economic or social and natural or physical environmental effects.

Comment: Commenters stated that § 1502.16(b) could support a false equivalency between long-term or permanent environmental damages and short-term economic impacts.

CEQ Response: The final rule brings text into § 1502.16(b) that had been located in the definition of the “human environment,” 40 CFR 1508.14, that required that EISs give appropriate consideration to interrelated economic and environmental effects on the “human environment.” This change brings operative language into § 1502.16(b) while the final rule definition of “human environment” cross-references to the definition of “effects or impacts.” See § 1508.1(m). The consideration of the “relationship between short-term uses of man’s environment and the maintenance and enhancement of long-term productivity” remains an essential consideration under § 1502.16(a)(3), in accordance with NEPA section 102(2)(C)(iv).

Comment: Commenters requested further clarification of § 1502.16 and specifically at which point the agency must give “appropriate consideration” to the interrelation of economic and social effects with the natural or physical environment. A commenter requested that CEQ provide case studies or specific instances in which economic and social effects are not related to natural environment effects.

CEQ Response: Section 102(2)(B) of NEPA, as applied in 40 CFR 1502.23, requires consideration of economic and social effects when interrelated with the natural or physical environment. When and how such effects are interrelated is specific to the circumstances of the proposed action, and the final rule continues to provide agencies with considerable flexibility in applying the requirement. One example where it would be inappropriate to consider economic impacts is where Congress has prohibited use of economic considerations in agency decision making. CEQ declines to provide further specificity in the final rule.

Comment: Commenters expressed concern that the proposed § 1502.16(a)(10) would require a point-by-point analysis of economic and technical considerations and require overwhelming additional resources in terms of expertise, training, and assessment time.

Commenters stated that such considerations were already included in the development of “practicable” alternatives.

CEQ Response: Economic and technical considerations are expressly referred to in section 102(2)(B) of NEPA. The reasonableness of an alternative is informed by economic and technical considerations. Since it has been a long-standing requirement to evaluate economic and technical considerations, when applicable, the new requirement at § 1502.16(a)(10) will not require additional resources.

Comment: Commenters requested that CEQ require agencies give equal weight to socioeconomic and environmental analysis in § 1502.16(b).

CEQ Response: The final rule directs agencies to give “appropriate consideration” to the interrelation of economic and social effects and natural or physical environmental effects. Consideration depends on the particular facts and circumstances of the proposed action. CEQ declines to provide further specificity to agencies in the final rule.

14. Submitted Alternatives, Information, and Analyses (§ 1502.17)

Comment: Commenters expressed support for the new § 1502.17, “Summary of submitted alternatives, information, and analyses,” which locates in one place a summary of, and response to, issues that are of particular concern to public commenters. Many commenters expressed that the NEPA review process needs to solicit more thoughtful public participation and comments and stated the proposed changes would encourage and improve the effectiveness of public participation. Commenters noted the new summary section ensures that the agency carefully reviewed comments from the public.

CEQ Response: Section 1502.17 in the final rule ensures agencies have considered all alternatives, information, and analysis submitted by State, Tribal, and local governments and

other public commenters during the scoping process for consideration by the lead and cooperating agencies in developing the EIS by including a summary of the submitted information in the EIS. CEQ notes that § 1501.9(d)(7) requires agencies to request identification of potential alternatives, information, and analyses relevant to the proposed action during the scoping process. The final rule in § 1502.17(a) requires an agency to include a summary that identifies the alternatives, information, and analyses received during the scoping process and publish all comments. The final rule in § 1502.17(a)(2) along with § 1503.1(a)(3) invite comment on the summary of submitted alternatives, information, and analyses, as part of the draft EIS comment period. Those comments will be considered and responded to in the final EIS pursuant to § 1503.4 (or “otherwise publish,” in § 1503.4(b)). Finally, § 1505.2(b) requires the decision maker to certify the agency has considered the information.

Comment: Commenters opposed the proposed new EIS section, summary of submitted alternatives, information, and analysis, in § 1502.17 and stated this is a new EIS requirement that seems to conflict with the goal of limiting pages and reducing cost and time. Other commenters questioned the utility of the summary, and noted it is duplicative of the requirements of § 1502.14 (alternatives including the proposed action) and § 1503.4 (response to comments). Commenters also argued the summary is a new EIS requirement that is not required by NEPA.

CEQ Response: The consideration of opposing viewpoints and presenting that information in an EIS is central to NEPA. The 1978 regulations required agencies to consider the information received during scoping in development of the draft EIS. Some agencies routinely summarize and publish comments received during the scoping process in a scoping report. The final rule codifies these practices in § 1502.17 and instructs the agency to identify and summarize specific information submitted by commenters in a consolidated section of the

EIS. The EIS alternatives section required by § 1502.14 is distinct from the § 1502.17 summary because the purpose of § 1502.14 is to analyze reasonable alternatives to the proposed action. Some of the submitted alternatives may not be reasonable or necessary to analyze since agencies need only consider a range of reasonable alternatives. However, including them in the § 1502.17 summary will provide notice that the agency considered all of the submitted alternatives. This will improve transparency in the EIS preparation process because the public will see that the agency received and considered the submitted alternatives, information, and analysis. This is a new requirement, but when balanced against the benefits of increasing transparency, CEQ does not consider it to be an undue burden.

Comment: Commenters objected to the proposed new EIS section § 1502.17, stating that it would diminish agencies' duty to fully consider information submitted by the public, in particular the consideration and discussion of opposing viewpoints in an EIS, citing to *California v. Block*, 690 F.2d 753, 770–71 (9th Cir. 1982). Additionally, commenters raised concerns that agencies or applicants preparing an EIS would improperly summarize comments by intentionally diluting or distorting comments to make them less impactful. Commenters stated that the absence of a summarized discussion showing how the agency considered the submitted information would result in decreased transparency. Commenters also disputed the appropriateness of presuming an agency has considered all submitted information without a discussion of the submitted information providing evidence that the agency took a “hard look.”

CEQ Response: The consideration of opposing viewpoints is a part of the NEPA process and remains a core requirement of an EIS. *See* § 1502.9(b) and (c). The final rule in § 1502.17 ensures agencies have considered all alternatives, information, and analysis submitted by State, Tribal, and local governments and other public commenters during the scoping process for

consideration by the lead and cooperating agencies in developing the EIS by including a summary of the submitted information in the EIS. A summary by its nature is designed to improve the readability and usefulness to the decision maker of a document, but would not form the entire basis of agency decision making. Agencies must base their decisions on the entire administrative record. The final rule § 1505.2(b) adds the requirement that the decision maker for the lead agency certify in the ROD that the agency has considered all submitted alternatives, information, analyses, and objections.

It is the agency that must comply with NEPA and ensure the ROD reflects a consideration of the entire administrative record. The final rule in § 1502.17 instructs the preparer to identify and summarize specific information submitted by commenters during the scoping period in one section of the EIS. The comments received during scoping will be published as an appendix to the draft EIS. The § 1502.17 summary complements the requirement in § 1503.4, that agencies consider substantive comments timely submitted during the public comment period in an appendix to the final EIS. Additionally, § 1503.1(a)(3) now requires agencies to invite public comment on the summary. These changes improve transparency in the EIS preparation process by allowing the public to see that their submitted alternatives, information, and analysis were considered by the agency.

Comment: Commenters expressed concerns with § 1502.17 as written and requested CEQ clarify if the § 1502.17 summary needs to summarize each comment or provide a thematic summary of the submitted alternatives, information, and analysis. Other commenters requested CEQ amend § 1502.17 to limit the summarization to “relevant” alternatives, information, and analysis submitted by the public. Other commenters requested CEQ amend § 1502.17 to limit

the summarization to those alternatives, information, and analysis “that have influenced or persuaded agency decision-making.”

Commenters argued that § 1502.17 appears to be inconsistent with proposed changes to §§ 1502.14(a) and 1503.4(a), because § 1502.17 requires a summary of “all alternatives, information, and analyses submitted.” Whereas, in § 1502.14(a), CEQ proposed to remove the word “all” before “reasonable alternatives” so that section in pertinent part now requires agencies to “[e]valuate reasonable alternatives to the proposed action” In § 1503.4(a), CEQ proposed to add the word “substantive” before the word “comments” so that section in pertinent part now requires agencies to “consider substantive comments.” Commenters noted § 1502.17 as written requires the agency to summarize all submitted alternatives, information, and analysis regardless of their feasibility, scientific accuracy, or impact on the decision-making process. Commenters stated without some limitation to the reasonableness or substance of the summarized information pursuant to § 1502.17, that summary would be unnecessary, inefficient, and confusing to the public.

CEQ Response: CEQ acknowledges the commenters’ suggestion. The final rule contains revisions to § 1502.17 clarifying that the summary must identify all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agency. These changes provide agencies with the flexibility to summarize groups of comments that identify the same alternative, information, or analyses. The summary is distinct from, and complements, the alternatives section (§ 1502.14) and the response to comments (§ 1503.4) resulting in distinct requirements that should be applied in a complementary manner.

Comment: Commenters requested CEQ clarify if the EIS page limits located in § 1502.7 include the § 1502.17 summary. Other commenters requested CEQ amend the final rule so that the § 1502.17 summary is included as an appendix, not within the EIS due to concerns over page limits and readability of the EIS.

CEQ Response: CEQ notes that the § 1502.7 page limit is restricted to sections identified paragraphs (4) through (6) of § 1502.10(a). Those sections are: (a)(4) purpose of and need for action; (a)(5) alternatives including proposed action; and, (a)(6) affected environment and environmental consequences. The § 1502.7 page limit excludes (a)(7) summary of submitted alternatives, information, and analyses (§ 1502.17). Additionally, § 1502.10 provides a recommended format of an EIS and allows an agency to use a different format when appropriate.

Comment: Commenters expressed concerns with § 1502.17 as written and suggested CEQ revise § 1502.17 to clarify if the summary must be included in both the draft EIS and the final EIS or just the draft EIS.

CEQ Response: CEQ acknowledges the commenters' suggestion. The final rule contains revisions to § 1502.17 clarifying the summary of submitted alternatives, information, and analyses must be included in both the draft EIS (§ 1502.17(a)) and final EIS (§ 1502.17(b)).

Comment: Commenters expressed concerns with § 1502.17 as written and suggested CEQ revise § 1502.17 to clarify the agency must summarize all alternatives, information, and analysis submitted for consideration including comments from other Federal agencies, State, Tribal, and local governments and the public.

CEQ Response: CEQ acknowledges the commenters' suggestion. The final rule contains revisions to § 1502.17 clarifying the summary must identify all alternatives, information, and

analyses submitted by State, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agency.

Comment: Commenters expressed concerns with § 1502.17 as written and suggested CEQ require publication of the comments summarized pursuant to § 1502.17. Commenters stated that unless the comments received during scoping are published as part of the draft EIS, the § 1502.17 summary will leave the public without sufficient evidence that the lead agency took into consideration its concerns, including environmental justice concerns.

CEQ Response: The final rule has further revised § 1502.17(a)(1) to require agencies to publish all comments (or summaries thereof where the response has been exceptionally voluminous) received during the scoping process that identified alternatives, information, and analyses for the agency's consideration. This requirement improves transparency by ensuring the public can view a summary of the submitted information in addition to the information as it was submitted. In situations where an agency has received exceptionally voluminous responses, for example a letter-writing campaign utilizing a form letter or a set of form comments, the agency may publish a representative comment with summary of the campaign.

Comment: Commenters requested CEQ extend the requirement of § 1502.17 to EAs.

CEQ Response: An EA is a brief discussion of the proposed action, alternatives, and the environmental impacts of the proposed action and alternatives. The purpose of an EA is to briefly provide sufficient evidence and analysis for determining whether to prepare and EIS or a FONSI. An EA does not trigger the scoping requirements of § 1501.9 therefore the requirement to summarize that information in § 1502.17 would not be applicable in an EA.

15. List of Preparers (§ 1502.18)

Comment: Commenters stated that the regulations should not require a list of preparers, and agencies should only provide it if specifically requested by the public. Commenters stated that the lead Federal agency is responsible for the content of NEPA documents and any resulting decisions made.

CEQ Response: The final rule retains the requirement from the 1978 regulations to include a list of preparers in EISs. The final rule indicates that the list should normally not exceed two pages, and CEQ is unaware of any impediment or burden for agencies to comply with this requirement. The list of preparers continues to serve important transparency goals and informs the public that agencies have selected qualified personnel to prepare NEPA documents.

16. Appendix (§ 1502.19)

Comment: Commenters stated that normally EISs contain multiple appendices, and therefore CEQ should retitle § 1502.19 (proposed § 1502.20) as “Appendices” and use the plural term throughout.

CEQ Response: CEQ acknowledges that sometimes agencies use multiple appendices but do not find it necessary to retitle this section.

17. Publication of the environmental impact statement (§ 1502.20)

Comment: Commenters requested CEQ revise § 1502.20 (proposed § 1502.21) to require agencies to share administrative draft versions of draft and final EISs with applicants prior to publication to assist in reduction of factual errors.

CEQ Response: CEQ declines to add this requirement. Like other public commenters, applicants may provide factual clarifications and corrections during the comment period(s) provided under § 1503.1.

Comment: Commenters asked CEQ to clarify whether the phrase “shall transmit the entire statement electronically” in § 1502.20 (proposed § 1502.21), allows agencies to distribute links to documents posted online because some documents may be too voluminous to email. Commenters also asked CEQ to clarify whether “transmit” means that agencies must compile distribution lists of interested parties’ emails and notify these parties or whether publication on agency websites satisfy this requirement.

CEQ Response: CEQ defines publish and publication in a technology neutral way to accommodate electronic distribution, including email links to documents published online. Section 1506.6(b)(1) provides that agencies must inform interested or affected parties, which agencies may do through one or more mechanisms provided in § 1506.6(b). Agencies should make reasonable efforts to ensure that they inform such parties, which may include an email that links to documents published online.

18. Incomplete or Unavailable Information (§ 1502.21)

Comment: CEQ received comments supporting the revisions to § 1502.21 (proposed § 1502.22), “Incomplete or unavailable information.” Commenters specifically supported replacing “exorbitant” with “unreasonable” in the provisions relating to when agencies must obtain such information. Some commenters supporting the revisions noted that the costs of obtaining information can outweigh the value of the data to the decision-making process.

CEQ Response: Section 1502.21 (proposed § 1502.22) addresses the duties of agencies when necessary information is incomplete or unavailable. In the 1978 regulations, CEQ directed that agencies would be required to undertake a “worst case analysis” of the risk and severity of

possible adverse environmental impacts where necessary information was unavailable.⁶⁴ In 1986, CEQ finalized revisions to this section of the regulations to eliminate the requirement to prepare a worst case analysis where information was incomplete or unavailable.⁶⁵

In the final rule, CEQ makes several additional revisions to clarify this section for Federal agencies, including revising § 1502.21(a) (proposed § 1502.22(a)) to strike the word “always,” replacing the term “exorbitant” with “unreasonable” in paragraphs (b) and (c), and eliminating 40 CFR 1502.22(c) because this paragraph is obsolete. In the final rule, CEQ has also clarified that unavailable information is different than incomplete information by adding that the latter information is “incomplete, but available.”

The revisions are intended to promote clarity in the regulations and consistency with the “rule of reason” that bounds NEPA analyses. Under § 1502.21(b) (proposed § 1502.22(b)) as revised, agencies will continue to be required to obtain essential, available information where the overall costs are not unreasonable and the means of obtaining that information are known. Where the overall cost is unreasonable or means are unavailable, agencies will continue to be required pursuant to paragraph (c) to disclose that information is incomplete or unavailable and explain the relevance of the incomplete or unavailable information to the evaluation of reasonably foreseeable significant adverse impacts to the human environment, summarize existing credible scientific evidence relevant to the evaluation of such impacts, and include the agency’s evaluation of the impacts based on theoretical approaches or generally accepted research methods.

⁶⁴ 43 FR at 55984.

⁶⁵ 51 FR 15618 (Apr 25, 1986).

Comment: A commenter supporting the revisions requested that § 1502.21 (proposed § 1502.22) be further amended to provide a process for entities to bring information to an agency's attention during the NEPA process, including a process that requires a statement of the availability of more complete information, the relevance of such information, and a summary of existing credible scientific evidence relevant to evaluating reasonably foreseeable significant adverse impacts.

CEQ Response: No additional process is needed because in the final rule CEQ already requires agencies to solicit information and analyses from State, Tribal, and local governments as well as the public. The solicitation and the submittal of such information is addressed in various sections of the regulations, including provisions relating to the NOI and draft EIS and the request for comments and provisions relating to commenting generally. *See, e.g.,* §§ 1501.9, 1503.1, and 1503.3.

Comment: Commenters stated that § 1502.21 (proposed § 1502.22) should not apply to EAs.

CEQ Response: As CEQ stated in its 1986 amendment to proposed § 1502.22, Federal agencies are only required to implement this section when preparing an EIS.⁶⁶ In the final rule, however, CEQ states that agencies may apply these provisions to an EA. *See* § 1501.5(g)(1).

This would allow agencies to use the standards of § 1502.21 (proposed § 1502.22), including

⁶⁶ In 1986, in response to comment CEQ stated, "Section 1502.22 is part of the set of regulations which govern the EIS process, as opposed to the preparation of an environmental assessment. *It is only appropriate to require this level of analysis when an agency is preparing an EIS.* The type of analysis is called for in § 1502.22 is clearly much more sophisticated and detailed than the scope of an environmental assessment. Environmental assessments should be concise public documents which *briefly* provide sufficient analysis for determining whether to prepare an EIS and aid in an agency's compliance with NEPA when no EIS is necessary." *See* 51 FR 15618, 15625 (Apr. 25, 1986) (emphasis in the original).

whether to obtain incomplete or unavailable information, to evaluate potentially significant adverse impacts and compare alternatives.

Comment: One commenter suggested § 1502.21 (proposed § 1502.22) be removed and included in the definition of effects at § 1508.1(g).

CEQ Response: CEQ declines to move it to the definition section because § 1502.21 (proposed § 1502.22) is text that provides particular instructions.

Comment: Some commenters opposed striking “always” in § 1502.21(a) (proposed § 1502.22(a)), stating that CEQ had failed to explain when and why an agency should not be required to “always” disclose that there is unavailable or incomplete information. Commenters stated that “always” is prescriptive and eliminating the term will lead to ambiguity over when disclosure is required and provide agencies with unreasonable discretion to withhold information to the public regarding gaps in information.

CEQ Response: The word “always” is unnecessary because § 1502.21(a) states that agencies “shall make clear that such information is lacking.” Striking “always” is consistent with other revisions throughout the regulations to modernize and improve readability and consistency and reduce unnecessary language. Striking “always” will not create any uncertainty because under the regulations agencies are required, without exception, to disclose the fact of incomplete or unavailable information when an agency is evaluating reasonably foreseeable significant adverse effects on the human environment and information is lacking.

Comment: One commenter requested that CEQ revise § 1502.21(a) (proposed § 1502.22(a)) as follows: “When a lead agency is evaluating reasonably significant adverse effects on the human environment in an environmental impact statement and determines(in

consultation with any cooperating agencies, if applicable) that there is incomplete or unavailable information, the lead agency shall make clear that such information is lacking.”

CEQ Response: CEQ has not made the requested revision because it is duplicative of provisions in Part 1501 that address the respective roles of lead and cooperating agencies. Regarding § 1502.21 (proposed § 1502.22), it is the responsibility of the lead agency to make the required determinations in consultation with cooperating agencies, where appropriate.

Comment: Some commenters opposed replacing “exorbitant” with “unreasonable” in § 1502.21(b) and (c) (proposed § 1502.22(b) and (c)) when considering the “overall costs” of obtaining information relevant to reasonably foreseeable significant adverse impacts that is essential to a reasoned choice among alternatives. Some commenters contended CEQ had not adequately explained how it was consistent with its original description of “overall cost” considerations, the common understanding of the term, and how that term is regularly interpreted in practice. Other commenters stated that “exorbitant” was more stringent, or that it is more objectively evaluated than “unreasonable,” or raised concerns that agencies would use cost as the justification to limit their analyses and consideration of environmental impacts. Other commenters stated that a delay in project approval should never be used to justify evasion of agencies’ NEPA duty to gather essential information.

CEQ Response: The term “exorbitant” is not used in the NEPA statute and is not defined in the regulations. As stated in the proposed rule, replacing “exorbitant” with “unreasonable” is consistent with how CEQ described “overall costs” in the 1986 amendments relating to § 1502.21 (proposed § 1502.22). CEQ stated that “overall costs” encompass “financial costs

and other costs such as costs in terms of time (delay) and personnel.”⁶⁷ CEQ further stated that it intended “that the agency interpret ‘overall costs’ in light of overall program needs.”⁶⁸ The requirement to determine if the ‘overall costs’ of obtaining information is exorbitant should not be interpreted as a requirement to weigh the cost of obtaining the information against the severity of the effects, or to perform a cost-benefit analysis. Rather, the agency must assess overall costs in light of agency environmental program needs.”) Replacing “exorbitant” with “unreasonable” is consistent with how “overall costs” are to be interpreted, as well as with the “rule of reason” that bounds NEPA analyses. *See, e.g., Pub. Citizen*, 541 U.S. at 767 (“Also, inherent in NEPA and its implementing regulations is a ‘rule of reason,’ which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process”); *see also Marsh*, 490 U.S. at 373–74 (agencies should apply a “rule of reason”).

Pursuant to § 1502.21(b) as revised, agencies will continue to be required to obtain available information that is essential to the reasoned choice between alternatives where the costs are not unreasonable or the means are unavailable. Further, where the overall costs are unreasonable or the means of obtaining the information are not known, agencies will continue to be required pursuant to paragraph (c) to disclose in the EIS that information is incomplete or unavailable, and provide additional information to assist in analyzing the reasonably foreseeable significant adverse impacts.

⁶⁷ 51 FR at 15622.

⁶⁸ *Id.* *See also* Connaughton Letter, *supra* note 61, at p. 4 (“The term ‘overall costs’ encompasses financial costs and other costs such as costs in terms of time (delay), program and personnel commitments.”).

Comment: Some commenters requested that CEQ provide further guidance on determining whether costs are “unreasonable.” Other commenters requested CEQ direct agencies to take into account not only monetary cost but also the goals of the applicant, and weigh the value of obtaining additional information against the complexity of or difficulty in obtaining information. One commenter stated that relevant costs are discussed in the preamble of the proposed rule⁶⁹ and requested they be included in the body of the regulations.

CEQ Response: CEQ has not further revised the regulations because whether the overall costs of obtaining available information are unreasonable is case-specific and will depend on the agency’s program needs. CEQ has previously stated that it intends that the term “overall costs” as used in § 1502.21 (proposed § 1502.22) encompasses “financial costs and other costs such as costs in terms of time (delay) and personnel.”⁷⁰ CEQ has also previously stated that it intends that an agency interpret “overall costs” in light of overall program needs. *Id.* As discussed in the proposed rule, agencies should use their experience and expertise to determine what scientific and technical information is appropriate to inform their analyses and decision-making.

Comment: Regarding the collection of field data, commenters stated that agencies should focus on gathering meaningful information, and avoid lengthy or costly information-gathering processes focused on information that is not essential. Some commenters stated that while it is always possible to gather more field data through additional studies, monetary costs and costs associated with delays may outweigh the value of such information. One commenter stated that the term “exorbitant” has led to agencies requiring large, time-consuming and generally

⁶⁹ See 85 FR at 1703 (Jan. 10, 2020).

⁷⁰ 51 FR at 15622.

unnecessary data-collection efforts, or to seek “perfect” science that is not necessary to inform agency decision making.

CEQ Response: Pursuant to § 1502.1 of the final rule, agencies should focus on significant environmental issues and alternatives and should reduce paperwork and the accumulation of extraneous background data. An agency that lacks information relevant to evaluating reasonably foreseeable significant adverse effects should focus on whether the available information is essential to the reasoned choice between alternatives. Agencies should also consider reliable existing data and resources, including remotely gathered information or statistical models that may inform the agency’s analysis, according to § 1502.23 (proposed § 1502.24). NEPA analysis is bound by a “rule of reason” and agencies should conduct timely and efficient NEPA reviews. *See* §§ 1500.1(b), 1501.10.

Comment: Commenters requested that CEQ further revise the regulations to encourage agencies to use desktop evaluations, remote sensing data, and other reliable data. One commenter requested that CEQ address that the gathering of some information may be seasonal and not fall within the initial proposed schedule, and expressed the view that the schedule should be revised under such circumstances.

CEQ Response: CEQ has finalized its proposed revisions to § 1502.23 (proposed § 1502.24) to state that agencies should rely on existing data and resources, and to clarify that agencies may make use of any reliable data sources, such as remotely gathered information or statistical models. As noted above, agencies should use their experience and expertise in identifying available information that is essential to a reasoned choice among alternatives, and determining whether the overall costs of obtaining it are not unreasonable.

Comment: Commenters asserted that the direction pursuant to § 1502.23 (proposed § 1502.24) that “[a]gencies are not required to undertake new scientific and technical research to inform their NEPA analyses” is inconsistent with the requirement in § 1502.21 (proposed § 1502.22) for agencies to obtain information regarding significant adverse effects if the means of obtaining the information is known and the overall costs is not unreasonable. They stated that this revision would allow agencies to forego additional field and analytical studies necessary to evaluate impacts and alternatives. Commenters provided examples (e.g., forest plans) of environmental reviews where new research was important to make an informed decision. One commenter suggested that CEQ add a sentence to § 1502.21(b) (proposed § 1502.22(b)) stating, “This information can be provided by new research when appropriate.”

CEQ Response: The 1978 regulations applied the requirement to include “information relevant to reasonably foreseeable significant adverse impacts essential to a reasoned choice among alternatives” to only incomplete information and not also to unavailable information. In response to comments requesting clarification with respect to § 1502.23 (proposed § 1502.24), CEQ has interpreted this distinction to mean that agencies are not required to generate new scientific and technical research. CEQ declines to set forth conditions where the conduct of new research is appropriate, as requested by the commenter.

Irrespective of whether or not information is available, CEQ has retained the requirement from the 1978 regulations at § 1502.21(c) (proposed § 1502.22(c)) to report within the EIS “the information relevant to reasonably foreseeable significant adverse impacts [that] cannot be obtained because the overall costs of obtaining it are unreasonable or the means to obtain it are not known.” In § 1502.23 of the final rule, CEQ clarifies that nothing in that section is intended

to prohibit agencies from complying with the requirements of other statutes pertaining to scientific and technical research.

Comment: A commenter recommended that CEQ revise § 1502.23 (proposed § 1502.24) to acknowledge responsible opposing views and requested a new subsection be added requiring that agencies disclosing when there is incomplete or unavailable information also include in the EIS “[a] summary of any responsible opposing scientific data that run counter to that cited in section 1502.22(c)(4).”

CEQ Response: Agencies are required to summarize credible scientific evidence relevant to evaluating the reasonably foreseeable significant adverse impacts. It is CEQ’s intent that agencies summarize relevant data, including information that may represent a minority or dissenting perspective.

Comment: One commenter asserted that section 102(2)(E) implies an obligation to develop new information not already available in public sources.

CEQ Response: Section 102(2)(E) of NEPA does not direct agencies to undertake new research in connection the preparation of detailed analyses required under section 102(2)(C). Section 102(2)(E) requires only that agencies “study, develop, and describe appropriate alternatives to recommended courses of action.” 42 U.S.C. 4332(2)(E). An EA can satisfy the requirements of section 102(2)(E) under both the 1978 regulations, at 40 CFR 1501.4(b), and the final regulations at § 1501.5(c)(2) (“Briefly discuss the purpose and need for the proposed action, alternatives as required by section 102(2)(E) of NEPA, the environmental impacts of the proposed action and alternatives, and include a listing of agencies and persons consulted.”). Additionally, the term “study” in section 102(2)(E) of NEPA is not defined in the statute, and thus is subject to reasonable interpretation by CEQ.

Comment: Commenters raised concerns that “reasonably foreseeable” is defined differently in § 1502.21(d) (proposed § 1502.22(d)) than in § 1508.1(z), and that the discrepancy could give rise to litigation.

CEQ Response: CEQ did not propose to revise the language in § 1502.21(d) (proposed § 1502.22(d)), which was revised in 1986. The 1986 rule clarified that “reasonably foreseeable,” as used in this paragraph, applies only to this subsection.

Comment: Commenters suggested that the regulations provide guidance or address when impacts may have “catastrophic consequences.” One commenter stated that there was no basis for limiting reasonably foreseeable impacts to those with “catastrophic consequences” and that the use of the term “significant” rather than “catastrophic” is more appropriate. One commenter requested that CEQ clarify that “impacts which have catastrophic consequences” do not equate to a “worst case scenario” consistent with *Robertson v. Methow Valley Citizens*, 490 U.S. 332 (1989).

CEQ Response: CEQ did not propose to revise § 1502.21(d) (proposed § 1502.22(d)), which was revised in 1986 to eliminate the requirement to prepare a “worst case analysis” and to make other revisions. The final rule makes a minor revision to change “which” to “that.” Based on implementation of this provision since 1986, there is not a need for further clarification of this section at this time.

Comment: In the definition of reasonably foreseeable, a commenter requested adding “environmental” before “consequences.”

CEQ Response: CEQ declines to make the requested revision because “consequences” refers to any catastrophic impact to the human environment including socio-economic impacts.

Comment: One commenter opposed eliminating 40 CFR 1502.22(c). The commenter contended this would further narrow Federal agencies' duties by eliminating the requirement that Federal agencies inform the public of "catastrophic consequences" if information is difficult to find or costly.

CEQ Response: The commenter may have misunderstood the proposed change. The final rule eliminated 40 CFR 1502.22(c) because it is obsolete. The provision clarified that the 1986 rule applied to all EISs for which an NOI was published after May 27, 1986, and that agencies had discretion whether to comply with the requirements of the original or amended regulation for EISs under development. Under the revised § 1502.21(c) (proposed § 1502.22(c)), CEQ has retained the provisions from the 1986 amendment requiring agencies to disclose the lack of information and provide additional information relevant to the analysis of reasonably foreseeable significant adverse effects.

19. Cost-Benefit Analysis (§ 1502.22)

Comment: Some commenters encouraged CEQ to require cost-benefit analyses for all major projects. Other commenters suggested CEQ should require agencies to determine whether a cost-benefit analysis is relevant to the choice among alternatives and document it in the draft EIS. Other commenters recommended that CEQ require cost-benefit analyses when a project impacts threatened or endangered species and ecosystems, or relevant to issues such as global warming. Other commenters recommended that CEQ require agencies to weigh economic benefits of a project against the impacts of the project on human health and the environment.

CEQ Response: As stated in § 1502.22 (proposed § 1502.23) of the final rule, and similar to the 1978 regulations, 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. Pursuant to § 1502.22 generally, and consistent with the final sentence of that provision, agencies may set out cost-benefit analysis as to quantitative considerations and otherwise set out non-quantitative consideration in qualitative terms. In the final rule, CEQ has made revisions for clarity, including changing from passive to active voice, and declines to make further revisions. Additionally, applications of NEPA to particular policy areas is beyond the scope of this rulemaking.

Comment: Some commenters suggested CEQ should add the phrases “to the human environment” and “relevant to the human environment” at the end of the first and second sentences respectively.

CEQ Response: CEQ has not revised this subsection. However, in the final rule, CEQ clarifies the definitions of effects to reference “the human environment” specifically. In the final rule, § 1508.1(g) defines “effects or impacts” as changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. The final rule definition of “human environment” also cross-references to the definition of “effects or impacts.” *See* § 1508.1(m).

Comment: Some commenters stated that the cost-benefit provision was confusing, especially when a project has a mix of monetized and un-monetized resource values.

CEQ Response: CEQ expects that the changes to this provision in the final rule, including changing the language from the passive to active voice and clarifying the reference to compliance with section 102(2)(B) of NEPA as ensuring consideration of unquantified environmental amenities and values in decision making, along with economical and technical considerations, will resolve the confusion.

Comment: Some commenters expressed general approval of the provision on cost-benefit analysis.

CEQ Response: CEQ acknowledges the commenters' approval.

20. Methodology and Scientific Accuracy (§ 1502.23)

Comment: CEQ received comments supporting the revisions to § 1502.23 (proposed § 1502.24). Commenters supported the use of modern technologies, including clarification that agencies may make use of remotely gathered information or statistical models, and reliance on reliable existing data and resources to promote efficiency and reduce duplication between Federal and State, Tribal and local requirements.

CEQ Response: In § 1502.23 (proposed § 1502.24), CEQ has revised the section to clarify that agencies should use reliable existing information and resources. CEQ has revised this section to allow agencies to draw on any source of information (such as remote sensing and statistical modeling) that the agency finds reliable and useful to the decision-making process. These changes promote the use of reliable data, including information gathered using current technologies. CEQ further notes that in addition to this section relating to methodology and scientific accuracy, other policies also apply including the Information Quality Act⁷¹ and the OMB Peer Review Bulletin.⁷²

Comment: One commenter suggested that the statement “[a]gencies are not required to undertake new scientific and technical research to inform their analyses” conflicted with the

⁷¹ Treasury and General Government Appropriations Act for Fiscal Year 2001, Public Law 106–554 sec. 515.

⁷² OMB Final Information Quality Bulletin for Peer Review, M–05–03 (Dec. 16, 2004), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2005/m05-03.pdf>.

requirements of § 1502.21(proposed § 1502.22), and suggested the language in § 1502.21 (proposed § 1502.22) be included in § 1502.23 (proposed § 1502.24) for consistency.

CEQ Response: In the final rule at § 1502.21, CEQ has clarified the difference between incomplete versus unavailable information. *See* §§ 1502.21. Unavailable information may require new scientific and technical research, and therefore is not required pursuant to § 1502.23 of the final rule nor, as described above, section 102(2)(E) of NEPA.

Comment: Commenters opposed the inclusion of language stating, “[a]gencies are not required to undertake new scientific and technical research to inform their analyses.” Some commenters asserted that it is often necessary for agencies to conduct additional surveys, studies, or new research, to inform their analysis. Other commenters stated that new research may be needed to understand the implications of choices, particularly with respect to new technologies and challenges, and particularly risky or unprecedented activities. Commenters stated that new research is often essential to designing the proposed action or complying with other environmental laws. Finally, some commenters stated that the inclusion of the new language would lead to uninformed decision making, or adverse effects, including for environmental justice communities. Other commenters stated that CEQ should clarify that environmental review should only entail gathering existing scientific research and data.

CEQ Response: CEQ has further clarified § 1502.23 (proposed § 1502.24) to state that “[n]othing in this provision is intended to prohibit agencies from compliance with the requirements of other statutes pertaining to scientific and technical research.” The language concerning new research is interpreted in the context of § 1502.21(b) (proposed § 1502.22(b)), which requires agencies to obtain available information essential to a reasoned choice between alternatives where the overall costs are not unreasonable and the means of obtaining that

information are known. Where the overall costs of either incomplete or unavailable information are unreasonable or means of obtaining the information are not known, agencies will continue to be required to disclose in the EIS and provide additional information to assist in analyzing the reasonably foreseeable significant adverse impacts. *See* § 1502.21(c).

In addition to other statutes, there may be regulations or Executive orders that require agencies to undertake scientific or technical research and would continue to apply under the final rule. As commenters have noted, new research may be required for complying with many of the environmental laws and regulations other than NEPA, such as monitoring and modeling for Clean Air Act compliance, wetland delineation for Clean Water Act compliance, or field surveys or assessments for ESA or National Historic Preservation Act compliance. Nothing in the final rule, including the revisions in § 1502.21 (proposed § 1502.22) and § 1502.23 (proposed § 1502.24), change the substantive requirements of those statutes that may require agencies to undertake new scientific or technical research.

Comment: Commenters recommended that agencies be allowed to conduct new research but limited in geographic scope and duration, and encourage agencies to share data and research.

CEQ Response: The final rule does not prohibit agencies from conducting new research nor does it set parameters such as those recommended by the commenters. Rather, the final rule clarifies that “unavailable information” includes new research. Agencies may be required to conduct new research under other statutory authorities.

Comment: Commenters stated that explicit authorization of remote sensing and statistical modeling was not necessary because it is already understood that such methods may be used. Some commenters requested clarifying that remote sensing and modeling do not substitute for

site-specific surveys. Other commenters requested that CEQ provide examples of statistical modeling that would be appropriate.

CEQ Response: Explicit authorization of remote sensing and statistical modeling will improve implementation of NEPA. Agencies should use their experience and expertise when assessing the reliability in determining what scientific and technical information is appropriate.

Comment: One commenter recommended that CEQ strike “reliable” before “existing data and resources.”

CEQ Response: CEQ declines to make the proposed revision. Inclusion of the term “reliable,” recognizes that the agency has discretion in determining what scientific and technical information is appropriate to inform the analyses and decision making.

Comment: Commenters recommended that CEQ clarify that the age of data is not necessarily determinative as long as it remains reliable. One commenter recommended that CEQ clarify that areas not accessible should be surveyed using aerial photography, remote sensing and mapping.

CEQ Response: CEQ has revised § 1502.23 (proposed § 1502.24) to clarify that agencies should use reliable existing data and resources. To the extent that information is unavailable, agencies are not required to conduct new scientific and technical research to obtain it. *See* § 1502.21. Agencies should use their experience and expertise when assessing the reliability in determining what scientific and technical information is appropriate to inform the analyses and decision making.

Comment: One commenter requested that CEQ indicate whether proposed revisions to § 1502.23 (proposed § 1502.24) would preclude agencies from conducting new surveys relating to specific species or habitats, whether the senior agency officials could extend the time limits

for such surveys, how agencies would comply with State protocols relating to multi-year surveys, and how agencies would comply with Federal statutes other than NEPA (e.g., ESA).

CEQ Response: CEQ has clarified in § 1502.23 of the final rule that nothing in this provision is intended to prohibit agency compliance with the regulations or other statutes. CEQ acknowledges that application of the final rule to proposed actions depends upon specific facts and analysis that is necessary for a particular proposed action in addition to compliance with other Federal statutes, protocols, or policies.

In the final rule, CEQ establishes presumptive time limits for environmental documents in § 1501.10. Under that section, senior agency officials of the lead agency may approve a longer period in writing and establish a new time limit. *See* § 1501.10(b). The senior agency official may consider, inter alia, state of the art of analytic techniques, the availability of relevant information, other time limits imposed on the agency by law, regulations or Executive order, as well as other factors. *See* § 1501.10(c).

Comment: One commenter recommended that CEQ provide guidance on reliable data sources, such as considerations related to completeness and accuracy, technical protocols or purposes and policies underlying data.

CEQ Response: The revisions in § 1502.23 (proposed § 1502.24) reinforce that agencies should make use of reliable existing data and resources. Because of the variety of proposed actions that may be subject to environmental reviews under NEPA, CEQ has not provided further direction as requested by the commenter; however, other Federal policies may apply. *See supra* note 26. As noted above, agencies should use their experience and expertise in evaluating data.

Comment: One commenter was concerned that agencies may discount the reliability of a study when disclosure of the underlying data would violate other laws and recommended adding “Agencies may not discount the reliability of scientific conclusions when the disclosure of underlying data is specifically barred by Federal law” to § 1502.23 (proposed § 1502.24).

CEQ Response: Pursuant to §1502.23 (proposed § 1502.24) as revised, agencies must ensure the professional integrity, including scientific integrity, of the discussion and analyses in environmental documents including making use of reliable existing data and resources.

Agencies may not ignore or discount information for the purposes of NEPA simply because public dissemination may be restricted. Federal policies address the use influential information that is subject to “compelling interests such as privacy, trade secrets, intellectual property, and other confidentiality protections.”⁷³ Agencies should refer to these policies where applicable.

See, e.g., supra note 26.

Comment: One commenter recommended that CEQ include language in § 1502.23 (proposed § 1502.24) stating that analysis of an impact is sufficient for NEPA purposes if analyzed pursuant to a Federal statutory scheme designed to regulate that impact.

CEQ Response: In the final rule, CEQ has addressed circumstances where the proposed action is an action for which other statutes serve the function of agency compliance with NEPA.

See §§ 1501.1(a)(6), 1507.3(c)(5).

⁷³ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies, 67 FR 8452 (Feb. 22, 2002), sec. V(3)(b)(ii)(B).

Comment: One commenter suggested that in addition to stating the agencies were not required to undertake new scientific and technical research, that quantification of impacts is not required and that qualitative impact analysis is often a more accurate analytical approach.

CEQ Response: Under both the 1978 regulations and the final rule, agencies must ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents. The use of quantitative or qualitative information remains a matter of application of agency expertise using generally accepted professional standards.

Comment: A commenter recommended that the NEPA regulations be more transparent in explaining how an agency will use information submitted by the applicant in the environmental review process. The commenter stated that, as proposed, the draft regulations require extensive consideration of materials submitted by “public commenters,” but it is less clear how the agency will use and/or respond to information provided by the applicant. The commenter raised concerns that in their experience the lead agency has ignored information provided by the applicant and instead redoes the analysis at significant cost, and that this is not efficient and contrary to the goals of NEPA.

CEQ Response: Section 1502.23 requires agencies to ensure the professional integrity, including scientific integrity, of the discussion and analyses in environmental documents. Implicit in this requirement is that agencies will include and consider in the analysis all reliable information submitted by an applicant.. In addition, the final rule directs agencies to agencies to incorporate material by reference, including planning studies, analyses or other relevant information. § 1501.12.

Comment: A commenter stated that technical and field study should end at the ROD or agency decision, and that concurrence, approvals, and permits be based on data available at the stage of the ROD.

CEQ Response: The final rule requires agencies to consider all of the alternatives, information, analyses and objections submitted pursuant to relevant provisions. *See, e.g.,* §§ 1501.9(d)(7), 1502.17, 1503.1 and 1503.3. The final opportunity to submit studies will typically be during the public comment period on the draft EIS, unless there is significant new information relevant to environmental concerns bearing on the proposed action or its impacts. *See* § 1502.9(d). To inform decision making, it is important for comments to be timely submitted so that the NEPA process is both predictable and completed within the applicable time limit.

21. Environmental review and consultation requirements (§ 1502.24)

Comment: Commenters requested CEQ eliminate “to the fullest extent possible,” from § 1502.24(a) (proposed § 1502.25(a)) arguing that many agencies fail to comply with this directive and routinely wait to complete other required consultations until after NEPA documents are finalized and all opportunity for public comment has passed.

CEQ Response: CEQ declines to strike the phrase “to the fullest extent possible” from § 1502.24(a) (proposed § 1502.25(a)) because there may be occasional instances where it is not feasible to fully document compliance with other Federal laws until after the agency completes its NEPA review, for example phased or tiered actions.

Comment: Commenters recommended that adding the Clean Water Act to the list of example statutes in § 1502.24(a) (proposed § 1502.25(a)).

CEQ Response: There are numerous examples that CEQ could include in this section. Therefore, CEQ retains the existing examples, but agrees that the Clean Water Act is one of the

statutes compliance with agencies should integrate into their EIS. To the fullest extent possible agencies shall prepare draft EISs concurrently with requirements of applicable Federal laws, including the Clean Water Act, where applicable. It is unnecessary to list all Federal laws or Executive orders that may be integrated with the NEPA process under § 1502.24 (proposed § 1502.25).

Comment: Commenters stated that the final rule should broaden § 1502.24(b) (proposed § 1502.25(b)) to include, State, Tribal, and local permits, licenses, and other authorizations or requirements to appropriately identify future hurdles and streamline project implementation.

CEQ Response: This provision does not preclude agencies from incorporating compliance with State, Tribal, and local requirements, and § 1506.2 provides that agencies should coordinate with State, Tribal, and local governments to the fullest extent practicable. For NEPA documents prepared by a State or by a Tribe under delegated authority from a Federal agency, it would be appropriate to include such authorizations.

Comment: Commenters stated that the current regulations do not require NEPA documents to include a list of applicable Tribal laws and regulations. Such a listing would help ensure compliance with Tribal legal requirements.

CEQ Response: Agencies may include a list of applicable Tribal laws and regulations, particularly in those instances where Tribes are cooperating agencies. However, it may not always be practicable for an agency to do so and therefore CEQ declines to make the requested change.

F. Comments Regarding Commenting on Environmental Impact Statements (Part 1503)

Comment: Commenters requested that CEQ extend the provisions in part 1503 to EAs.

The commenters noted that EAs are one of the most common forms of NEPA compliance documents and argued formal comment requirements for EAs is essential for informing the public about proposed Federal actions.

CEQ Response: As discussed in section II.C.5, the final rule retains the approach in the 1978 regulations for agencies to have significant flexibility to structure public involvement in EAs to the extent practicable. CEQ declines to apply the provisions in part 1503 to EAs.

1. Inviting Comments and Requesting Information and Analyses (§ 1503.1)

Comment: Commenters opposed the requirement at § 1503.1(a)(3) and stated that the invitation to comment on the completeness of the summary is unnecessary because agencies must invite comment on the entire draft EIS in § 1503.1(a)(2). Commenters further stated that § 1503.1(a)(3) creates a new litigation risk for project opponents to challenge an EIS.

CEQ Response: CEQ has revised § 1503.1(a)(3) in the final rule to clarify what information agencies are seeking comment on and has not included language relating to completeness. The invitation to comment on the submitted alternatives, information, and analysis and the summary thereof (§ 1502.17) supports the presumption of consideration under § 1505.2(b) and exhaustion provisions under § 1500.3(b). Therefore § 1503.1(a)(3), will reduce unnecessary litigation.

Comment: Commenters requested that CEQ revise the final rule to limit comments on the § 1502.17 summary to those that were: (a) not previously submitted; (b) not previously

available or could not have reasonably been available; or (c) in response to new positions or information not included in the draft EIS.

CEQ Response: The draft EIS comment period invites comments generally and § 1503.1(a)(3) invites “comment[s] specifically on the submitted alternatives, information, and analyses and the summary thereof (§ 1502.17).” To ensure information can be considered by the agencies in developing the draft EIS, commenters should identify all relevant alternatives, information, and analyses during scoping as soon as practicable.

Comment: Commenters raised concerns that § 1503.1(a)(3) limits public comment on the draft EIS to only the completeness of the summary of the submitted alternatives, information, and analyses section (§ 1502.17) thereby excluding comment on the proposed action and the draft EIS as a whole.

CEQ Response: In response to comments, CEQ has revised portions of this process including revisions to § 1503.1(a)(3) to clarify what information agencies must request from the public and has not included language on completeness. The information requested pursuant to § 1503.1(a)(3) is in addition to the information requested pursuant to § 1503.1(a)(2) which continues to require the agency to request the comments of the public. The final rule revises § 1503.1(a)(2)(v) to clarify that agencies should affirmatively solicit comments in a manner designed to inform those persons or organizations who may be interested in or affected by the proposed action.

Comment: Commenters supported the proposed changes at § 1503.1(c) for agencies to accommodate the electronic submission of public comments, provided the comment process is accessible to affected persons. Commenters stated that this requirement would improve the public’s ability to participate in the NEPA process.

CEQ Response: CEQ acknowledges the comment.

Comment: Commenters requested that CEQ revise the final rule to include “timely” before “comments” in §§ 1503.1(a)(1) and (a)(2), and 1503.2 for consistency with agencies’ duty under § 1503.4 to “consider substantive comments timely submitted during the public comment period.”

CEQ Response: The language as drafted is clear, and the requested revision is not necessary.

Comment: Some commenters expressed concern that they would be restricted from participating in public processes later in the development of an EIS if they did not participate initially.

CEQ Response: There are no provisions in the final rule that would limit participation later in the process to only individuals and entities that participated earlier. Any member of the public can participate in scoping and public commenting.

Comment: Commenters expressed concern that striking the reference to Office of Management and Budget (OMB) Circular A-95 in 1503.1(2)(iii) removes the President’s statutory responsibility to use OMB as a tool for communication between the lead Federal agency and State, Tribal, and local agencies. Commenters stated that this would leave it up to the lead agency alone to complete this task in a manner that is considered thorough and complete, that the burden of communication falls directly on the lead agency, and that removal of this specialized task force will provide more work for the lead agency, which is already having a hard time keeping up with the workload.

Response: CEQ proposed to eliminate the reference because it was obsolete. OMB Circular A–95 no longer exists because it was revoked pursuant to section 7 of E.O. 12372.⁷⁴

Comment: A commenter expressed concern that the proposed rule appears to conflict with existing regulations under 36 CFR part 218, which identifies an administrative review process for the U.S. Forest Service including a 45–day time period for filing of pre-decisional objections to final analyses and draft decision documents at 36 CFR 218.26(a). A commenter requested further changes to explicitly allow for existing agency-specific objection regulations or include a clear statement that if agency regulations require longer timeframes, the timeframes at § 1500.3(b)(3) would apply instead. In addition, the references to an EIS comment period (as per §§ 1503.1 and 1503.3) only refer to one period, when the Forest Service has two public involvement periods—one called “comment” and one called “objection.” To elaborate on the response directly above, the Forest Service releases a draft EIS and has a 45–day comment period. Then, it uses the comments to adjust the document—producing a final EIS and a draft ROD, in which the Forest Service has a 45–day objection period. Although it is standard for the Forest Service to have a 45–day objection period under 36 CFR part 218 regulations, the Forest Service can require a 90–day objection period under 36 CFR part 219 Plan Amendment regulations. The commenter requested that CEQ make changes to reconcile § 1506.11 with U.S. Forest Service procedures.

CEQ Response: The final rule does not require a 30–day comment period on the final EIS summary of alternatives, information, and analysis, and therefore addresses the commenters concern regarding conflict with § 1500.3(b)(3). The flexibility requested by the commenter is

⁷⁴ 47 FR 30959, July 16, 1982.

reflected in § 1506.11(c), which establishes the circumstances for an exception to the time periods in § 1506.11(b). As to the extensive references to Forest Service regulations, those are beyond the scope of this rulemaking but § 1507.3 requires agencies to update their specific NEPA procedures to conform to the final rule.

2. Duty to Comment (§ 1503.2)

Comment: Commenters requested that CEQ revise §§ 1503.2 and 1503.3(d) in the final rule to clarify the scope of an agencies duty to comment and request or require mitigation. Some commenters stated that agencies should limit their comments and mitigation requirements to those issues within their jurisdiction by law or special. Other commenters stated that agencies with a duty to comment should be able to comment on the entire EIS and request or require mitigation regardless of their statutory authority to approve or grant a permit or license. Other commenters requested CEQ reinstate § 1503.3(d) without the proposed revisions.

CEQ Response: The final rule clarifies that any mitigation measures specified by a cooperating agency must cite its applicable statutory authority. § 1503.3(e). The final rule at § 1508.1(s) also clarifies that NEPA does not mandate the form or adoption of any mitigation. CEQ declines to make further changes to address the commenters' concern.

Comment: A commenter expressed concern with the proposed changes to § 1503.2 requiring comment from Federal agencies with jurisdiction to simply cooperating agencies. The commenter expressed concern that the proposal could remove the duty of commenting from the Federal agencies, which means there will be less scrutiny on the project and less work for the Federal agencies to complete.

CEQ Response: The proposed change does not affect the duty to comment by Federal agencies with jurisdiction by law or special expertise. Any Federal agency with jurisdiction by

law is required to be a cooperating agency, and any Federal agency with special expertise may be a cooperating agency upon request of the lead agency (§ 1501.8(a)). A Federal agency with special expertise may only deny a request for cooperation in preparing an environmental document with notice to CEQ and the senior agency of the lead agency. § 1501.8(c). The proposed change to § 1503.2, which CEQ is finalizing, would only remove the duty to comment from agencies with special expertise that are not cooperating agencies. Such agencies may nonetheless submit comments as a participating agency.

3. Specificity of Comments and Information (§ 1503.3)

Comment: Commenters supported proposed revisions to § 1503.3(a) that clarify the types of information contained in comments that promote informed decision making and the provision of supporting data and methodology. Commenters noted that these clarifications would guide the public on what information to provide in their comments. Commenters noted that these clarifications encourage agencies and professional organizations to submit comments that identify data sources that support their position on a given issue, and that increased specificity in comments would improve the quality of a final NEPA document.

CEQ Response: CEQ acknowledges commenters' support for the proposed revisions.

Comment: Commenters raised concerns with the use of the word "shall" in § 1503.3(a) and requested that CEQ use the word "should." Commenters also raised concerns with the level of detail, specificity, and sophistication required in comments by § 1503.3(a). Commenters noted the use of the word "shall" in § 1503.3 effectively requires the public to submit comments that are "as specific as possible" and "provide as much detail as necessary." Commenters also stated that these requirements place members of the public in a Catch-22, either risking an agency dismissing their comment as not being specific enough or risking being charged for

violating professional State board standards, for example, practicing engineering without a license, if their comments are too specific. Other commenters suggested the proposed changes would create a “pay-to-play” system in which interested commenters must hire experts, in order to have their comment considered. Commenters also stated that these requirements place members of the public in a Catch-22, either risking an agency dismissing their comment as not being specific enough or risking being charged for violating professional State board standards, for example, practicing engineering without a license, if their comments are too specific. Other commenters suggested the proposed changes would create a “pay-to-play” system in which interested commenters must hire experts, in order to have their comment considered.

Other commenters stated that the proposed changes would discourage and possibly preclude public comment particularly from laypersons or environmental justice communities, including Tribal communities. Commenters noted these commenters often have relevant information gleaned from personal experience with the potentially impacted environment but may hesitate to share their knowledge with Federal agencies particular when faced with a perception that their comments need to satisfy a level of detail, specificity, and sophistication.

CEQ Response: CEQ declines to amend § 1503.3(a) in the final rule by replacing the word “shall” with the word “should.” The 1978 regulations used the phrase “shall be as specific as possible” and this language is unchanged in the final rule. The intent of the additional language is to guide commenters in providing information in a manner that is most useful for informed decision making, and not intended to limit public comment or preclude consideration of substantive comments. This guidance is consistent with legal precedent (“NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon [parties] who wish to participate to structure their

participation so that it is meaningful, so that it alerts the agency to the [parties'] position ... [t]his is especially true when the [parties] are requesting the agency to embark upon an exploration of uncharted territory..." See *Pub. Citizen*, 541 U.S. at 764, quoting *Vt. Yankee*, 435 U.S. at 553).

Commenters are free to hire experts to present their comments and agencies must consider all substantive comments timely submitted pursuant to § 1503.4(a). But the proposed changes do not necessitate the public to hire experts to prepare comments on their behalf. Further, the final rule includes a number of changes to improve public notification and involvement in the NEPA process. The final rule clarifies that agencies should select appropriate methods for public involvement and provides agencies with the flexibility to determine which methods of public involvement are appropriate. The changes in the final rule allow agencies to consider the most effective and efficient methods to involve potentially affected communities, and will encourage public participation by individuals with relevant information gleaned from personal experience with the potentially affected environment.

Comment: Commenters stated that the proposed rule increases burdens on public commenters while decreasing agencies' obligation to consider and respond to comments. Commenters raised concerns that changes to §§ 1501.9 and 1503.3(b) shifts responsibility for analyzing a project's impacts and evaluating alternatives from the lead agency and applicant to the public. Commenters stated that these changes, and the inclusion of "economic and employment impacts" prioritize the interest of private companies and project proponents over the public's right to comment.

CEQ Response: The final rule, including §§ 1501.9 and 1503.3, does not shift responsibility for analyzing a project's impacts and evaluating alternatives from the lead agency and applicant to the public. Under the final rule, as revised, agencies must solicit public

comment earlier in the process and to affirmatively invite commenters to suggest alternatives to the proposed action and submit information and analyses the agency has not considered. The final rule reinforces the agency's responsibility for the accuracy, scope, and content of the EIS (§ 1506.5). The final rule also requires the agency to summarize and publish this information (§ 1502.17) and requires the decision maker to certify that the agency has considered all of the alternatives, information, analyses, and objections submitted by State, Tribal, and local governments and public commenters (§ 1505.2(b)). These changes invite State, Tribal, and local governments, and the public to engage in the NEPA process in a more a meaningful way but do not shift responsibility from the agency. Furthermore, the Act recognizes that economic and technical considerations are part of the decision making process. *See* 42 U.S.C. 4331(a) and 4332(2)(B). Inclusion of economic and employment impacts benefits the public and aids the decision making process.

Comment: Commenters raised concerns that the proposed language in § 1503.3(b) prohibits the consideration of new and substantive information submission by the public or other commenters outside of the comment periods. Commenters stated that there are instances when interested stakeholders may not be able to comment during the comment period due to seasonal workloads or other time constraints. Commenters suggested longer public comment periods (60 days) would provide the public sufficient time to provide substantive comments. Commenters requested that CEQ revise § 1503.3(b) to allow agencies to extend public comment periods when necessary. Other commenters requested CEQ revise § 1503.3(b) to allow agencies to consider new and substantive information submitted outside of the comment periods.

CEQ Response: In response to comments, CEQ has revised the final rule to remove the requirement of a 30-day comment period on the final EIS; however, agencies may request

comments on the final EIS and set a deadline for providing such comments. Additionally, the public has multiple opportunities to provide information to the agency during the NEPA process as the analysis on the proposed action is refined including scoping and in response to the draft EIS. To inform decision making, it is important for comments to be timely submitted so that the NEPA process is both predictable and completed within the applicable time limit. CEQ revised the relevant language in § 1503.3(b) to clarify that comments and objections must be submitted within the deadline for submitting comments on the draft EIS, and where not submitted are unexhausted and forfeited. The comment periods are sufficient to provide commenters a meaningful opportunity to provide public comment. CEQ recognizes that commenters may have different circumstances and workloads. CEQ notes that § 1506.11 provides flexibility to agencies to set the relevant comment period on the draft EIS.

Comment: Commenters requested that the phrase “exhausted and forfeited” be eliminated from §§ 1500.3(b) relating to exhaustion and 1503.3(b) and replaced with the following: “Comments on the final environmental impact statement are most helpful prior to release of the record of decision. The public may object to the final decision in the record of decision through an agency’s objection process, or judicial review.”

CEQ Response: CEQ declines to remove the phrase “unexhausted and forfeited” from §§ 1500.3 and 1503.3 in the final rule. The exhaustion provisions in §§ 1500.3(b) and 1503.3(b) help to establish a predictable and timely NEPA process with substantive comments and information timely submitted during comment periods.

Comment: Commenters requested that CEQ explain and provide legal support for the inclusion in § 1503.3(e) the requirement that cooperating agencies, including Tribal nations, “shall cite to its applicable authority” when it specifies mitigation measures it considers

necessary to grant or approve applicable permit, license, or related requirements or concurrences. Commenters stated that CEQ did not provide an explanation or definition of “applicable authority” as used in this clause.

CEQ Response: CEQ added the requirement in § 1503.3(e) that cooperating agencies cite to their own organic statutes when requiring a mitigation measure it considers necessary to grant or approve an applicable permit in order to clearly reflect the enforcement authority for required mitigation. For State, Tribal, or local agencies that are cooperating agencies their applicable authority would be their relevant State, Tribal, or local law that would authorize mitigation in connection with the proposed project. CEQ included this requirement because NEPA is a procedural statute and does not require mitigation.

Comment: A commenter recommended clarifying § 1503.3(a) to encourage specificity and detail in comments submitted on a proposed action during the scoping process.

CEQ Response: It is helpful for commenters to provide detailed comments during scoping. In the final regulations in § 1501.9(d), CEQ directs agencies to include more detailed information in the NOI to prepare an EIS, and expressly directs agencies to invite public comment on potential alternatives, information and analyses relevant to the proposed action. However, given that scoping occurs early in the process with more limited information available, CEQ declines to provide a similar level of specificity on commenting as for the draft EIS.

4. Response to Comments (§ 1503.4)

Comment: Commenters requested CEQ define “substantive.” Other commenters requested CEQ clarify that the lead agency has the flexibility to determine that comments are substantive even if the comments do not “explain why the issue raised is significant to the consideration of potential environmental impacts and alternatives to the proposed action, as well

as economic and employment impacts...” This flexibility is needed because despite the phrasing of the comments, the information in the comments may be relevant or helpful to agency decision making.

CEQ Response: CEQ declines to define “substantive” and agrees that agencies should have the flexibility to determine comments that are substantive. Section 1503.3(a) of the final rule recommends comments explain why the issue raised is important to the consideration of potential environmental impacts and alternatives to the proposed action, as well as economic and employment impacts. This recommendation guides commenters to provide information in their comment that would aid the agency in understanding and addressing a commenter’s concern.

Comment: Commenters noted proposed § 1503.4(a) states that “[a]n agency preparing a final environmental impact statement shall consider substantive comments timely submitted during the public comment period...” Commenters stated that this implies that agencies are prohibited from considering substantive comments submitted outside of formal comment periods. Commenters observed those comments can contain useful information and ignoring such comments would also discourage stakeholder participation in the NEPA process.

CEQ Response: CEQ has made revisions to § 1503.4 in the final rule for clarity. The public has multiple opportunities to provide information to the lead agency during the NEPA process, including during scoping and in response to the draft EIS. It is important for substantive information to be timely submitted so that the NEPA process is both predictable and completed within the applicable time limit. Section 1502.9 of the final rule addresses the situation when new circumstances or information relevant to environmental concerns arises after issuance of a draft EIS.

Comment: Commenters objected to changes in proposed § 1503.4(a) and stated that it reduces agencies' duties to respond to comments by changing "shall respond" to "may respond." Commenters noted § 1503.4(a) states in pertinent part that "[a]n agency preparing a final environmental impact statement shall consider ... and may respond ..." Commenters requested CEQ reinstate the requirement that agencies must respond to comments.

CEQ Response: CEQ has revised § 1503.4(a) in the final rule to clarify that agencies may respond to individual comments or groups of comments. The revised language is not a change in agency position. Under the 1978 regulations, Federal agencies had the flexibility in terms of structuring their responses to public comments. Further, under the APA agencies have a duty to respond to significant public comments. The final rule lists several ways in § 1503.4(a)(1)–(5) in which an agency may respond to comments and information received on the draft EIS, and CEQ has clarified in the final rule that agencies need not respond to each individual comment.

Comment: Commenters objected to proposed changes to § 1503.4(a)(5) and stated that the changes erode an agency's duty explain why comments do not warrant further agency response by removing requirements to cite sources and information which support the agency's position. Commenters noted that proposed changes to § 1503.3 require the public to cite sources and reference corresponding sections or page numbers, but proposed changes to § 1503.4 remove a requirement for a similar level of citation from agencies when responding to comments. Commenters stated that agencies may abuse the removal of the citation requirements by refusing to consider comments that address issues that the agency or a project proponent does not wish to consider or does not recognize for the important issues they may raise.

CEQ Response: CEQ disagrees with the characterization of the proposed changes.

Under the regulations as revised, agencies must consider substantive comments and its APA duty is to consider significant comments, and neither statute requires an agency to explain the reason a particular comment does not warrant further response under the governing legal standards. The final rule includes revisions to § 1503.4 to clarify agencies' duties to consider and respond to comments. The citation requirement in 40 CFR 1503.4(a)(5) was duplicative of writing and citation requirements in other sections of the regulations. The final regulations continue to require that agencies ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents, and to require agencies to identify any methods used and make explicit reference to the scientific and other sources relied upon for conclusions in the statement. § 1502.24.

Comment: Commenters expressed support for the proposed revisions to § 1503.4 to clarify agencies may respond to comments collectively and stated that form letters should be treated as a single comment regardless of the number of submitters or the volume of submissions.

CEQ Response: CEQ acknowledges commenters support for the clarification.

Comment: Commenters requested CEQ amend § 1503.4 by including a requirement that an agency consult with any applicant regarding changes made as a result of comments received. Commenters stated that applicants should be provided with a formal opportunity to submit additional information responsive to public comments and discuss with the agency any proposed changes to the proposed action or alternatives prior to the agency's development of a Final EIS. Commenters explained applicants have particular knowledge about the proposed activities and

can provide detailed information regarding technical issues or the feasibility of a proposed modification.

CEQ Response: CEQ declines to add the requested requirement to § 1503.4. The final rule includes several changes that improve coordination between agencies and applicants, including allowing applicants to prepare environmental documents under the supervision of the agency. § 1506.5. Agencies may include in their implementing procedures criteria for consultation with an applicant or project proponent prior to responding to comments and development of the final EIS.

Comment: Commenters stated that § 1503.4(c) is not clear and requested CEQ clarify what the agency should do if the changes to the EIS are not minor. Commenters asked if the agency needs to rewrite the entire final EIS, or utilize a supplemental EIS. Other commenters requested CEQ revise § 1503.4(c) to require the agency to publish the final EIS in its entirety incorporating any changes in response to comments on the draft EIS.

CEQ Response: CEQ proposed minor changes to the 1978 regulations to clarify § 1503.4(c). The existing language has not been a source of confusion for agencies, and CEQ declines to make further changes to address the commenters' requests.

G. Comments Regarding Pre-Decisional Referrals to the Council of Proposed Federal Actions Determined to Be Environmentally Unsatisfactory (Part 1504)

Comment: Commenters requested that the final rule add a process for resolving concerns earlier in the NEPA process at the draft EIS stage or sooner, so that referrals are not deferred until after the final EIS. Commenters requested that the final rule adjust the time period for delivering referrals to CEQ because delivering referrals 25 days after the lead agency has published the final EIS is too late in the process to be useful. Commenters requested the final

rule limit the right to invoke a referral unless the agency requesting a referral raised its concern with the lead agency earlier in the environmental review process, preferably no later than during the comment period for the draft EIS.

CEQ Response: The final rule in § 1504.3(b) retains the operative language from the proposed rule and 1978 regulations regarding the timing of referrals. Under § 1504.3(a), the referring agency must advise CEQ at the earliest possible time that it intends to make a referral and include its advice on the draft EA or EIS when it is practicable to do so. CEQ declines to make the requested changes to require the referral process to begin earlier or to place prerequisites on the right to seek a referral.

Comment: Commenters stated that the final rule should clarify the referral process as to how it may affect the applicability of the time limits to the final decision. Commenters requested that the regulations clearly state that an agency would not sign a final decision until CEQ completes its actions and the recommendations of the referring agency are addressed.

CEQ Response: The time limits in § 1501.10 do not include the time that would be needed for CEQ to review a pre-decisional referral. CEQ notes that a senior agency official could consider a pre-decisional referral when extending the time limits.

Comment: Some commenters requested expanding the pre-decisional referral process to include EAs. Other commenters opposed such an expansion because it could undercut the authority of the lead agency to determine significance, especially when the lead agency is preparing an EA in order to determine whether it should prepare an EIS.

CEQ Response: The final rule expands the pre-decisional referral process to EAs. The pre-decisional referral process allows for continued discussion with the lead agency regarding a

significance determination. CEQ expects that the pre-decisional referral of EAs will arise infrequently because effects analyzed in EAs typically do not rise to the level of significance.

Comment: A commenter recommended the addition of the phrase “the human environment” where “effects,” “impacts,” “resources,” and “environmental quality” are used in §§ 1504.1, 1504.2, 1504.3.

CEQ Response: CEQ declines to adopt this recommendation in the final rule. The definition of “effects” or “impacts” in § 1508.1(g) already associates those words with “the human environment.” Adding the recommended language in connection with “resources” and “environmental quality” is not necessary.

1. Purpose (§ 1504.1)

Comment: Commenters expressed concern regarding the lack of transparency with EPA’s review and comment process under section 309 of the Clean Air Act and requested additional disclosures and ratings. Commenters stated that agencies should be required to make EPA’s comments and all records regarding the referral process publicly available.

CEQ Response: EPA’s procedures under section 309 of the Clean Air Act are outside the scope of this rulemaking. CEQ declines to require additional disclosures regarding the referral process in the final rule.

Comment: Commenters asked whether the EPA has a time limit for its review and comment on EISs under section 309 of the Clean Air Act (42 U.S.C. 7609).

CEQ Response: While section 309 of the Clean Air Act does not specify a timeframe for EPA’s review and comments, § 1504.3(b) of the final rule requires that any pre-decisional referral to CEQ occur no later than 25 days after the final EIS has been made available to EPA.

2. Criteria for Referral (§ 1504.2)

Comment: Some commenters recommended that CEQ include in § 1504.2(g) consideration of the benefits as well as the costs of delaying or impeding the decision making of the agencies involved in the action. Some commenters recommended that the final rule delete § 1504.2(g) because the proposed addition of economic and technical considerations is contrary to the intent of section 102(2)(B) of NEPA. Commenters pointed to the Senate Report accompanying NEPA, which explains that, in the past, agencies have ignored or omitted from consideration environmental factors because they are difficult to compare with economic and technical factors. Commenters also noted that the Senate Report refers to the “full costs” of Federal actions, which include the costs of environmental attributes such as natural barriers to flooding that could be adversely affected by Federal actions. Some commenters stated that the economic costs of the delay should not be relevant when the project has not begun. Commenters stated that purely economic interests do not fall within NEPA’s zone of interest, so economic and technical considerations should not be part of pre-decisional referrals. Some commenters stated that the inclusion of economic and technical considerations gives undue weight to industry economic interests and impedes industry innovation. Some commenters requested a public accounting of economic damages from Federal permitting or land management planning where agency decision makers are balancing impacts. Some commenters suggested the use of a category for extraordinary or unusual circumstances. Other commenters supported the addition of economic and technical considerations as a criterion for referral.

CEQ Response: CEQ declines to make further changes in response to the comments and includes § 1504.2(g) in the final rule. NEPA does not require consideration of costs and benefits for pre-decisional referrals to CEQ. The inclusion of economic and technical considerations is

grounded in section 102(2)(B) of NEPA. The economic costs of delaying or impeding the agency decision making on the action are only one of the seven considerations for the referring agency in § 1504.2, to be balanced with possible violation of national environmental standards or policies. The other five are, severity, geographical scope, duration, importance as precedents, and availability of environmentally preferable alternatives.

3. Procedure for Referrals and Response (§ 1504.3)

Comment: Commenters requested clarification on who determines what is “practicable” as used in § 1504.3(a)(2).

CEQ Response: As stated in section II.A of the final rule, the term “practicable” conveys the ability for something to be done, considering the cost, including time required, technical and economic feasibility, and the purpose and need for agency action. As used in § 1504.3(a)(2), the referring agency will determine what is “practicable.”

Comment: Commenters stated that CEQ did not explain in the NPRM the proposed change in § 1504.3(c)(1) striking language from the 1978 regulations requiring the referral letter to request that no action be taken during the referral process.

CEQ Response: CEQ strikes this language from the 1978 regulations because it overly constrained the request from the referring agency. The referring agency has multiple options when submitting a referral, and a request for no action to be taken during the referral process is only one potential option. Further, the lead agency can make a determination on whether and to what extent such a delay is appropriate. CEQ notes that because the pre-decisional referral process necessarily occurs before a final agency decision, no irreversible or irretrievable commitment of resources can be made.

Comment: Commenters stated that the NPRM did not adequately explain the proposed change from “in controversy” to “disputed” in § 1504.3(c)(2)(ii).

CEQ Response: CEQ changes this language for clarity. “Disputed material facts” is a phrase that is commonly used in fact finding proceedings.

Comment: Commenters requested clarification regarding § 1504.3(d)(2), and whether explanations would replace evidence, or if evidence would be required along with explanations.

CEQ Response: The final rule retains the phrase “evidence and explanations, as appropriate,” to allow for flexibility in providing supporting bases for the referral.

Comment: Commenters stated that CEQ did not explain the proposed change in § 1504.3(e) that would narrow the reference from “interested persons” to the “applicant.”

CEQ Response: CEQ makes the proposed change in the final rule. The inquiry for the pre-decisional referral process is focused on the applicant as the most directly affected person or entity. It provides further clarity and emphasizes the importance of the applicant articulating its views about the referral within the allotted time period. Interested agencies or persons may continue to submit their views to CEQ for consideration outside of the pre-decisional referral process in § 1504.3(e).

Comment: Commenters stated that CEQ did not explain the change in § 1504.3(f)(3) that would eliminate the reference to public meetings or hearings as a means of obtaining additional views and information.

CEQ Response: CEQ strikes this language from the 1978 regulations because there are a variety of effective means, including public meetings and hearings, for CEQ to obtain views from the public. Although no longer expressly mentioned in § 1504.3(f)(3), public meetings and hearings are neither discouraged nor precluded.

Comment: Some commenters requested that the final rule define the term “President” as used in § 1504.3(f)(7).

CEQ Response: The term “President” in § 1504.3(f)(7) refers to the President of the United States.

Comment: Some commenters requested that the final rule change the language “25 days after receipt” in § 1504.3(f) to “60 days after receipt,” and change the “60 days” CEQ has to complete its actions to “120 days” in § 1504.3(g).

CEQ Response: CEQ declines to adopt the recommended changes. Based on past experience with pre-decisional referrals, it is not necessary to extend the referenced time periods.

Comment: Commenters stated that pre-decisional referrals to CEQ increase project costs and delays, and requested that the applicant’s position be included as a consideration for and during the referral process.

CEQ Response: CEQ declines to make the requested changes to add the applicant’s position as a criterion for referral. Section 1504.2(g) sufficiently encompasses economic considerations. The final rule in § 1504.3(e) retains the language from the proposed rule that allows applicants to submit their views during the pre-decisional referral process.

Comment: Commenters stated that CEQ had not explained the changes in § 1504.3(h) regarding judicial review, no private right of action, final agency action, and the deletion of the language of the 1978 regulations regarding an agency hearing under the APA. Commenters suggested that removal of the existing language would permit agencies and CEQ to circumvent the APA and is otherwise inconsistent with NEPA’s goals. Some commenters supported the proposed change because it could streamline the NEPA process and avoid time spent in litigation.

CEQ Response: The final rule includes this proposed change. As the preamble to the 1978 regulations explains, CEQ adopted 40 CFR 1504.3(h) at that time after some commenters noted that several agency statutes require determinations to be made on the record after an opportunity for a public hearing. Thus, the purpose of 40 CFR 1504.3(h) was to restate the prohibition on ex parte communications with agency decision makers that may be applicable in various contexts under the relevant statutes. The language in 40 CFR 1504.3(h) was duplicative of existing law.

By deleting the sentence in the final rule, CEQ does not change agency obligations under 5 U.S.C. 557(d) when participating in the CEQ referral process. Instead, CEQ's replacement language in § 1504.3(h) more accurately reflects the legal requirements of the APA and correctly notes that the outcome of a referral is "dependent on later consistent action by the action agencies." As CEQ explained in the preamble to the proposed rule, the language in § 1504.3(h) will simplify and modernize referrals to CEQ and ensure that it is a more timely and efficient process. CEQ achieves this purpose by updating § 1504.3(h) to reflect that voluntary resolutions under the referral process are not final agency actions subject to judicial review. Moreover, it does not deprive stakeholders of judicial review that would otherwise be available under the APA or the relevant agency statutes that bar ex parte communications. The final rule simply restates the law and clarifies the role of the referral process in agency adjudication. Judicial review and APA or statutory restrictions on ex parte communications were and remain dependent on the underlying agency statutes governing the relevant action at issue in a referral.

H. Comments Regarding NEPA and Agency Decision Making (Part 1505)

1. Remove and Reserve Agency Decisionmaking Procedures (§ 1505.1)

Comment: Commenters opposed striking § 1505.1 because it includes useful information that NEPA practitioners use all the time and are not fully recognized in the revisions.

CEQ Response: In the final rule, CEQ incorporates the text of 40 CFR 1505.1, “Agency decisionmaking procedures,” to § 1507.3(c). CEQ also adds a requirement for certification by the decision maker in § 1505.2(b) as a more transparent method to document the decision-making process.

Comment: Commenters expressed support for moving § 1505.1 to part 1507 on agency compliance. Commenters also supported the proposed clarifications to § 1505.2.

CEQ Response: CEQ acknowledges the support for the changes.

2. Record of Decision in Cases Requiring Environmental Impact Statements (§ 1505.2)

Comment: Commenters stated that proposed § 1501.7(g), which would require that Federal agencies issue a joint ROD when practicable, has yet to be successfully demonstrated. Commenters stated that interagency conflicts have caused considerably more delay than if the respective agencies had prepared environmental reviews.

CEQ Response: The final rule integrates the expectations for timing and efficiency of FAST-41 and E.O. 13807. Joint RODs have been issued and provide greater certainty in the decision-making process. They allow the Federal Government to speak with a coordinated voice when conducting environmental reviews and making authorization decisions. Agencies retain the flexibility to forgo a joint ROD where they determine that it will be more efficient to issue separate RODs.

Comment: Commenters requested CEQ clarify that the decision maker is not obliged to select any alternative in its entirety, but may select elements of one or more alternatives when arriving at a final action. As long as the agency considers and discloses the effects of each part of the final action, explicitly preserving the flexibility for a decision maker to select parts of different alternatives, this also preserves agencies' ability to create the best possible action.

CEQ Response: Consistent with long-standing practice, agencies may select a final action that falls within the range of environmental analysis, even if elements are contained in multiple alternatives. Section 1505.2 allows flexibility for an agency decision maker to select elements of one or more alternatives when arriving at a final action.

Comment: Commenters expressed support for proposed § 1502.18, "Certification of submitted alternatives, information, and analyses," and noted the new certification requirement ensures that the agency carefully reviews comments from the public.

CEQ Response: CEQ acknowledges the support for the proposed changes and notes that the final rule includes this provision in § 1505.2(b)).

Comment: Commenters objected to proposed § 1502.18 and stated that the certification of submitted alternatives, information, and analyses section is a new EIS requirement that is not required by NEPA.

CEQ Response: The consideration of submitted alternatives, information, and analyses is central to the NEPA process. Certification by the decision maker as provided in § 1505.2(b) will ensure the agency considered all alternatives, information, and analysis submitted by State, Tribal, and local governments as well as the public. This step will improve the NEPA process and help achieve the Act's twin aims of ensuring informed decision making and informing the public regarding the decision making process.

Comment: Commenters objected to and expressed concerns regarding the requirement at proposed § 1502.18 for a senior agency official to certify in the ROD that the agency has considered the information contained in the § 1502.17 summary of the EIS. Commenters stated that the certification is unnecessary because the publication of a final EIS represents the agency's certification of the EIS. Further, commenters stated that § 1503.4 already requires an agency to consider substantive comments submitted during the public comment period. Similarly, the ROD represents the decision of the agency and should not need additional certification by a senior agency official.

CEQ Response: The final rule in § 1505.2(b) requires certification by the decision maker who is signing the ROD. While the senior agency official may also be the decision maker for some agencies, the identification of who in the agency is the decision maker for particular actions is governed by applicable law and agency procedures (including delegation of authority). This certification supports the presumption under § 1505.2(b).

Comment: Commenters objected to proposed § 1502.18 and stated it would reduce an agency's obligation to respond to comments because § 1502.18 requires a certification that the agency has considered this information without evidence to support the certification. Commenters requested CEQ revise proposed § 1502.18 to require agencies to consider and discuss in the final EIS or ROD all timely and relevant comments and include all comments received and agency responses to them. Other commenters requested CEQ revise proposed § 1502.18 to require the decision maker to verify that the agency provided a "hard look" consideration prior to certifying that the agency considered the submitted information.

CEQ Response: Agency decision makers must base their decisions on the entire decision file, and the ROD must reflect that consideration. The final rule in § 1505.2(b) adds the

requirement that the decision maker certify in the ROD that the agency has considered submitted alternatives, information, analyses, and objections. This certification requirement supplements the requirement in § 1503.4 that agencies consider substantive comments timely submitted during the public comment period.

Comment: Commenters expressed concern that the “certification” requirement in proposed § 1502.18 is based solely on the EIS “summary” described in § 1502.12. Commenters stated that, compared to the level of information and analysis provided in the entire EIS, the summary is an inadequate basis to make such a certification. Commenters requested the final rule change the wording to say the “certification” will “based on the findings of the environmental impact statement.”

CEQ Response: In response to comments, the final rule in § 1505.2(b) clarifies that the decision maker must certify the EIS based on the summary of submitted alternatives, information, and analyses in the final EIS “together with any other material in the record that he or she determines to be relevant.” The additional language encompasses any findings, alternatives, information, and analyses that the decision maker deems relevant. *See also* § 1505.2(b) (“Agency environmental impact statements certified in accordance with this section are entitled to a presumption that the agency has considered the submitted alternatives, information, and analyses, including the summary thereof, in the final environmental impact statement.”).

Comment: Commenters requested revisions to proposed § 1505.2(e) providing for an agency’s certification in the ROD to strike “submitted” in the first occurrence of this word and to add that the decision maker has reviewed the final EIS, and fully understands the issues,

alternatives, and impacts, and to specify the decision maker's experience and technical qualifications.

CEQ Response: CEQ declines to make the requested revisions. Section 1505.2(b) of the final rule focuses on the new certification requirement. In response to comments, CEQ revises § 1505.2(b) of the final rule to clarify that it requires the decision maker to certify in the ROD that the agency has considered all of the alternatives, information, analyses, and objections submitted by State, Tribal, and local governments and public commenters for consideration by the lead and cooperating agencies in developing the EIS. Decision makers exercising authority on behalf of the agency and as part of the decision-making process rely on the experience and expertise of their staff who have prepared the EIS. The final rule continues to require in § 1502.18 that the EIS list the names and qualifications of persons primarily responsible for preparing the EIS or significant background papers, including basic components of the statement.

Comment: Commenters disputed that CEQ has the authority to create a “conclusive presumption” standard for judicial review under the APA in relation to whether an agency adequately reviewed the information included in the submitted alternatives, information, and analyses. Commenters stated that it would be illegal to replace the “hard look” standard established by the Supreme Court in *Kleppe*, 427 U.S. at 390, with a “hard certification” standard. Commenters stated only Congress can replace the “hard look” standard under the APA and *Kleppe* with a “conclusive presumption” standard and its adoption by CEQ.

CEQ Response: The certification satisfactorily serves as documentation that the decision maker has considered all of the alternatives, information, analyses, and objections submitted by commenters in the development of the EIS. In response to comments, § 1505.2(b) of the final rule establishes that agencies are entitled to a “presumption” but not a “conclusive presumption”

that the agency has considered such materials. As section II and II.G.2 of the final rule explains, agencies are entitled to such a presumption of regularity.

Comment: Commenters supported the requirement in proposed § 1505.2(e) for the decision maker to certify that the agency considered “the submitted alternatives, information, and analyses submitted by public commenters.”

CEQ Response: CEQ acknowledges the support for the change, which is included in § 1505.2(b) of the final rule with modifications.

Comment: Commenters opposed the addition of “enforceable” and “requirements or commitments” in proposed § 1505.2(c) as ambiguous.

CEQ Response: The final rule adds enforceable to § 1505.2(a)(3). For a mitigation requirement or commitment to be reliable in a ROD, it must be enforceable by the agency. The intent of “enforceable” in this provision is to clarify that any monitoring and enforcement program is tailored to the enforceable mitigation requirements or commitments. Agencies are not required to adopt an accompanying monitoring and enforcement program for voluntary or otherwise non-enforceable mitigation requirements or commitments.

Comment: Commenters stated that in proposed § 1505.2 (c) adding the term “enforceable” before mitigation will lead to agency confusion on what is an enforceable mitigation requirement or commitment. Commenters stated that agencies may seek only measures that need to be implemented in accordance with regulatory permits or local or regional ordinances (which typically should not be considered as mitigation measures, as they are permit conditions), and recommended deleting the term “enforceable” to allow agencies flexibility in reviewing, evaluating, and developing mitigation measures.

CEQ Response: CEQ declines the requested revisions. In the final rule, however, CEQ clarifies in the definition of “mitigation” in § 1508.1(s) that while agencies must consider mitigation in their analyses, NEPA does not mandate the form or adoption of any mitigation.

Comment: Commenters expressed support for the proposed requirement to verify in the ROD that “the agency has adopted all practicable means to avoid or minimize environmental harm from the alternative selected, and if not, why the agency did not.” This provision is in keeping with section 101 of NEPA.

CEQ Response: CEQ acknowledges the support for this provision, which is retained from the 1978 regulations with minor modifications for clarity.

Comment: Commenters stated that CEQ should allow the lead agency to combine the final EIS and the ROD at § 1505.2, as is currently allowable under FHWA authority.

CEQ Response: The final rule retains the requirements in the 1978 regulations for a 30–day period after publication of a final EIS, consistent with the exceptions in § 1506.11. Section 1506.11(b) provides that the 30–day period does not apply where otherwise provided for by law, such as a combined final EIS and ROD authorized for FHWA projects under 23 U.S.C. 139(n)(2) and 49 U.S.C. 304a(b). Section 1507.3(f)(2) provides that agencies NEPA procedures may modify this time period when necessary to comply with other specific statutory requirements, including requirements of lead and cooperating agencies.

Comment: Commenters requested clarification regarding funding for mitigation and monitoring activities, which are often critical after a completed NEPA review to ensure compliance with the ROD.

CEQ Response: Where applicable, the project proponent should have sufficient funding to carry out any required mitigation (§ 1505.3(b)).

3. Implementing the Decision (§ 1505.3)

Comment: Commenters supported clarifying the application of mitigation to reflect the non-obligatory nature of NEPA's mitigation provisions. A commenter noted that, in the past, some agencies ignored the procedural nature of NEPA and imposed mandatory mitigation, sometimes with a goal of a net conservation gain. A commenter noted that the proposed change is consistent with the BLM Instruction Memorandum 2019-018.

CEQ Response: In the final rule, CEQ clarifies that NEPA is procedural in nature and not a supplemental authority under which agencies can require mitigation for all impacts.

Comment: While commenters agreed that an EIS or EA cannot mandate mitigation, they requested that NEPA documents demonstrate that the agency considered mitigation by providing information on options, costs, and effectiveness of potential mitigation to environmental harms associated with the proposed action.

CEQ Response: The EIS or EA should discuss mitigation options, costs, and effectiveness in order to inform the agency decision maker. As stated in § 1508.1(s), while NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation. As reflected in § 1505.2(a), agencies must identify in the ROD the alternatives considered and must state whether they have adopted all practicable means to avoid or minimize environmental harm from the alternative selected, and if not, why the agency did not. The extent of the mitigation evaluated is subject to the agency's discretion, as consistent with current practice.

Comment: Commenters stated that the current NEPA process provides a tool for Tribes to provide input and seek effective mitigation measures and the proposed amendments would severely impair that process. Commenters requested clarification in the rule because they

asserted that the proposed changes would make it more difficult to coordinate mitigation for adverse effects to historic properties of religious and cultural significance to Tribes.

CEQ Response: The NPRM specifically provided for enhanced Tribal involvement in comparison to the 1978 regulations. Under the final rule, CEQ adopts these changes.

Comment: Commenters asked that, if adoption of mitigation is not required in the NEPA analyses, where appropriate mitigation would be identified or addressed. Commenters noted that mitigation may be required by State law, and the proposed CEQ changes appear to contradict State requirements for mitigation.

CEQ Response: Mitigation may be adopted in a FONSI or ROD (§§ 1501.6 and 1505.2), or it may be included as a permit condition (§ 1505.3(a)). As reflected in § 1505.2(a), agencies must identify in the ROD the alternatives considered and must state whether they have adopted all practicable means to avoid or minimize environmental harm from the alternative selected, and if not, why the agency did not. For the purposes of agency efficiency, an agency may wish to include mitigation pursuant to State authorities where it is combining the EIS with State documents.

Comment: Commenters requested that CEQ further clarify how agencies communicate mitigation measures to the project proponent asserting that good communication was lacking.

CEQ Response: The final rule includes several changes regarding mitigation, including clarifying that it must have a nexus to the effects of the proposed action and that, while NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation. These changes will improve the project proponent's understanding of any requirements to mitigate the effects of the proposal.

Comment: Commenters stated that, where the environmental analysis is based on the inclusion of mitigation, all mitigation discussed as part of the selected action must be considered a part of the approved action, and therefore subject only to minor changes when implemented. Commenters stated CEQ's statement in proposed § 1505.2(c) requires disclosure only of enforceable mitigation, and is inconsistent with proposed § 1505.3 where mitigation committed to as part of the project description "shall" be implemented. Commenters stated all mitigation must be enforceable by the action agency because it is the public's and decision makers' understanding of the Federal action in question.

CEQ Response: The proposed revisions to §§ 1505.2(c) and 1505.3, finalized with revisions for clarity, are consistent with one another. Mitigation that an agency has committed to conduct as part of the project description (*i.e.*, not discretionary) is required and therefore is enforceable.

Comment: Commenters requested that CEQ modify part 1505 to require decision documents for actions covered by FONSI to be similar to a ROD, require agencies to ensure that mitigation and monitoring commitments appear in legally binding documents, and amend proposed §§ 1505.3(c) and (d) to provide that reports on progress in carrying out relevant mitigation and monitoring are made systematically available to the public. Other commenters recommended that CEQ provide detailed instructions to the lead agencies on how a project proponent should report on progress and completion of mitigation and monitoring to the Federal agency or appropriate cooperating agency.

CEQ Response: CEQ declines to make the recommended changes in the final rule. Section 1501.6 of the final rule covers FONSI procedures. A ROD and FONSI are legally binding documents. Given the diversity of agency programs, agencies should have full

flexibility in how project proponents and lead agencies report on mitigation and monitoring to cooperating agencies and interested stakeholders.

Comment: Commenters requested that CEQ modify § 1505.3 by stating that an agency must undertake the mandatory duties of § 1505.3 while the action is being carried out, and such duties must be completed before the authorized agency action is completed. Commenters stated that the final rule should revise § 1505.3 to clarify that any failures to perform the mandatory provisions of § 1505.3 (*i.e.*, all provisions prefaced by the word “shall”) are enforceable as illegal failures to act under 5 U.S.C. 706(1).

CEQ Response: CEQ declines to make the recommended changes to the final rule. While NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation or the timeline for implementing any mitigation measures. The use of the word “shall” in § 1503.3 denotes the nature of the relevant legal duties.

Comment: Commenters requested clarification in § 1505.3(d) as to whether “publish” also means “make available to the public.”

CEQ Response: Pursuant to the definition of publish and publication at § 1508.1(y), publish means making information available to interested persons, including by electronic publication. This would include the public.

I. Comments Regarding Other Requirements of NEPA (Part 1506)

1. Limitations on Actions during NEPA Process (§ 1506.1)

Comment: Commenters expressed support for clarifying allowable activities, including property acquisition, stating that these actions are taken at the applicant’s sole risk and do not prejudice the NEPA review or final decision. Additionally, commenters noted that the proposed

change is consistent with DOT's current practice. Commenters also believed these proposed changes would prevent costly delays.

CEQ Response: CEQ acknowledges the support for the proposed changes.

Comment: Commenters expressed general concern that the proposed changes undermine NEPA because they allow an agency to authorize irreversible and irretrievable commitments of resources before an EIS is prepared and that this is in direct violation of section 102 of NEPA. Specifically, allowing land interest acquisitions, purchases of equipment, fee simple, rights-of-way, conservation easements, and site preparations to occur during pendency of review would undermine and limit the range of alternatives, potential mitigation, and predetermine the outcome with the overall effect of reducing the effectiveness of public involvement. A commenter noted that courts have consistently refused to allow projects to proceed when violations of NEPA have occurred, specifically as it relates to the actions allowed before the NEPA process is complete.

CEQ Response: It has been long-standing practice under the 1978 regulations for applicants to perform certain types of work in support of their Federal application. For example, the 1978 regulations authorize the Rural Electrification Administration to approve minimal expenditures not affecting the environment by non-governmental entities seeking loan guarantees. 40 CFR 1506.1(d). CEQ proposed to eliminate this agency-specific reference and provide further clarity on the types of activities that support an application for Federal, State, Tribal or local permits or assistance. As an example of activities an applicant may undertake, CEQ proposed to add "acquisition of interests in land," which includes acquisitions of rights-of-way and conservation easements, to the existing list of actions that can proceed. CEQ's clarifications to § 1506.1(b) do not undermine the statutory requirement to analyze significant impacts and alternatives. Further, it is not correct to interpret section 102(2)(C)(v) of NEPA,

which requires an EIS to include “any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented,” to prohibit any activity related to a proposed action. NEPA is a procedural statute.

Comment: Commenters expressed concern that purchases of land and site preparations by agencies and applicants both before and during the formal NEPA process has influenced the range of alternatives analyzed.

CEQ Response: Allowing the acquisition of certain land interests during the pendency of an environmental review does not prejudice an outcome. *See Nat’l Audubon Soc’y v. Dep’t of the Navy*, 422 F.3d 174, 206 (4th Cir. 2005) (“Further environmental studies and land surveys do not pre-commit the Navy to building [the preferred alternative]. The CEQ regulations expressly allow design and other work necessary for permit applications Nor will the Navy’s purchase of land from willing sellers turn its ultimate decision about where to place the [preferred alternative] into a foregone conclusion.”); *see also, Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986). Under the statute, activities are permissible where the agency retains sufficient authority to select alternative outcomes during its environmental review. *Nat’l Audubon Soc’y* at 206.

Comment: Commenters stated that the proposed changes to relax certain restrictions on commitments on resources during the NEPA process would increase the perception that the formal scoping process is perfunctory and any public scoping comments are after-the-fact. Commenters also stated that these changes would allow applicants to begin projects before an environmental analysis is complete.

CEQ Response: Public scoping participation constitutes an integral part of the process and the proposed changes concerning commitments of resources will not adversely affect it. The

final rule expands, rather than reduces, public participation in the scoping process. Through the scoping process in § 1501.9 an agency may seek public comment or other forms of public involvement prior to publication of the NOI in addition to scoping after publication of an NOI. The final rule allows certain activities that neither have an adverse environmental impact nor limit the choice of reasonable alternatives.

Comment: Commenters requested that CEQ further clarify the types of activities that are allowed to proceed under section § 1506.1. Specifically, commenters recommended the addition of “utility relocation,” “minor ground disturbance associated with materials testing and investigations in furtherance of project planning or design does not constitute a pre-decisional commitment of resources that may limit the choice of alternatives,” as well as considering an “application from a non-Federal entity.” Commenters cited planning for water infrastructure projects as a potential benefactor of the revision. Commenters requested that CEQ provide guidance to Federal agencies on actions that constitute irreversible and irretrievable commitments of resources.

CEQ Response: A minor ground disturbance related to project planning or design would generally not have an adverse environmental impact or limit the choice of reasonable alternatives. However, this and other examples provided by commenters are typically evaluated by agencies based on the particular facts and circumstances. CEQ declines to include this level of specificity in the final rule. Additionally, § 1506.1(b) of the final rule clarifies the activities that are allowed to proceed, such as, 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 the applicant.

The application of these general standards are best left to the judgment of implementing agencies based on the particular facts and circumstances of their proposed actions. Agencies may provide further details in their procedures based on the specific circumstances of their programs.

Comment: Commenters asserted that CEQ did not justify its proposed changes to § 1506.1, cited no case law to support the revisions, and as a result the proposed changes would be arbitrary and capricious. Additionally, commenters stated that allowing certain actions to occur prior to the conclusion of an environmental review is inconsistent with case law and violates NEPA.

CEQ Response: CEQ may reinterpret NEPA, consistent with *Chevron*, unless the Supreme Court has interpreted the statute in a particular way to be clear as a matter of *Chevron* step one. *See Brand X*, 545 U.S. at 982–83. In response to comments on the ANPRM and CEQ’s experience implementing the 1978 regulations, CEQ proposed changes for the purpose of further clarifying those types of activities that may proceed during pendency of a NEPA review.

The changes that CEQ includes in the final rule are not inconsistent with NEPA. The types of actions include development by applicants of plans or designs or performance of other activities necessary to support State, Tribal, or local permits or assistance. The final rule clarifies that an agency may authorize such activities including but not limited to acquisitions of interests in land, purchases of long lead time equipment, and purchase options made by applicants. Some agencies, such as DOT, presently allow project proponents to acquire land during pendency of the NEPA review. Further, many agencies have categorically excluded various types of land

interest acquisitions for a myriad of purposes.⁷⁵ CEQ's changes to § 1506.1(b) facilitate consistent implementation among Federal agencies for these purposes but do not undermine the statutory requirement to analyze any irreversible and irretrievable commitments of resources that would be involved in the proposed action. While the location and legal control of certain lands may be a prerequisite for many Federal authorizations, allowing the acquisition of certain land interests during the pendency of an environmental review does not necessarily determine an outcome such that the agency no longer retains discretion under NEPA.

Comment: Some commenters suggested that CEQ's proposed changes in § 1506.1 will disproportionately and adversely harm African American landowners.

CEQ Response: The changes in § 1506.1 allow an agency to authorize acquisition of interests in land, based on the particular facts and circumstances regarding the proposed action, if that activity is necessary to support an application for Federal funding.

Comment: A commenter recommended that CEQ revise its regulations to allow for the acquisition of rights-of-way prior to completion of Federal NEPA requirements for projects that can demonstrate no significant adverse impact.

CEQ Response: The final rule expressly states in § 1506.1(b) that 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.

Comment: Commenters recommended that the limitations of actions for EISs be extended to EAs and CEs by revising § 1506.1(a) to read, "until an agency completes the NEPA

⁷⁵ See generally, List of Agency CEs, *supra* note 44.

process.” Other commenters expressed concern that expanding the “Limitation on actions during NEPA process” provisions to EAs would unnecessarily slow projects that do not require the preparation of an EIS.

CEQ Response: CEQ added FONSIIs to § 1506.1(a) to codify existing practice and judicial determinations that the limitation on actions applies when an agency is preparing an EA as well as an EIS. CEQ declines to apply the limitation on actions to CEs because CE actions do not have adverse environmental effects or require alternatives analysis unless there are extraordinary circumstances. If extraordinary circumstances may prevent the application of a CE, the agency would prepare an EA or EIS subject the requirements of § 1506.1(a).

Comment: Commenters requested that CEQ delete or further revise § 1506.1 to clarify that applicants implementing private projects be able to conduct activities outside of the permitting agency’s statutory jurisdiction and activities with little or insignificant environmental impact during a NEPA review. A commenter requested that CEQ clarify that an applicant may take actions that are otherwise legal, do not require authorization, or do not trigger a major Federal action significantly impacting the environment.

CEQ Response: Activities that are outside of the proposal are not covered by the limitation on actions in § 1506.1(a). Further, an action outside of the permitting agency’s statutory jurisdiction would generally not meet the definition of major Federal action at § 1508.1(q)(1)(vi) and therefore not be covered by the restrictions in § 1506.1. CEQ declines to provide further clarification in the final rule.

Comment: A commenter stated their concern with replacing the word “non-governmental entities” with” applicant” in § 1506.1(b).

CEQ Response: The term “applicant” is more consistent with its use throughout the final rule.

Comment: One commenter recommended that CEQ strike § 1506.1(b), in its entirety as they believe non-Federal entities should be able to take actions when doing so is otherwise legal and no authorizations are needed for that specific action.

CEQ Response: CEQ declines this recommendation, because § 1506.1(b) provides important flexibility and clarification of the scope of § 1506.1(a). CEQ properly interprets NEPA in § 1506.1(a) to impose a procedural requirement that limits actions during the NEPA process.

Comment: Commenters stated that § 1506.1(a)(2) and (b) were ambiguous and failed to clarify the universe of what activities could occur pre-ROD. Commenters recommended that CEQ clarify what is meant by an agency “taking appropriate action to ensure that the objective and procedures of NEPA are achieved.”

CEQ Response: CEQ did not propose changes to the above-quoted language (except to revise “insure” to “ensure”) and declines to make changes in the final rule because the application of these general standards are best left to the judgment of implementing agencies based on the particular facts and circumstances of a proposed action. The quoted language referenced by the commenters has been retained from the 1978 regulations. The intent is to require agencies to ensure that FONSI and RODs are completed before activities covered by the proposed action are undertaken that would have an adverse environmental impact or limit the choice of reasonable alternatives. This language has been clearly understood and CEQ declines to make further changes to the final rule.

Comment: One commenter recommended that CEQ add an additional limitation in §§ 1506.1(a)(2) and (c)(3) to prohibit actions that could limit mitigation measures available to the agency.

CEQ Response: The final rule requires FONSI or RODs be issued before activities can be undertaken that would limit the choice of reasonable alternatives, and these may include appropriate mitigation measures not already included in the proposed action or alternatives, during the pendency of the NEPA review. Foreclosing mitigation measures too early would violate the sequencing requirement. CEQ declines to make further changes to the final rule to address the comment.

Comment: A commenter recommended that CEQ replace the word “equipment” in § 1506.1(b) with the word “materials,” so it would read “purchase of long-lead time materials.”

CEQ Response: CEQ acknowledges the suggestion and notes that the language is sufficiently broad to include long-lead time materials that are not equipment. In particular, the list of “acquisition of interests in land ... purchase of long lead-time equipment, and purchase options” is introduced by the phrase “including, but not limited to.”

Comment: One commenter recommended that CEQ make various changes to § 1506.1(c), including changing the phrase “or environmental assessment” to “or programmatic environmental assessment,” and change “interim action” to “an interim action” in § 1506.1(c)(3).

CEQ Response: In the final rule, CEQ finalizes the provisions from the NPRM, with minor grammatical changes, and simplifies the reference to “programmatic environmental impact statement or environmental assessment” to “programmatic environmental review.”

Comment: Commenters requested that CEQ add EAs and CEs to § 1506.1(c)(2).

CEQ Response: CEQ declines because the second clause of § 1506.1(c) refers to major Federal actions that may significantly affect the quality of the human environment. As such, it only applies to an EIS, not an EA or CE.

Comment: One commenter suggested CEQ change § 1506.1(a)(1) to “impact to the human environment.”

CEQ Response: CEQ notes that it has elsewhere explained how the definition provisions work and thus declines to add the word “human.” CEQ also notes that it has revised the definition of “effects” in § 1508.1(g) of the final rule to reference “changes to the human environment.”

Comment: In responding to CEQ’s question as to whether there are circumstances under which an agency may authorize irreversible and irretrievable commitments (§ 1506.1), some commenters suggested that there are no circumstances under which an agency may authorize irreversible and irretrievable commitments of resources, because that would undermine NEPA, and result in uncertainty and legal liability.

CEQ Response: In its final rule, CEQ finalizes § 1506.1 as proposed, with minor grammatical changes, and simplified the reference to “programmatic environmental impact statement or environmental assessment” to “programmatic environmental review.” CEQ did not make any further changes as to whether there are circumstances under which an agency may authorize irreversible and irretrievable commitment of resources. Further, under case law concerning the 1978 regulations as amended, an agency is not precluded from taking actions prior to or without completing the analysis required by NEPA unless that action would have adverse environmental effects or limit the range of alternatives and determine the outcome of the agency decision. *See, e.g., Nat’l Audubon Soc’y*, 422 F.3d at 202 (“allowing an agency to

continue work on a project while its environmental study is pending does not necessarily create the type of option-limiting harm that NEPA seeks to prevent.”)

Comment: A commenter stated that livestock grazing should not be considered as an irreversible or irretrievable commitment of resources by a Federal agency because the impacted natural resource is renewable.

CEQ Response: The application of this provision depends on the particular facts and circumstances regarding the proposed action. CEQ declines to make further changes to address the commenter’s concern.

2. Elimination of Duplication with State, Tribal, and Local Procedures

(§ 1506.2)

Comment: Some commenters were supportive of changes to this provision, noting that it encourages Federal agencies to use State, Tribal, and local planning documents to avoid duplication.

CEQ Response: CEQ acknowledges support for the proposed changes.

Comment: Some commenters stated that proposed §§ 1501.7(h)(2) and 1506.2(b) were too restrictive concerning Federal agency use of studies, analysis, and decisions developed by State, Tribal, and local governments. Concerning § 1501.7(h)(2), a commenter stated that the phrase, “consistent with its responsibility as a lead agency,” is vague and has been used by lead agencies as a basis for refusing to use scientific studies and analyses prepared by State, Tribal, and local governments. Concerning § 1506.2(b), the commenter felt the reference to “environmental studies, analysis, and decisions” could have the consequence of excluding lead agencies from using relevant socio-economic information prepared by State, Tribal, and local governments. Commenters also recommended striking the reference to “jurisdiction by law or

special expertise” and require use of cooperating agencies’ analyses to be consistent with proposed § 1502.24.

CEQ Response: CEQ has made additional changes in the final rule to remove potential impediments for Federal agency use of studies, analysis, and decisions developed by State, Tribal, and local government agencies. The final rule does not include the phrase, “consistent with its responsibility as lead agency” in § 1501.7(h)(2) because it was non-specific and caused confusion regarding the use of germane and informative scientific research. CEQ has also revised § 1506.2(b) so that cooperation with State, Tribal, and local governments includes the use of studies, analysis, and decisions developed by State, Tribal, and local governments. The revised language better reflects the intent of CEQ’s proposal, which is to encourage broad use of studies, analysis, and decisions prepared by State, Tribal, and local agencies, as appropriate. The requirements at § 1502.23 apply to the use of analyses under § 1501.7(h)(2). However, CEQ has declined to add a cross-reference to § 1502.23 because it could be construed to not apply the provisions elsewhere in the rule. CEQ declines to strike “jurisdiction by law or special expertise” because the language was retained from the 1978 regulations and has not been a source of confusion.

Comment: Some commenters opposed the change to § 1506.2(c), which replaces the word “shall” with the word “may” in reference to preparation of one document when Federal agencies are cooperating in fulfilling the requirements of applicable State, Tribal, and local ordinances that have environmental impact statement or similar requirements that are in addition to, but not in conflict with, NEPA.

CEQ Response: CEQ has finalized the change as proposed. Under the final rule at § 1506.2(c), Federal agencies cooperating with State, Tribal or local agencies are required to the

extent practicable to prepare joint EISs, and Federal agencies have flexibility but are not required to prepare one document with such agencies for the purpose of complying with State, Tribal or local ordinances with environmental impact statement or similar requirements.

Comment: Some commenters expressed concern with the new language in § 1506.2(d), which specifies that agencies should discuss, but need not reconcile, any inconsistencies between the EIS and State, Tribal, or local planning documents. Some commenters suggested CEQ modify the language at § 1506.2(d) to direct agencies to seek to reconcile any inconsistencies between the proposed action as discussed in the EIS with the proposed action as discussed in the State, Tribal, or local planning document. One commenter noted that the Federal Land Policy and Management Act (43 U.S.C 1701 *et seq.*) and the National Forest Management Act (16 U.S.C. 1600) require coordination and consistency with State and local plans. Some commenters expressed concern that inconsistencies could frustrate the purposes of project sponsors. Other commenters suggested that absent a requirement to resolve inconsistencies, Federal agencies would miss an important opportunity for collaboration, which could improve the quality of EISs. Some commenters recommended that CEQ incorporate a formal consistency review into § 1506.2 where State, Tribal, and local governments would be afforded an opportunity to review and petition CEQ concerning proposed Federal decisions that may be inconsistent with their own plans and policies.

CEQ Response: The 1978 regulations did not require reconciliation, and the final rule continues, consistent with those regulations to require a Federal agency to describe the extent to which it would reconcile its proposed action with a State, Tribal or local plan. NEPA does not dictate a substantive outcome, while non-Federal planning documents may be based on authorities that are not strictly procedural. The final rule encourages agencies to reduce

duplication to the fullest extent practicable and expressly references use of environmental studies, analyses, and decisions to support of Federal, State, Tribal, or local environmental reviews or authorization decisions as potential ways to meet the requirement. Furthermore, interested State, Tribal, and local governments have the opportunity to provide input on any inconsistencies during the comment period on Federal agency EISs. For these reasons, CEQ declines to provide further direction to Federal agencies concerning reconciliation or a formal consistency review.

Comment: Some commenters recommended that CEQ allow State, Tribal, or local environmental reviews to substitute for some or all of the NEPA review required for a Federal action. Other commenters suggested a similar approach, but only when the State, Tribal, or local NEPA-like law is at least as stringent as NEPA.

CEQ Response: Agencies may incorporate by reference non-Federal environmental reviews; however, CEQ declines to modify § 1506.2 to allow non-Federal environmental reviews to fully satisfy NEPA. CEQ notes that Federal agencies may avoid duplicative documentation by cooperating with State, Tribal, or local agencies to conduct joint reviews that satisfy the requirements of both laws or through incorporation by reference of relevant material. Federal environmental reviews that are prepared under authorities other than NEPA may satisfy the CEQ regulations, pursuant to §§ 1506.9 and 1507.3(c)(5).

3. Adoption (§ 1506.3)

Comment: Commenters expressed support for the proposed revisions to § 1506.3 that would allow a Federal agency to adopt another agency's EA, draft or final EIS, or CE determination if the proposed action is substantially the same. Commenters stated these changes

would formally allow for consistency and clarity across agency decision making and will prevent unnecessary duplication of NEPA review.

CEQ Response: CEQ acknowledges the support for the changes, which CEQ includes in the final rule.

Comment: Commenters expressed support for proposed revisions to § 1506.3 and requested that CEQ revise § 1506.3 to encourage or require, rather than merely allow, adoption of environmental documents, or portions of environmental documents, on the conditions that the actions covered by the original document and the proposed action are substantially the same and doing so would not jeopardize the integrity of environmental review. Other commenters recommended that CEQ require adoption unless an agency determined that it was inappropriate to do so. Other commenters requested that CEQ revise § 1506.3 to encourage the adoption of prior reviews and decisions within the same agency, not just other agencies. Commenters stated that CEQ should specifically allow reliance on previous NEPA analysis for renewal of grazing permits or similar routine authorizations that have previously undergone a NEPA review on the condition that there is no material change in the management of the project. Commenters suggested these changes would further CEQ's stated goal of "facilitating efficient, effective, and timely NEPA reviews by Federal agencies."

CEQ Response: Section 1506.3 allows agencies the flexibility to adopt a Federal environmental document if the actions covered by the original environmental document and the proposed action are substantially the same. Given the importance of timeliness and specified time limits in the final rule, CEQ expects agencies to adopt documents where appropriate, and therefore, an affirmative requirement is not necessary. CEQ notes that agencies could use § 1506.3 to adopt a document prepared by another Federal agency, or a State or Tribal

government exercising delegated Federal authority. CEQ encourages agencies to reduce duplication through programmatic environmental documents, joint environmental documents for actions involving multiple agencies, incorporation by reference, tiering, and adoption. These provisions provide Federal agencies with the flexibility to use available information in the most efficient manner for the agency while maintaining robust public review of the proposed Federal action.

CEQ declines to address grazing permits or similar routine authorizations in the regulations, because these types of actions are best addressed in the NEPA procedures of the relevant Federal agencies.

Comment: Commenters expressed support for proposed revisions to § 1506.3 and requested that CEQ revise § 1506.3 to allow adoption of environmental documents prepared by State or Tribal governments in compliance with State or Tribal law, in particular the State or Tribal equivalent of an EA. Commenters suggested if a State or Tribe has a sufficiently strong process, a Federal agency should be able to adopt the State or Tribe environmental documents under § 1506.3, in the same manner as environmental documents prepared by other Federal agencies. Commenters stated that allowing existing State or Tribal environmental documents to satisfy the procedural requirements of NEPA is consistent with existing Federal agency practices and provides opportunities to meaningfully inform the public and agency officials of the environmental impacts of major actions without duplicating work or unnecessarily expending tax dollars.

CEQ Response: CEQ acknowledges that State and Tribal environmental laws may consider a proposed action that is substantially the same as a proposed Federal action. While § 1506.2(b) requires Federal agencies to cooperate with State, Tribal, and local agencies to the

fullest extent practicable to reduce duplication between NEPA and State, Tribal, and local requirements, NEPA does not allow for substitution of a non-Federal review. This is distinct from situations where State, Tribal, and local governments are conducting NEPA reviews pursuant to assignment from Federal agencies. In those situations the State, Tribal, or local government is conducting a Federal NEPA review on behalf and under the authority of the assigning Federal agency. Revisions to § 1506.2 acknowledge the increasing number of State, Tribal, and local governments conducting NEPA reviews pursuant to assignment from Federal agencies. A NEPA document prepared pursuant to assignment from a Federal agency is a Federal environmental document eligible for adoption pursuant to § 1506.3.

CEQ acknowledges that Federal agencies cooperate with State, Tribal, and local governments on a wide range of shared actions that are subject to NEPA review. CEQ encourages Federal agencies to cooperate with State and Tribal governments on such actions to develop a single environmental document that satisfies all environmental review requirements. Further, CEQ encourages agencies, pursuant to § 1501.12, to incorporate by reference relevant material, which may include prior analyses conducted pursuant to State and Tribal environmental laws. These provisions allow Federal agencies the flexibility to use available information in the most efficient manner while maintaining robust review processes for proposed Federal actions.

Comment: Commenters requested that CEQ revise § 1506.3 to allow agencies to adopt environmental documents regardless of whether the proposal is the same or substantially the same as the original proposal. Commenters recommended that CEQ allow the use of adoption with an addendum or supplement that addresses the differences. Commenters noted the important standard is that the agency has independently evaluated the adopted document (and

any addition to it) to be sure the document and the interagency and public review process are adequate.

CEQ Response: CEQ has not made any further changes to § 1506.3 in the final rule in response to this suggestion. CEQ notes that the commenters appear to have misunderstood the standard for adoption as requiring the action analyzed in the adopted document and the adopting agencies proposed action to be the same. Under the 1978 regulations and the final rule, agencies may adopt NEPA documents when the proposal is substantially the same. Additionally, agencies may adopt all or a portion of an EIS relevant to their proposal when the actions are not substantially the same, but the agency must republish it for public comment as a draft EIS. As part of this republication, agencies may add to the analysis and address any differences or changes to the proposal. Additionally, agencies may incorporate by reference portions of a prior environmental document that are relevant to a new proposal. The final rule continues to provide Federal agencies with the flexibility to use available information in the most efficient manner while maintaining robust analysis and public review of proposed Federal actions.

Comment: Commenters requested that CEQ revise § 1506.3 to allow an adopting agency to adopt another agency's EIS covering an action that is substantially the same by issuing its own ROD subject to a public comment period, rather than republishing the adopted EIS.

CEQ Response: CEQ declines to add a mandatory comment period for RODs that adopt an EIS in § 1506.3 of the final rule because the ROD is intended to document final agency action. The final rule clarifies that an adopting agency must republish an adopted EIS as a final EIS if the actions covered by the original EIS and the proposed action are substantially the same. If the actions covered by the original EIS and the proposed action are not substantially the same, the adopting agency must republish the EIS as a draft EIS. However, if the adopting agency was

a cooperating agency for the EIS, the agency may adopt the final EIS in its ROD without republishing the EIS. The final rule extends the provisions for adoption to EAs and CE determinations, provided the actions covered by the original EA or CE determination and the proposed action are substantially the same.

Comment: Commenters expressed concern with § 1506.3 and requested that CEQ revise § 1506.3 to provide clear guidance to agencies on what criteria an agency must meet to properly adopt another agency's environmental document. Commenters noted Federal agencies have widely different NEPA regulations and standards, and expanding adoption to include EAs and CEs would allow an agency with stricter NEPA requirements to rely on environmental documents prepared under much looser regulations, resulting in documents that lack important details. Commenters requested that CEQ define the phrase "substantially the same," or provide clarifying guidance. Commenters observed that the regulations emphasize similarity between the action considered in the adopted document and the adopting agency's proposed action but do not articulate a standard for similarities in the affected environment.

CEQ Response: In order to adopt an EIS, EA, or CE determination, the adopting agency must assess whether the document meets the standards of an adequate EIS, EA, or CE determination under the agency's procedures and the CEQ regulations. Additionally, both the 1978 regulations and the final rule require agencies to develop or revise, as necessary, procedures to implement CEQ's revised regulations. The requirements for preparing agency procedures under § 1507.3(a), including consultation with CEQ, will have the effect of standardizing environmental documents and facilitating the practice of adoption where appropriate.

Comment: Commenters objected to § 1506.3 and requested that CEQ revise § 1506.3 to prohibit adoption of environmental documents that rely on outdated or obsolete information or analyses. Commenters stated older environmental documents frequently consider different environmental circumstances and rely on older scientific knowledge and technology. Further, changes in the environmental circumstances, and advances in scientific knowledge and technology may make a new assessment necessary. Commenters recommended that CEQ require agencies to ensure that no new or updated information or analyses exist that warrant the preparation of a new EA or EIS or prevent the use of a CE determination.

9.3.0-7 Response: CEQ does not find any changes to § 1506.3 in the final rule are necessary to address the concern. The final rule requires an adopted document meet the standards of an adequate EIS, EA, or CE determination under the regulations. Under the final rule, for an agency to adopt another agency's environmental document, the adopting agency must verify that the adopted document satisfies the regulations as if the document were evaluating the adopting agency's proposed action. As a result, an adopting agency would need to verify that the document they are adopting relies on information and analyses that accurately describes the affected environment and the environmental impacts of the proposed action and reasonable alternatives. Consistent with § 1502.9(d)(4), the agency may assess whether changes to the proposed action or new circumstances or information relevant to environmental concerns are significant and document the determination with the adoption.

Comment: Commenters objected to § 1506.3, because adoption encourages the use of existing EAs and EISs in place of a specific one for a proposed project. Commenters stated there is no requirement that the adopted documents be directly relevant to the new proposal. Commenters stated § 1506.3 provides no criteria for agencies to use when determining whether

to adopt an existing environmental document, or to prepare an environmental document that is tailored to the proposed project and site. Commenters noted ecosystems and human communities have unique histories that determine their structures, functioning, and vulnerabilities to disturbance. Commenters stated expanding adoption without establishing clear and appropriate adoption criteria would result in projects causing significant effects particularly to environmental justice communities that are not properly considered or documented.

CEQ Response: The regulations require the adopted documents to be directly relevant to the new proposed action. The final rule's standard for adoption requires the proposed action and the analyzed action to be substantially the same and a document that meets the standards of an adequate NEPA document under the regulations. The final rule expands the standard to include EAs. For an agency to adopt another agency's environmental document, the adopting agency must verify that the actions considered in the adopted document are substantially the same as the proposed action, and that the adopted document satisfies the regulations as if the document was evaluating the adopting agency's proposed action. As a result, an adopting agency would need to verify that the document it is adopting relies on information and analyses that accurately describe the affected environment and the environmental impacts of the proposed action. This approach does not preclude considering a community's cultural or socio-economic history and thus has no adverse effect on any particular community.

Comment: Commenters requested that CEQ revise § 1506.3 to require publication of the adopting document and the underlying environmental document being adopted. Commenters observed that adoption under the 1978 regulations required republication of a final EIS. Commenters noted the proposed rule preserved the republication requirement for an adopted final EIS but did not extend that requirement to EAs or CE determinations. Commenters

asserted that extending adoption to EAs and CE determinations without requiring publication of the adoption would transform the adoption process from a relatively transparent one, into a process shielded from public scrutiny.

CEQ Response: In response to comments, CEQ revises § 1506.3(d) (proposed § 1506.3(f)) to require documentation, but not publication, of an adoption of a CE determination. This is appropriate given that some agencies do not find it practicable to publish individual CE determinations. The final rule at § 1506.3(c) requires public notification of the adoption of an EA via the requirement to publish the FONSI and cross-reference § 1501.6.

Comment: A commenter requested that CEQ revise its regulations to include the “Determination of NEPA Adequacy” (DNA) concept for use by all agencies. A DNA is a determination that an existing NEPA document adequately analyzes an action and conforms to the approved land use plan. A DNA is a means by which the agency can use existing NEPA analyses to cover an action without performing an additional environmental study. Currently, the Bureau of Land Management is the only agency using this concept. The commenter stated that a DNA is a powerful agency tool for streamlining and expediting an action that has already been adequately analyzed in an existing environmental study.

CEQ Response: Section 1502.9(d)(4) codifies agency practice, including DNAs, providing that agencies can make a finding that changes to a proposed action or new circumstances or information relevant to environmental concerns are not significant and therefore do not require a supplement. Additionally, the final rule makes several changes that facilitate the practice of a DNA, such as expanding the practice of adoption, where an agency may use an existing NEPA document if it meets the standards for adequacy without additional environmental review of the proposed action. Agencies may also reduce duplication by

incorporating documents by reference and using documents that functionally comply with CEQ's regulations.

Comment: Commenters expressed support for § 1506.3(d) (proposed § 1506.3(f)) because it clarifies that agencies may adopt another agency's determination that a CE applies to a proposed action, provided the adopting agency's proposed action is substantially the same. Commenters noted that the 1978 regulations allowed for adoption of EIS where the actions covered by the EIS and the agency's proposed action are substantially the same. Commenters noted some agencies' implementing regulations have extended adoption to EAs provided the agency meets the same criterion. Commenters noted that § 1506.3(d) (proposed § 1506.3(f)) extends the same adoption criteria to a determination that a CE applies. Commenters noted multiple Federal agencies are engaged in similar activities like small-scale prescribed burns, ecological restoration, some biological research, and a handful of small-scale land management practices, which are examples of practices that adopted CE determinations could cover. Commenters recommended CEQ clarify that that adoption of another agency's determination of CE does not require lengthy process.

CEQ Response: CEQ acknowledges the support of the changes to § 1506.3(d) (proposed § 1506.3(f)). In response to comments, the final rule requires agencies to document, but not publish, adoption of another agency's determination that a CE applies to a proposed action that is substantially the same. This change may reduce the length of the process to adopt a CE. CEQ has made additional changes in the final rule to § 1507.3(f)(5) to facilitate an agency using another agency's CE.

Comment: Commenters requested that CEQ revise § 1506.3(d) (proposed § 1506.3(f)) to limit adoption of another agency's determination that a CE applies if the adopting agency's

proposed action is substantially the same and the action is covered by the adopting agency's list of CEs. Commenters asserted that one agency's determination that a CE applies could conflict with another agency's list of CEs, mission, or statutory requirements.

CEQ Response: CEQ acknowledges the commenters' suggestion, but does not make further changes to § 1506.3 in the final rule in response to the comment. Section 1506.3(d) of the final rule (proposed § 1506.3(f)) allows agencies the discretion to adopt another agency's determination that a CE applies to a proposed action if the adopting agency's proposed action is substantially the same. Therefore, limiting adoption of another agency's CE determination would be of limited value to the adopting agency if it had its own CE to apply. If the proposed action is covered by the adopting agency's list of CEs, the adopting agency likely would rely on its own CE rather than adopting another agency's CE determination. Section 1506.3(d) (proposed § 1506.3(f)) provides agencies the flexibility to adopt another agency's determination that a CE applies when the actions are substantially the same to address situations when a proposed action would result in a CE determination by one agency and an EA and FONSI by another agency. An adoption would be inappropriate if the adoption conflicts with the adopting agency's statutory requirements, but the adopting agency must make such a determination on a case-by-case basis.

Comment: Commenters requested that CEQ revise § 1506.3(d) (proposed § 1506.3(f)) to limit adoption of CE determinations to actions that are the same, not substantially the same. Commenters suggested the term "substantially the same" leaves too much room for interpretation and abuse. Commenters stated agency mandates and responsibilities widely vary and a CE determination that is suitable for one agency may not be appropriate for another agency. For example, commenters suggested one easily could foresee an agency adopting a CE determination

from another agency where the activity might be similar, but the location, expertise of staff implementing the action, and breadth of the activity is markedly different. Similarly, what qualifies as a CE can differ greatly between agencies, such as whether or how many acres of forest thinning qualifies for a CE, creating confusion for the public.

CEQ Response: CEQ established the standard for adoption of an EIS or portion thereof in the 1978 regulations, requiring the proposed action and the analyzed action to be substantially the same. That standard remains unchanged in the final rule, and is also applied to determinations concerning EAs and CEs. For an agency to adopt another agency's determination that a CE applies to a proposed action, the adopting agency must verify that the action considered in the adopted CE determination is substantially the same as the adopting agency's proposed action and that there are no extraordinary circumstances that may have a significant environmental effect (§ 1507.3(e)(2)(ii) (proposed § 1507.3(d)(2)(ii)). This standard recognizes that agencies may have different statutory authorities and therefore review different actions under NEPA for the same project. For example, one agency may fund a project, while another agency considers a permit for the same project—in this instance, the proposed action is the same as are its effects.

Comment: Commenters raised concerns that § 1506.3(d) (proposed §1506.3(f)) would allow the expanded use of CEs without the careful consideration that occurs when an agency establishes a CE. Commenters stated that allowing agencies to adopt another agency's CE is completely unwarranted and contrary to NEPA. The commenters argued that the CEQ regulations require each agency to establish its own CEs, based on each agency's own experiences regarding the environmental impacts of actions. Commenters raised concerns that § 1506.3(d) (proposed § 1506.3(f)) allows agencies to avoid the CE rulemaking process.

Commenters also stated § 1506.3(d) (proposed § 1506.3(f)) would provide more opportunities for agencies to claim that proposed actions fit within CEs. Commenters stated this provision would provide agencies another discretionary opportunity to claim that a proposed action does not need environmental review because it is substantially the same as a prior project.

CEQ Response: These comments reflect a misunderstanding of § 1506.3 in the final rule. Section 1506.3(d) (proposed § 1506.3(f)) provides agencies the flexibility to adopt another agency's determination that a CE applies when the actions are substantially the same to address situations such as when a proposed action would result in a CE determination by one agency and an EA and FONSI by another agency. CEQ established the standard for adoption for EISs and components thereof in the 1978 regulations, requiring the proposed action and the EIS-analyzed action to be substantially the same. That standard remains unchanged in the final rule, and is also applied to EAs and CE determinations. For an agency to adopt another agency's determination that a CE applies to a proposed action, the adopting agency must verify that the action considered in the adopted CE determination is substantially the same as the adopting agency's proposed action and that there are no extraordinary circumstances that may have a significant environmental effect (§ 1507.3(e)(2)(ii)) (proposed § 1507.3(d)(2)(ii)).

CEQ notes that the adoption process in § 1506.3(d) (proposed § 1506.3(f)) is distinct from the process described in § 1507.3(f)(5) (proposed § 1507.3(e)(5)) which would allow agencies to apply CEs established in another agency's NEPA procedures to a proposed action by establishing a process to do so in their agency NEPA procedures. Once established, this will allow agencies to use another agency's list of CEs when appropriate.

Comment: Commenters supported modifying § 1506.3(b) to encourage the use of prior reviews and decisions within the same agency, not just other agencies. Any renewal of permits,

or similar routine authorizations which have previously completed NEPA analysis should also be allowed to rely upon the previous NEPA analysis so long as there is no material change in the management of the project. This is consistent with the provisions of proposed § 1501.9(f)(1).

CEQ Response: Agencies can and should use previously completed environmental documents provided the documents meet the standards for an adequate statement. Section 1506.3 permits agencies to use their own previously completed environmental documents and no further changes are required.

4. Combining Documents (§ 1506.4)

Comment: Commenters supported the proposed changes to § 1506.4 and stated the proposed change from “may” to “should” would reduce duplicative documents in agency records. Commenters noted the proposed changes to § 1506.4 are consistent with other proposed changes to § 1506.2, “Elimination of duplication with State, Tribal and local procedures,” and § 1506.3, “Adoption,” that will reduce duplication of efforts and documents and improve the decision-making process. Some commenters suggested CEQ use even firmer language, such as “shall” combine documents whenever feasible.

CEQ Response: CEQ acknowledges the support for the proposed changes and, does not make any further changes to § 1506.4 in the final rule. Section 1506.4, finalized as proposed, clarifies that agencies should combine, to the fullest extent practicable, any environmental document with any other agency document to reduce duplication and paperwork.

Comment: Commenters objected to the proposed changes to § 1506.4 and requested CEQ leave the section unchanged. Some commenters stated CEQ justify removing the phrase “in compliance with NEPA” from § 1506.4. Other commenters stated the current regulations are sufficient because they allow for the combination of documents.

CEQ Response: The final rule contains clarifying revisions to § 1506.4 to improve readability by changing from passive to active voice. The phrase “in compliance with NEPA” was superfluous because § 1506.4 uses the term, “environmental document,” which by definition refers to a document prepared in compliance with NEPA (§ 1508.1(i)).

Comment: Commenters stated agencies may combine documents to avoid properly addressing their obligations under other laws, for example NHPA section 106 requirements resulting in adverse effects to historic properties.

CEQ Response: Section 1506.4 does not allow agencies to avoid their obligations under other laws. The combination of documents recognizes that agencies considering a proposed action in compliance with NEPA may also need to comply with other statutory requirements including their organic statutes and implementing procedures. The combination of documents under § 1506.4 furthers the statement in § 1500.1 that NEPA’s purpose is not to generate paperwork, but rather to provide for informed decision making and foster excellent action. To that end, agencies should not generate a unique environmental document when that document would duplicate information in other agency documents. Rather, the agency should combine the other agency documents with the environmental document so that the environmental document can satisfy the requirements of NEPA and other statutory requirements. The combination of documents does not change an agency’s duty to comply with other statutory requirements.

Comment: Some commenters perceived § 1506.4 to be a new requirement and objected to the combination of environmental documents and other documents. Commenters stated the combination of documents would result in the intermingling of agency decision records and obscure important information.

CEQ Response: The final rule maintains the long-standing agency practice of combining environmental documents with other agency documents to reduce redundancies in agencies' administrative records. The combination of documents under § 1506.4 furthers the statement in § 1500.1 that NEPA's purpose is not to generate paperwork, but rather to provide for informed decision making and foster excellent action. The combination of documents recognizes that agencies considering a proposed action in compliance with NEPA may also need to comply with other statutory requirements including their organic statutes and implementing procedures. To that end, the agency should combine other agency documents with the environmental document so that the environmental document can satisfy the requirements of NEPA and other statutory requirements.

Comment: Commenters suggested revising § 1500.4(q) to state “[t]o the extent practical, coordinating and combining with other agency documents and processes with environmental documents.” Commenters further suggested revising § 1500.5(k) to state “[a]s appropriate, coordinate and combine other agency documents and processes with environmental documents.” Both revisions were suggested because, according to commenters, it may not be practical or possible to combine documents and because agencies should coordinate and combine processes and documents.

CEQ Response: CEQ declines to make changes to the respective sections in the final rule. Section 1506.4, which is cross-referenced in both §§ 1500.4(q) and 1500.5(k), states that agencies should combine environmental documents with other agency documents, to the fullest extent practicable, so revisions to the respective sections to address whether it is practical to combine documents is not necessary. In addition, agency coordination is addressed elsewhere in the rule.

Comment: Commenter requested clarification as to whether the reference to “agencies” in § 1506.4 referred to Federal agencies.

CEQ Response: Consistent with the definition of “Federal agency” in § 1508.1(k), agency in § 1506.4 means all agencies of the Federal government as well as States, units of general local government, and Tribal governments assuming NEPA responsibilities from a Federal agency pursuant to statute. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office.

Comment: Commenters stated that they supported the proposed changes to §§ 1501.1(a)(6), 1507.3(c)(5), and 1506.9 (proposed §§ 1501.1(a)(5), 1507.3(b)(6)) regarding the use of functionally equivalent documents and processes. Commenters stated the goal of NEPA is not to simply produce additional paperwork but to ensure decision makers are fully informed of the effects of a decision and foster good decision making. These commenters also supported the use of functionally equivalent documents to avoid unnecessary duplication, delays and costs of decision-making processes. Because many statutes include a requirement for full consideration of environmental issues in agency decision-making processes and many Federal agencies have completed robust and comprehensive environmental programs that require thorough planning and evaluation of environmental effects, many commenters supported the agency’s ability to use those efforts to reduce duplication analyses.

CEQ Response: Utilizing documents and procedures prepared under other statutes that are functionally compliant with NEPA and its procedural requirements and the revisions will reduce duplicative procedures and documentation. Reducing duplicative analyses will result in more efficient and effective implementation of NEPA.

Comment: One commenter requested that CEQ issue guidance to explain to permittees on public lands how to submit information to Federal agencies showing that compliance with other statutes is functionally equivalent to NEPA.

CEQ Response: CEQ expects that agencies will consider opportunities to use functionally compliant processes and documents in their procedures.

Comment: Some commenters stated that allowing agencies to consider functionally equivalent documents or analyses would promote “less rigorous” environmental analysis and create a perverse incentive for the agencies. Commenters also stated that courts have narrowly applied the functional equivalence doctrine to situations where an agency is engaged primarily in an examination of environmental questions and where substantive and procedural standards ensure full and adequate consideration of environmental issues. Further, commenters stated that courts have rejected attempts by other agencies to extend functional equivalence such as the Forest Service, U.S. Fish and Wildlife Service, and National Marine Fisheries Service, and that CEQ does not have the authority or power to extend functional equivalence to other agencies. Some commenters expressed concern that an agency’s decision to codify the ability to consider functional equivalent documents as part of their procedures would “repeal” NEPA as a procedural statute.

CEQ Response: As discussed in section II of the final rule, courts have long recognized that agency compliance with statutes requiring consideration of environmental issues through procedures analogous to NEPA serve as the “functional equivalent” to compliance with NEPA’s procedural requirements. In considering whether a statute is the functional equivalent to NEPA, courts have generally focused on whether the agency is primarily engaged in examining environmental questions and whether the substantive and procedural standards under the statute

ensure full and adequate consideration of environmental issues.⁷⁶ Courts have also considered whether the documentation and action the agency has taken under another statute “substantially compl[y]” with the requirements of section 102(2)(C) of NEPA.⁷⁷ While the courts have generally limited application of functional equivalence to statutes administered by EPA, the United States Court of Appeals for the Second Circuit held that the Federal Communications Commission’s procedures for a rulemaking related to health and safety standards of radio frequency radiation were functionally compliant with NEPA and CEQ’s regulatory requirements for EAs and FONSI.s.⁷⁸

NEPA does not require agencies to prepare duplicative documentation and utilize duplicative procedures to comply with NEPA’s procedural requirements and ensure the Act’s twin aims of considering relevant environmental impacts of proposed actions and informing the public of about agency decision-making are fulfilled. As discussed above, the requirements related to functional compliance in the final rule are consistent with cases where courts have considered whether the documents prepared and procedures used under other statutes are

⁷⁶ See, e.g., *Env’tl. Def. Fund, Inc.*, 489 F.2d at 1256; *State of Ala. ex rel. Siegelman*, 911 F.2d at 504–05; *W. Neb. Res. Council*, 943 F.2d at 871–872; see also *Tex. Comm. on Natural Res. v. Bergland*, 573 F.2d 201, 208 (5th Cir. 1978) (applying factors but concluding that the National Forest Management Act was not functionally equivalent to NEPA because the Forest Service is required to balance environmental and economic needs). CEQ notes that the rationale in *Tex. Comm. on Natural Res.* is inconsistent with NEPA because it also involves consideration of economic variables. See NEPA section 101(a) (discussing “fulfill[ing] the social, economic, and other requirements of present and future generations of Americans”); section 102(2)(B) (“Federal Government shall . . . identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations”).

⁷⁷ *Hathaway*, 525 F.2d at 72 (“NEPA does not call for any particular framework or procedure and so long as the impact statement is relevant and thorough it need not be extensive.”); *Blum*, 458 F. Supp. at 661-62 (concluding that EPA Deputy Administrator’s final order demonstrated careful consideration of the “five core NEPA issues”, environmental impacts, adverse environmental effects, alternatives, the relationship between long- and short-term uses and maintenance and enhancement, and any irreversible and irretrievable commitments of resources).

⁷⁸ *Cellular Phone Taskforce*, 205 F.3d at 94–95.

functionally equivalent to those required under NEPA and will ensure functional compliance with NEPA and its procedural requirements.

Further, as it relates to CEQ's authority, the Supreme Court recognized in *Public Citizen*, 541 U.S. at 757, that "[t]he Council [on] Environmental Quality (CEQ) [was] established by NEPA with authority to issue regulations interpreting it, [and] has promulgated regulations to guide Federal agencies in determining what actions are subject to that statutory requirement." *See also Methow Valley*, 490 U.S. at 351 (noting that the "requirement" that an EIS include a specific discussion "flows both from the language of the Act and, more expressly, from CEQ's implementing regulations"). Since early in the statute's history, CEQ's authority to administer NEPA has been recognized. *Warm Springs Dam Task Force*, 417 U.S. at 1309–10.

Comment: Commenters referenced instances where utilizing functional equivalence under other statutes, such as CERCLA, led to disputes that could have been managed better had the agency applied the process under NEPA.

CEQ Response: It is speculative whether a process under another statute that led to disputes could have been better managed under NEPA's procedures.

Comment: Commenters stated that CEQ's solicitation for comment on additional analyses that would be functionally equivalent to an EIS is too vague to allow for meaningful public input and therefore CEQ should solicit further comment on any subsequently identified alternative analysis.

CEQ Response: CEQ did not receive public comments providing sufficient support to expressly include additional analyses that may prove to be functionally equivalent to an EIS. CEQ has made no further changes with respect to this question in the final rule.

5. Agency Responsibility for Environmental Documents (§ 1506.5)

Comment: Commenters stated that if an applicant can successfully prepare an EA for an agency, it should also be able to prepare an EIS, and supported the revision. Other commenters expressed support for allowing applicants and contractors to assume a greater role in the preparation of an EIS under the supervision of a Federal agency, and noted that it would promote efficient use of agency resources.

CEQ Response: Federal agencies have worked successfully with applicant-prepared EAs for many years under 40 CFR 1506.5(b), which required agencies to independently evaluate, revise appropriately, and take responsibility for the content of such EAs. Based on its experience, CEQ finds it is appropriate to allow this approach to be applied to EISs. As revised, agencies will still be required to independently evaluate, and revise as appropriate a preliminary environmental document and take responsibility for the content of any the document upon its publication by the agency. For purposes of these regulations, CEQ does not see a distinction between an applicant and the contractors working for it.

Comment: Commenters disagreed with CEQ's justification that allowing increased use of applicant-prepared NEPA documents would increase communication with the applicant, stating that similarly close coordination can occur through public comment and review procedures, or activities such as "pre-NOI" activities. Commenters further stated that CEQ identified no barriers to communication with applicants that the proposed change would resolve, and noted that the regulations already require agencies to assist the applicant by outlining the types of information required.

CEQ Response: Improved communication and coordination with the applicant is one of several anticipated benefits of the proposed changes to § 1506.5(c). Importantly, the changes

will also provide agencies with more flexibility to select the most efficient means of completing an EIS. Some commenters emphasized that contractors may possess significant environmental and technical resources that could enable more efficient and timely preparation and evaluation of environmental reviews. The 1978 regulations allowed agencies to use applicant-prepared preliminary environmental documents for EAs and, upon review of this practice, CEQ has expanded to its EISs in the final rule.

To facilitate an efficient process, the final rule requires agencies to provide guidance to applicants preparing NEPA documents, and participate in the preparation, while also requiring agencies to independently evaluate documents prior to approval, and to take responsibility for the scope and contents

Comment: Commenters stated that the proposed changes to § 1506.5(c) would allow for bias in environmental documents, would allow for incomplete documents and conflicts of interest, and would result in environmental reviews that prejudice the analysis toward a private entity's preferred course of action. Commenters stated that CEQ should ensure that members of the public feel confident that their comments during NEPA reviews are taken seriously and allowing private applicants to prepare the NEPA documents will undermine such confidence.

CEQ Response: CEQ affirms that it is important to maintain the public's faith in the integrity of the EIS process, and has included safeguards to ensure bias is not introduced into NEPA documents. The final rule retains many of the procedures of the 1978 regulations for public comment and review of the agency's administrative record. Upon consideration of the long-standing practice of allowing applicants to assist with the preparation of EAs, CEQ has not

identified evidence of bias in NEPA documents.⁷⁹ To the extent that an applicant prepares biased or otherwise deficient documents, the final rule requires that agencies exercise independent review, which ensures such issues are corrected.

Section 1503.4 reinforces the agencies' duty to consider substantive public comments, including comments on the underlying environmental documents. Further, pursuant to § 1502.24, agencies must ensure the professional integrity, including the scientific integrity, of the discussions and analyses in environmental documents.

Comment: Commenters stated that removing the requirement for an agency to choose a contractor that avoids any conflict of interest is a reversal of position from CEQ's previously issued guidance, CEQ Memorandum Re: Guidance Regarding NEPA Regulations (July 22, 1983); commenters stated that CEQ should include this requirement in the final rule.

Commenters cited the text from CEQ's 1983 guidance stating:

“...if any delegation of work is to occur, it should be arranged to be performed in as objective a manner as possible. Preparation of environmental impact statements by parties who would suffer financial losses if, for example, a ‘no action’ alternative were selected, could easily lead to a public perception of bias. It is important to maintain the public’s faith in the integrity of the EIS process, and avoidance of conflicts in the preparation of environmental impact statements is an important means of achieving this goal.”⁸⁰

CEQ Response: CEQ has made further changes to § 1506.5(b)(4) to require that contractors and applicants preparing preliminary environmental documents for agencies provide

⁷⁹ Project proponents have no incentive to perform inadequate NEPA work only to see the project delayed in the courts.

⁸⁰ 48 FR 34263, 34266 (July 28, 1983).

a financial disclosure statement to the agency. While independent agency review will ensure that environmental documents adhere to appropriate standards, disclosing the financial interests of applicants and project sponsors will allow the public and stakeholders to understand whether a firm or a project sponsor has a financial interest in the outcome of a project. CEQ clarifies that any firm or applicant need not provide any privileged or confidential business information to satisfy this requirement, nor does an interest in the outcome of a proposal foreclose such an entity from preparing preliminary environmental documents for the agency.

Comment: Some commenters preferred to maintain the current process of allowing only independent contractors to prepare environmental reviews. They asserted that it would expedite document preparation without compromising the integrity of the NEPA process. Moreover, several Federal agencies already use similar procedures for agency-directed contractors. Commenters recommended that agencies develop rosters of approved contractors based on technical competency or historical work products. Commenters stated the proposed change would lead to a less efficient NEPA process, requiring agencies to expend more of their limited time and resources reviewing applicant-authored materials, responding to public comments, and resolving administrative challenges to environmental reviews and NEPA procedures. Other commenters expressed concern with industry being allowed to select their own contractors.

CEQ Response: Under the final rule, independent contractors may continue to be used by Federal agencies; however, limiting agencies to using pre-approved rosters of contractors will lead to less timely NEPA documents. The final rule retains the long-standing practice of agencies directly preparing NEPA document using its own staff, hiring a contractor, or entering into a “third-party” arrangement with an applicant to hire a contractor. As revised, the final rule

provides agencies with additional flexibility to conduct the reviews. Contracting details may be addressed in agency implementing procedures and related materials.

Comment: Commenters stated that applicants should adhere to Federal ethics standards and guidelines when providing services to the government on behalf of the public and should be held to the same standards as public officials who must file public financial disclosure statements, which are broadly interpreted by the Office of Government Ethics to identify potential conflicts of interests.

CEQ Response: The commenters are correct that certain senior level employees must file various financial disclosure reports depending on the position or status of the employee. Importantly, covered Federal employees perform decision-making responsibilities within their respective Federal agencies. In drafting an applicant-prepared EA or EIS, the applicant or its contractor exercises no decision-making authority. The agency must review and revise the materials as necessary and, for those officials, financial disclosures may be appropriate. Finally, the ultimate decision on whether to authorize a particular action still lies with the agency decision-maker. As outlined in § 1505.2 the agency must still identify all alternatives considered, state whether the agency has adopted all practicable means to avoid or minimize environmental harm from the alternative selected, and address any comments or objections received on the final EISs submitted alternatives, information, and analyses section. Finally, CEQ expects that the agency's decision-making document is still to be prepared independently from any applicant or its contractors.

Comment: A commenter requested CEQ add language to proposed § 1506.5(a) and (b) stating that the costs of this independent evaluation shall be borne by the contractor and/or applicant.

CEQ Response: The administration of contracts by Federal agencies is subject to statutory and regulatory requirements and is outside the scope of this rulemaking.

Comment: Commenters expressed concern that the proposed revisions would limit the input of States, Tribes, and the public in oversight of environmental documents.

CEQ Response: Nothing in § 1506.5 changes the provisions in the regulations that allow for the participation by State, Tribal or local governments in the NEPA process, or for State, Tribal, and local governments and the public to comment on environmental documents.

Comment: A commenter suggested adding after “applicant” a reference to “or a third party paid for by an applicant” in § 1506.5(b) (proposed § 1506.5(a)).

CEQ Response: In the final rule, CEQ has reorganized and revised § 1506.5 to better communicate the requirements allowing applicants and contractors to assume a greater role in the preparation of EAs and EISs. The rule as revised references both applicants and contractors.

Comment: A commenter recommended that CEQ broaden proposed § 1506.5(c) to allow others to prepare EISs including students, agency volunteers, and Tribal partners.

CEQ Response: The final rule refers to applicants and contractors generally. Section 1506.5(b)(3) requires that the environmental documents include the names and qualifications of persons preparing environmental documents and conducting the independent evaluation of any information submitted or environmental documents prepared by an applicant or contractor.

Comment: A commenter stated that the case law is clear and that EISs and EAs are to be prepared by the agency undertaking the action.

CEQ Response: The 1978 regulations expressly allowed for the preparation of EAs by applicants under the supervision of the agency. In the final rule, § 1506.5 allows greater flexibility for the project sponsor (including private entities) to participate in the preparation of

EAs and EISs under the supervision of the lead agency, while continuing to require agencies to independently evaluate and take responsibility for those documents.

Comment: One commenter expressed concern that the proposed revisions to § 1501.8(q) exempting loans, loan guarantees, and other forms of financial assistance in combination with the proposed revisions to § 1506.5 to allow contractors to prepare NEPA documents would allow Federal agencies to push projects through the process without doing the work or having the agency's name on the NEPA document.

CEQ Response: Under the final rule, agencies have responsibility for determining whether a proposed action constitutes a major Federal action. Further, the final rule makes clear in § 1506.5(a) that the agency is responsible for the accuracy, scope, and content of environmental documents prepared by an applicant or contractor under the supervision of the agency. The final rule further requires in § 1506.5(b) that agencies provide guidance to the applicant and contractor, and participate in the preparation of environmental documents, and that the agencies include in the environment documents the names and qualifications of the persons that have prepared them, and independently evaluate the information submitted or the environmental document. As discussed above, CEQ finds that it is appropriate to allow applicants to prepare documents to provide efficiency and because agencies retain their responsibility to oversee and take responsibility for the environmental document.

Comment: Commenters requested that CEQ provide additional details on presumptive time limits for instances where applicants are preparing draft EAs or EISs for the lead agency. More specifically, commenters ask that CEQ provide a time limitation on the length of time available to a reviewing agency for review of draft environmental documents prepared by an applicant. For example, if an agency provides guidance and participates as required in § 1506.5,

the agency should be well prepared to issue a project approval within a short timeframe.

Commenters also noted that CEQ proposed additional guardrails for potential “loopholes” where applicants are preparing draft NEPA documents such that a private sponsor may be able to avoid early public engagement and avoid applying NEPA early in the process.

CEQ Response: The final rule requires presumptive time limits for completion of EISs and EAs. When an applicant is preparing a draft NEPA document for a Federal agency, the agency must participate early and provide technical guidance and assistance to the agency to eliminate duplicative work and ensure that the draft NEPA document will meet the needs of the agency and comply with NEPA. CEQ declines to place additional restrictions on the time agencies have to review draft NEPA documents and agencies may set appropriate timeframes for review in their implementing procedures. With respect to applying NEPA early in the process, in accordance with § 1501.2, agencies should still integrate the NEPA process at the earliest reasonable time, even in situations where an applicant may be preparing a draft NEPA document for the agency.

6. Public Involvement (§ 1506.6)

Comment: Some commenters expressed support for the proposed revisions to § 1506.6, observing that modernizing this section to allow for public involvement, including public comment and public meetings, through electronic media would result in greater outreach and public participation. Commenters recommended that the various forms of electronic communication must be designed in a readily understandable and intuitive manner with user-friendly and ADA-accessible interfaces. Commenters noted that some electronic systems currently used by agencies are not user-friendly or intuitive. Commenters also observed that utilizing the internet for soliciting feedback and improving awareness of a particular review

would create a more inclusive process for involving the public in the review while reducing unnecessary costs.

CEQ Response: CEQ has further revised § 1506.6 in the final rule to clarify that agencies should consider the public's access to electronic media when selecting appropriate methods for public notice and involvement. CEQ proposed changes to § 1506.6 to modernize the regulations and allow agencies greater flexibility to design and customize public involvement to best meet the specific circumstances of their proposed actions and the potentially affected communities. The final rule expands the already wide range of methods that agencies may use when providing notice to and involving potentially affected communities.

Comment: Commenters stated that E.O. 12898 and its accompanying Presidential Memorandum direct Federal agencies reviewing and preparing EISs to ensure hearings, documents, and notice related to a proposed project are made available and accessible to the general public. Commenters stated that the proposed changes would not require agencies to publish a draft EIS for public review before a public hearing, or make documents available to the public free of charge or at a very low cost.

CEQ Response: The final rule expands opportunities for public outreach in scoping and the development of EISs (§§ 1501.9, 1503.1, 1506.6) and requires agencies to make information on NEPA reviews publicly available such as environmental documents, notices, and other relevant information. The final rule also contains language in §§ 1502.20, 1503.1, and 1506.6 to ensure agencies consider the ability of impacted communities to access electronic media. The final rule also directs agencies to provide for agency websites or other means to make available environmental documents, relevant notices and other relevant information to allow agencies and the public to efficiently and effectively access information about NEPA reviews. § 1507.4.

Comment: Commenters expressed concerns with the proposed changes to § 1506.6(c) which allow agencies to use electronic communication to hold public hearings or public meetings. Commenters stated that agencies or applicants may abuse this provision by not holding physical public meetings and instead rely fully on electronic communication.

Commenters asserted that provisions allowing agencies to use electronic means to conduct public hearings and meetings and publish documents threaten to disenfranchise individuals with limited English proficiency, disabilities, or limited financial means and violate the spirit of NEPA.

Commenters requested specific guidance to agencies for appropriately involving environmental justice communities, noting that historically environmental justice communities have been disproportionately affected by the adverse environmental impacts of Federal actions. Commenters observed that the proposed rule does not incorporate recommendations from the Federal Interagency Working Group on Environmental Justice, which focused on increasing outreach to vulnerable communities. Commenters explained many environmental justice communities have limited access to high-speed internet and other infrastructure necessary for electronic communication. Other commenters noted the proposed rule does not require agencies to utilize adaptive or innovative approaches to involve minority, low-income, and Tribal populations in the NEPA process. Commenters argue that proposed amendments to § 1506.6 will in effect erect an “electronic barrier” to public participation by environmental justice communities.

Commenters also stated agencies must consider the public’s ability to readily participate in the NEPA process and ensure a process that provides reliable access. Commenters stated that agencies must continue to increase efforts to fully involve all of the affected public in the NEPA

process. Commenters further noted that electronic media should not be the sole method of public notification and participation for any proposed actions, but rather should be an additional strategy or tool to capture a broader audience than traditional means alone. Other commenters requested that CEQ require Federal agencies to provide the public an opportunity to be heard at in-person meetings, stating that CEQ must ensure public meetings and public commenting are in fact public by providing means for all interested parties to attend and participate consistent with NEPA and the APA.

CEQ Response: CEQ has made further changes to § 1506.6 in the final rule to clarify that agencies should consider the public’s access to electronic media when selecting appropriate methods for providing public notice and involvement. The intent of the final rule is to modernize the regulations and provide agencies with greater flexibility to design and customize public involvement to best meet the specific circumstances of their proposed actions. The *Federal Register* is the primary means by which regulatory developments in the Federal government are communicated to the public, and the final rule expands the already wide range of tools agencies may use when providing notice to potentially affected communities and inviting public involvement.

Comment: Commenters requested that CEQ revise § 1506.6(a) to establish a government-wide minimum standard for public involvement by adding: “This shall include: (1) Soliciting public comments for not less than 30 days on environmental assessments; (2) Soliciting public comments for not less than 30 days during scoping for environmental assessments and environmental impact statements; and (3) Soliciting public comments for not less than 60 days on draft environmental impact statements.”

CEQ Response: Agencies have historically had considerable flexibility in structuring public involvement for EAs and scoping, with a required minimum 45–day comment period on a draft EIS consistent with § 1506.11. Agencies continue to be well served by this approach so CEQ has retained it in the final rule.

Comment: Commenters requested that CEQ revise § 1506.6(b) to clarify that agencies must provide notice to State, Tribal, and local agencies and governments that may be interested or affected by the proposed action. Commenters noted that other provisions in § 1506.6 require specific forms of notice; however, § 1506.6(b)(3) utilizes the word “may” indicating agencies have the discretion to provide notice to State, Tribal, and local governments. Commenters requested to revise § 1506.6(b)(1) to state “[i]n all cases, the agency shall notify State, Tribal, and local governments that may be interested or affected by the proposed action, and those who have requested notice on an individual action.”

CEQ Response: CEQ declines to make any further changes to § 1506.6(b)(1) in the final rule. The final rule establishes a duty of Federal agencies to inform and cooperate with State, Tribal, and local governments. Agencies are encouraged to consult early in the process with State, Tribal, and local governments (§ 1501.2), required to invite the participation of likely affected Federal, State, Tribal, and local agencies and governments during the scoping process (§ 1501.9), and required to request comments from appropriate State, Tribal, and local agencies (§ 1503.1).

Comment: Commenters requested that CEQ revise § 1506.6 to require publication in the *Federal Register* notification for all actions, not just actions of national concern. Commenters also requested CEQ clarify § 1506.6 publication is required at the start of the NEPA process for EAs and EISs. Commenters suggested § 1506.6(b)(2) should read: “A notice in the *Federal*

Register is required for the notice of intent and notice of availability for the draft and final environmental impact statement and for publication of the ROD. In addition to the *Federal Register* notices, the agency may choose other methods of communication with the public including ...”

CEQ Response: CEQ declines to make further revisions in § 1506.6(b)(2) of the final rule. Section 1501.9(d) of the final rule includes a requirement that NOIs be published in the *Federal Register*, and § 1506.11 of the final rule requires that the Environmental Protection Agency publish a notice each week in the *Federal Register* of availability of each EIS filed by agencies, which includes each draft, final and supplemental EIS filed with EPA. The final rule also requires that agencies make available on their agency websites or other means environmental documents, which may include RODs, as well as relevant notices and other relevant information for use by agencies, applicants, and interested persons. *See* § 1507.4. Additionally, when developing implementing procedures, agencies may establish a process to publish notifications in the *Federal Register* that are beyond those of a “national concern.”

Comment: Commenters objected to changing “shall notify” to “may notify” in § 1506.6(b)(2) on the basis that it would erode public participation by changing the standard for notification of national organizations about pending projects. Commenters expressed concern that CEQ intends to minimize participation of national organizations. Commenters also stated that the process for notifying communities regarding actions of potentially local concern has not changed and requires notification of potentially interested community organizations. Commenters noted, however, that local organizations with interest in proposed projects often have limited ability to address them and may rely on national organizations with aligned interests

to help them participate. Commenters requested that CEQ reinstate the requirement for agencies to notify national organizations about actions with effects of national concern.

CEQ Response: Section 1506.6 requires agencies to provide public notice of NEPA-related hearings, public meetings, and other opportunities for public involvement, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected by their proposed actions. When selecting appropriate methods for providing public notice, agencies should consider the ability of affected persons and agencies to access electronic media. Agencies must provide notice to those who have requested notice on a specific action and may notify organizations, both national and local, that have requested regular notice. The final rule recognizes the use of modern technologies and expands the range of methods agencies may use when providing notice to the public and clarifies that agencies are expected to consider which methods would effectively and efficiently inform the public about the proposed action.

Comment: Commenters objected to the proposal to remove the requirement to hold public meetings on projects of substantial controversy in § 1506.6(c). Commenters stated that projects of “substantial environmental controversy” are frequently the projects in which the public is most interested. Commenters requested CEQ reinstate the requirement.

CEQ Response: CEQ declines to include the suggested revision to § 1506.6(c) in the final rule. The final rule requires agencies to hold or sponsor public hearings, public meetings, or other opportunities for public involvement whenever appropriate or in accordance with statutory requirements applicable to the agency. CEQ removed the term “substantial environmental controversy” because that term was not defined, difficult to consistently interpret and apply, and located only in § 1506.6(c).

Comment: Commenters objected to the proposed changes at § 1506.6(c) to remove the requirement that an agency publish a draft EIS at least 15 days before holding a public hearing on the draft EIS. Commenters stated the 15–day waiting period allows the public the opportunity to review a draft EIS before attending a meeting which allows for informed public comment. Commenters requested CEQ reinstate the 15–day period in the final rule.

CEQ Response: CEQ declines to include the suggested revision to § 1506.6(c) in the final rule. The 1978 regulations recommended, but did not require, a 15–day period between publication of a draft EIS and holding a hearing on the draft EIS, and this recommended period did not apply when the purpose of the hearing was to provide information on the draft EIS. CEQ encourages agencies to make the draft EIS available prior to public hearings, public meetings or other opportunities for public involvement.

Comment: Commenters objected to the proposed changes that remove the provisions that recommended agencies release environmental documents to the public at no charge and without invoking the deliberative process privilege § 1506.6(f). Commenters noted this change appears to conflict with section 5.5(c) of E.O. 12898, which requires that “[e]ach Federal agency shall work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public.” Commenters raised concerns that these changes will act as a barrier to public participation by increasing the cost of seeking relevant documents and limiting what documents an agency is required or encouraged to provide. Commenters requested CEQ reinstate the provisions regarding FOIA fees and the deliberative process privilege.

CEQ Response: CEQ does not make any further changes to § 1506.6(f) in the final rule. The requirements referenced by the commenters are duplicative of other publication

requirements in the final regulations and agencies' FOIA regulations. The final rule clarifies that agencies should publish on an agency website environmental documents and other relevant information. CEQ notes that agencies routinely release materials under FOIA to the public without charge to the extent practicable, or charge only the cost of reproducing the material.

Comment: Commenters requested CEQ revise § 1506.6 to require agencies to respond to requests from the public for the technical and analytical records underlying the analysis in NEPA documents before the agencies close public comment periods. Commenters stated that agencies are failing to respond to requests for information, submitted via FOIA, and requests to an agency's NEPA coordinators in a timely fashion. This practice is forcing the public to comment without such specifically requested information. Commenters stated that CEQ is insisting on more detailed and technically or scientifically supported comments from the public without requiring agencies to provide the public with necessary and specifically requested information and agency records. Commenters stated that these proposed changes collectively indicate that CEQ is interested in undermining meaningful public participation.

CEQ Response: The final rule simplifies this paragraph to require agencies to make EISs, comments and underlying documents available to the public consistent with FOIA, which Congress has amended numerous times since the enactment of NEPA, mostly recently by the FOIA Improvement Act of 2016, Public Law 114–185. Whenever practicable, agencies must publish environmental documents and appropriate analyses at the same time as other planning documents (§ 1501.2(b)(2)), and are prohibited from incorporating material by reference that is not reasonably available for inspection by interested persons within the time allowed for comment (§ 1501.12). The final rule at § 1502.23 (proposed § 1502.24) also requires agencies to

identify any methodologies used and to make explicit reference to scientific and other sources relied upon for conclusions in an EIS.

The final rule, moreover, includes provisions to promote access to information through current technologies, and encourages agencies to publish information using methods that efficiently and effectively make environmental documents and information available for review by interested persons, including electronic publication. § 1508.1(y). Section 1507.4 of the final rule, finalized as proposed, also directs agencies to provide for agency websites or other means to make available environmental documents, relevant notices, and other relevant information for use by interested persons.

Comment: Commenters requested that CEQ revise § 1506.6(f) to clarify that certain documents provided or created during the NEPA review process are not releasable under FOIA. For example, Tribal governments frequently provide comments that may contain information about sensitive historic sites or culturally sensitive information.

CEQ Response: CEQ acknowledges the commenters' suggestions but declines to make the requested revision to § 1506.6(f) in the final rule. CEQ notes that some environmental information is routinely withheld because that information is protected from disclosure under a FOIA exemption or other Federal law. CEQ encourages Federal agencies to work closely with State, Tribal, and local agencies and governments to ensure that sensitive information is appropriately handled by the lead agency and protected from disclosure where that is warranted under the law.

Comment: Commenters requested that CEQ revise § 1506.6(b)(3)(vi) to remove “small business associations.” Commenters asserted that referencing only “community organizations” is sufficiently inclusive and singling out a specific organization type is unfair to other

organizations. Other commenters requested CEQ amend § 1506.6(b)(3)(vi) to add environmental organizations.

CEQ Response: CEQ acknowledges the commenters' suggestions, but declines to include the suggested revision to §§ 1506.6(b)(vi) in the final rule. The language was used in the 1978 regulations and included in the proposed rule, without change. CEQ believes it is helpful to provide that interested community organizations, which would include environmental organizations, may also include small business associations.

Comment: Commenters requested that CEQ revise § 1506.6(f) to expressly require that all environmental documents are made available to the public under the Freedom of Information Act (FOIA).

CEQ Response: Section 102(2)(C) of NEPA expressly requires agencies to make the EIS available to the public pursuant to FOIA; however, the EIS would be subject to FOIA regardless of the requirement at § 1506.6(f). Expanding the reference at 1506.6(f) to include all environmental documents is unnecessary since they already are subject to FOIA.

Comment: A commenter requested that CEQ revise its regulations to prescribe a highly standardized approach to public involvement, and expressed the view that the proposed regulations would deny the public a consistent and reliable opportunity to participate in the NEPA process, and thereby deprive agencies of all opportunities to improve their decision-making activities. Further, a commenter stated that agencies should not be granted the authority to restrict the level of public involvement based on vague notions of "project circumstances." Instead, the commenter stated that CEQ should allow for this kind of restricted public involvement only in cases of compartmentalized information or other legitimate security concerns.

CEQ Response: CEQ disagrees that a highly standardized approach would improve public involvement in the NEPA process. Similar to the 1978 regulations, the final rule provides flexibility for agencies to structure public involvement based on the specific circumstances of the proposed action. Further, the final rule expands opportunities for public involvement in scoping before issuance of the NOI, and expanded use of electronic communication.

Comment: A commenter requested that CEQ limit participation by non-Tribal, non-neighbor public for projects on Tribal land. The commenter stated that the public comment process slows the environmental review process and requires significant Federal resources to respond to public comments. Commenter further stated that for any proposed Federal action on Indian lands that requires an EIS, the EIS should be made available for review and comment by “(i) Indian tribes in the affected area and individual members of those tribes wherever they reside; (ii) Other individuals who reside in the affected area; and (iii) State and local governments within the affected area.” This limitation on the availability of an EIS for review and comment would not apply if the proposed Federal action regards an activity “related to gaming under the Indian Gaming Regulatory Act.” Other than this exception, the limitation would apply to any proposed Federal action regarding an activity on Indian lands.

CEQ Response: The statute does not allow for selective participation among the public based on the characteristics of the proposed action. However, as described elsewhere, the final rule contains a number of changes to strengthen cooperation between Federal agencies and Tribal governments.

Comment: Commenters supported proposed changes to § 1506.6 that clarify and expand Tribal involvement. Commenters suggested CEQ further revise § 1506.6 to require, when relevant, specific Tribal notice, posting in public places within Tribal communities, and having

on reservation public meetings to increase Tribal member and Tribal community input.

Commenters explained that Tribal members have extensive knowledge based on centuries of traditional uses of the lands, and continue to exercise traditional activities on public lands.

However, Federal agencies often do not reach out to impacted Tribal communities during public comment periods. Commenters stated that the collective changes to the proposed rule have the overall effect of rendering Tribes and the public as passive bystanders, occasionally providing comments for the lead agency to ignore.

CEQ Response: CEQ acknowledges the commenters' suggestion but declines to include the suggested revision to § 1506.6 in the final rule. The final rule including § 1506.6 contains a number of changes to strengthen cooperation between Federal agencies and Tribal governments. These changes include treating Tribal and State governments similarly with respect to public involvement and removing references to reservation boundaries as recognition that Tribal interests often extend beyond reservation boundaries. Additionally, the final rule improves the scoping process by requiring agencies to invite State, Tribal, and local governments and the public to identify potential alternatives, information, and analysis relevant to the proposed action. Section 1502.17 of the final rule requires agencies to summarize and publish comments received during scoping. Section 1503.1(a)(3) requires agencies to invite comments specifically on the submitted alternatives, information, and analyses and the summary thereof. Section 1506.6 expands the suite of methods agencies may use when notifying and involving State, Tribal, and local governments and the public. The final rule clarifies that agencies should select appropriate methods for public involvement and allows agencies the flexibility to determine which methods of public involvement are appropriate. Finally, § 1505.2 requires the decision maker to certify in the ROD that the agency has considered all of the alternatives, information, analyses, and

objections submitted by State, Tribal, and local governments and public commenters. For these reasons, adding further notice requirements for Tribal communities is not necessary to ensure their full participation.

Comment: One commenter was concerned that there would not be an opportunity for public participation if an agency were allowed to substitute a functionally equivalent process or documentation.

CEQ Response: Courts have determined that certain statutes are functionally equivalent to NEPA, reflected by the changes at §§ 1501.1(a)(6) and 1507.3(d)(6), and therefore satisfy NEPA's requirements concerning public participation. The changes to §§ 1506.1 and 1507.3(c)(5) allow an agency to substitute one or more procedures or documents under other statutes or Executive orders for the requirements in the final rule; however, these changes would not allow an agency to forego public involvement as asserted by the commenter. The changes regarding functional equivalence and compliance maintain NEPA's twin aims of considering relevant environmental impacts of proposed actions and informing the public of about agency decision-making are fulfilled, while reducing duplicative procedures and documentation.

Comment: Some commenters stated that the proposed changes would limit the ability of the public, especially environmental justice communities, to provide public comment on projects. Tribal commenters stated that the proposed changes would limit Tribal involvement.

CEQ Response: CEQ acknowledges the comment, however, to the extent the proposed changes would affect projects that are currently subject to categorical exclusions, no public comment would have been required under the 1978 regulations.

7. Further Guidance (§ 1506.7)

Comment: A commenter asked that CEQ include E.O. 13790, “Promoting Agriculture and Rural Prosperity in America,” and E.O. 13817, “Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals,” to the list of Executive orders in § 1506.7.

CEQ Response: The Executive orders referenced in § 1506.7 in the final rule directly relate to implementation of NEPA and agency guidance documents. In § 1506.7, CEQ declines to reference any Executive orders not directly related to implementation of NEPA and issuance of agency guidance documents. To the extent an Executive order bears on a particular NEPA review, the public may submit comments to further their points.

8. Proposals for Legislation (§ 1506.8)

Comment: A commenter expressed support for CEQ’s proposal to consolidate and revise for clarity the requirements for legislative EISs currently described in 40 CFR 1508.17 and the requirements found in the definition of legislation, as they remain mostly intact.

CEQ Response: CEQ acknowledges support for the proposed changes and has finalized those changes with additional revisions for clarity.

Comment: A commenter opposed the proposed revision of the definition of legislation, arguing that substituting the word “means” for “includes” would narrow the definition. The commenter stated there are potentially other instruments that a department may send to Congress besides a bill or legislation, such as a report (*NRDC v. Lujan*).

CEQ Response: NEPA requires agencies to “include in every recommendation or report on proposals for legislation” a “detailed statement,” provided certain other conditions are met. 42 U.S.C. 4432(2)(C). The definition of “legislation” does not modify the phrase “recommendation or report.” Rather, CEQ clarifies that NEPA only applies to

“recommendation[s] and report[s]” about “bills and legislative proposals,” assuming those other conditions are met. In making this clarification, CEQ is mindful that there must be a meaningful threshold to NEPA’s applicability, which this definition of “legislation” provides. CEQ is also mindful that the interactions between administrative agencies and congressional offices are continuous, of infinite variety, going well beyond the category of “bills and legislative proposals,” and largely informal.

Comment: Some commenters opposed the proposed revision of the definition of legislation as it would create a harmful precedent that the Federal Government can essentially avoid NEPA compliance on any or all projects “proposed” by the President in conflict with the intent, if not the letter, of the law. Similarly, some commenters argued that CEQ must classify the President as analogous to a Federal agency because the President implements policy through Federal agencies and because “Congress’s Declaration of National Policy” in section 101 of NEPA makes clear that the statute applies to the entire Federal Government, including the President as chief executive. Relatedly, commenters stated that eliminating legislative EISs would conflict with Article II, Section 3, of the Constitution, which states that the President “shall take care that the Laws be faithfully executed.”

CEQ Response: Formulating and transmitting recommendations to adopt “bills and legislative proposals” is not part of taking care that the laws be faithfully executed; it is inherently about the prospect of creating new laws. The Constitution gives plenary authority to the President to recommend legislation: “He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures *as he shall judge necessary and expedient . . .*” Art. II, § 3 (emphasis added). Congress may not impose conditions or limitations on this authority. *Cf. Zivotovsky v. Kerry*, 135 S. Ct. 2076, 2094

(2015) (finding an exclusive presidential power to recognize or refuse to recognize foreign governments as legitimate). Because this is a plenary authority that the Constitution confers upon the President, Congress may not impose conditions on its exercise. By construing NEPA not to apply to “requests for appropriations or legislation recommended by the President” from the definition of “legislation” under the statute, *see* § 1508.1(p), CEQ avoids a constitutional difficulty. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 569 (1947).

Comment: Commenters stated the legislative EIS requirement should not be changed as it is statutory and obligatory, requiring “agencies” that “recommend or report” on legislation to undertake an EIS. Commenters noted changes to the requirement would be outside of CEQ’s authority and in conflict with the law unless an exemption is specifically provided under the statute.

CEQ Response: In the final rule, CEQ merely provides a threshold as to what constitutes “legislation” for purposes of NEPA’s applicability, bearing in mind that interactions between agencies and congressional offices are continuous, of infinite variety, going further than the category of “bills and legislative proposals,” and largely informal. The Supreme Court has expressly recognized that CEQ’s implementation of NEPA is entitled to deference. *See Andrus*, 442 U.S. at 357.

Comment: A commenter recommended further consultation with CEQ’s attorneys to increase certainty as to the source of Executive branch agency authority and further amending of this section’s language to ensure that processes for agencies proposing legislation and for cooperation and support of legislation brought forward by other entities are clearly delineated. The commenter recommended that agencies’ proposals for legislation are presented for review

by the Executive Office of the President for a finding of whether those proposals are considered necessary and expedient by the President prior to those legislative proposals being offered to the Congress for consideration.

CEQ Response: As noted in section II.H.8 of the final rule, the President is not subject to NEPA in his direct recommendations to Congress, but agencies subject to the APA are subject to NEPA, as appropriate, concerning legislative proposals that they develop. This avoids the concern with constitutionality of the statutory requirement. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 569 (1947).

9. Proposals for Regulations (§ 1506.9)

Comment: Commenters stated that CEQ's three-part test for determining functional equivalence at §§ 1506.9(b) and 1507.3(b)(6) was vague and unenforceable, and amounts to a lower standard such that it does not ensure the actual functional equivalence of the alternative analyses. Commenters questioned whether "full and adequate consideration" is synonymous with the "detailed statement" required under section 102 of NEPA, whether agencies must analyze and consider the "five core NEPA issues," the adequacy of the requirements on timing of public involvement, and whether the focus on analyzing environmental issues would be lost if other issues are analyzed simultaneously. Commenters stated that the overall effect of the proposed changes was to open the door to the type of perfunctory analysis that fails to take a "hard look" at the environmental consequences of a Federal action. Further, commenters expressed concern that substitution of other procedures, such as those related to regulatory impact analyses (RIAs), may lead to an absence of scoping and opportunities to identify alternatives and issues for analysis.

9.4.2-1 Response: CEQ does not include the proposed three-part test in the final rule. Instead, under § 1506.9, agencies must identify the provision(s) in the CEQ's regulations that are satisfied by procedures and documentation pursuant to other statutory or Executive order requirements. Such an approach does not allow for a perfunctory analysis, as asserted by the commenters. The final rule's requirements are consistent with cases where courts have considered whether the documents prepared and procedures used under other statutes are functionally equivalent to those required under NEPA and will ensure functional compliance with NEPA and its procedural requirements. This will also ensure that NEPA's twin aims of considering relevant environmental impacts of proposed actions and informing the public of about agency decision-making are fulfilled, while reducing duplicative procedures and documentation.

Comment: Commenters stated that RIAs are not functionally equivalent to a detailed statement under NEPA. Commenters stated that the purpose of an RIA is to consider the costs and benefits of proposed regulations, noting that E.O. 12866 does not mention environmental concerns in section 1(b), *The Principles of Regulation*.

CEQ Response: In the final rule, CEQ revises § 1506.9 to clarify that procedures and documentation pursuant to other statutory or Executive order requirements may satisfy some or all of the requirements of the CEQ regulations. When a procedure or document satisfies some or all of the requirements of the CEQ regulations, the agency may substitute it for the corresponding requirements in the CEQ regulations and need not carry out duplicative procedures or documentation. Agencies must identify which corresponding requirements in the CEQ regulations are satisfied and consult with CEQ to confirm such determinations. As noted in section II.H.9 of the final rule, for some rulemakings, agencies prepare an RIA, pursuant to

E.O. 12866. While section 1(b) of E.O. 12866 does not mention environmental concerns, other sections of E.O. 12866 reference the environment and the “natural environment”, including sections 1(a), 2(f), 6(a)(3)(C)(i)-(ii). Also, agencies may assesses regulatory impacts to air and water quality, ecosystems, and animal habitat, among other environmental factors in an RIA. Adverse environmental impacts are treated as a cost or foregone benefit, as appropriate, under OMB Circular A-4, “Regulatory Analysis” (Sept. 17, 2003).⁸¹ An RIA itself or in combination with other documents may satisfy some or all of the requirements of these regulations.

Comment: A commenter stated that the requirements and provisions of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1801 *et seq.*, combined with E.O. 12866, the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and other applicable laws, as well as the National Oceanic and Atmospheric Administration (NOAA) Fisheries procedural directives regarding substantive and procedural standards for analysis, provides a full and adequate consideration of environmental and socio-economic impacts. The commenter stated that MSA section 303(a)(9) requires preparation of a fishery impact statement that must specify and analyze the likely effects including cumulative conservation, economic, and social impacts. The commenter also stated that the Regional Fishery Management Council process offers multiple opportunities for the public to provide oral and written comments at all stages of analytical development prior to selecting a preferred alternative, and that additional opportunities for public comment are provided during the rulemaking process.

CEQ Response: The final rule provides agencies with the ability to determine that another statute serves the function of agency compliance with NEPA (§§ 1501.1(a)(6) and

⁸¹ *Supra* note 63.

1507.3(d)(6)) and the ability to designate and rely on one or more procedures or documents prepared under other statutes or Executive orders as satisfying some or all of the requirements in the CEQ regulations and substitute such procedures to reduce duplication (§§ 1506.9 and 1507.3(c)(5)). With respect to the MSA, the authorizing agency, NOAA, would be responsible for applying the relevant provisions in the final rule to the particular facts and circumstances described by the commenter.

10. Filing Requirements (§ 1506.10)

Comment: Commenters appreciated the proposed changes to § 1506.10 to remove the requirement to file paper copies of EISs with the EPA.

CEQ Response: CEQ acknowledges the support for the proposed changes, which have been finalized in the rule.

11. Timing of Agency Action (§ 1506.11)

Comment: Commenters requested that CEQ revise § 1506.11 to reflect that the issuance of a ROD should not be delayed pending final promulgation of proposed new National Ambient Air Quality Standards (“NAAQS”) under the Clean Air Act. If new standards are proposed but not finalized, conditional NEPA approval should be given upon a commitment by project sponsors that they will demonstrate compliance later in the development cycle.

CEQ Response: The EIS can analyze an alternative that includes future possible regulatory conditions, but decisions should be based on legal and regulatory conditions at the time of the decision. Permits can be conditioned to account for the possibility of regulatory changes. This final rule is media neutral and CEQ declines to specify how NAAQS decisions should interact with NEPA here.

Comment: Commenters requested that CEQ revise § 1506.11(b) to require Federal agencies to obtain State concurrence for Coastal Zone Management Act (CZMA) consistency declarations and to coordinate with states under the Fish and Wildlife Coordination Act (FWCA) for Federal agency activities, prior to making or issuing a ROD. Alternatively, commenters requested that specific language be developed and included in the final NEPA regulations to provide for the CZMA consistency process and the FWCA process as required by Federal statute.

CEQ Response: The final rule does not supersede other statutory requirements such as the CZMA or FWCA. While most agency procedures are designed to satisfy other environmental legal requirements during the NEPA process, it is not always feasible to do so. Therefore, CEQ declines to make the requested change to the final rule.

Comment: Commenters requested clarification concerning the requirement in § 1506.11(a) that the EPA publish a notice in the *Federal Register* of the EISs filed since its prior notice. Commenters asked whether EPA would be required to publish instances where there were no EISs filed in a given week.

CEQ Response: While, to CEQ's knowledge, no instance has occurred where there have been no EISs filed in a given week, EPA has informed CEQ that it would provide notice of that fact on their website should the circumstance occur.

Comment: Commenters supported the proposed changes to clarify that agencies may use other agency procedures for the appeal times or wait period between final EIS and ROD (*i.e.* the BLM Protest, the FS Objection procedures).

CEQ Response: CEQ acknowledges the comment and has retained 1506.11(c)(1) from the 1978 regulations with minor revisions for clarity.

Comment: Commenters stated that the minimum time period for comments on the draft EIS is “unreasonably short.”

CEQ Response: The final rule’s requirement that agencies allow at least 45 days for public comment after publication of a draft EIS is similar to the 1978 regulations. *See* 40 CFR 1506.11(d).

Comment: Commenters stated that the proposed 30–day comment period for objections to the summary after publication of the final EIS, would be unlikely to influence agency decisions. Some commenters also viewed the 30–day window as too short. Other commenters objected to the 30–day window on the ground that it would create uncertainty for certain statutory processes that require the final EIS and ROD to be the same document.

CEQ Response: CEQ received many comments on this provision and agrees that a mandatory 30–day comment period after the final EIS does not serve a sufficiently useful purpose to justify its retention. In the final rule, however, agencies do retain authority to solicit comments on the final EIS if they so choose. *See* § 1503.1(b). In addition, the final rule retains the minimum 30–day period after publication of the final EIS and before an agency may make or issue a ROD subject to limited exceptions including where statutory authorities provide for combining a final EIS and ROD. *See* § 1506.11(b)–(c).

Comment: Commenters questioned the utility of the 30–day “cooling off” period associated with § 1506.11(b)(2) and supported accommodating the statutory processes that require the final EIS and ROD to be the same document.

CEQ Response: The final rule does not make further revisions to § 1506.11(b) except for clarity or to change from passive to active voice; however, in response to comments, CEQ added “including requirements of lead or cooperating agencies” to § 1507.3(f)(2). The intent of the

language is to improve coordination between lead and cooperating agencies and to facilitate the integration of NEPA review with reviews conducted pursuant to other statutes. The additional language clarifies that agencies, in their NEPA procedures, may alter certain time periods to facilitate issuance of a combined final EIS and ROD.

Comment: Commenters stated that with the transition to electronic distribution of environmental documents, those members of the public reviewing hardcopy documents would receive less time than other members of the public reviewing environmental documents electronically.

CEQ Response: The final rule does not change the minimum amount of time allowed for public comments on a draft EIS, which is at least 45 days. Further, § 1506.11 ensures that agencies transmit EISs to the public concurrently with their submissions to the EPA. Agencies should make diligent efforts to ensure that they deliver or otherwise make accessible any hard copies transmitted to the public in a timely manner. Electronic distribution, whether by CD, online posting on agency websites, or other means will ensure that the reviewing public can most efficiently take advantage of established comment periods.

12. Emergencies (§ 1506.12)

Comment: Commenters recommended that CEQ strike “environmental impact” and replace it with “impacts to the human environment” in the first sentence of § 1506.12.

CEQ Response: In the final rule, CEQ clarifies that “effects” are changes to the human environment. *See* § 1508.1(g). Like the proposed rule, the final rule definition of “human environment” cross-references to the definition of effects. *See* § 1508.1(m).

Comment: Commenters expressed concerns with CEQ’s proposed changes suggesting that they would exempt a broad range of projects from NEPA on the premise of being an emergency when, in fact, the “emergency” is a naturally occurring and foreseeable events.

CEQ Response: CEQ has developed significant experience with NEPA in the context of emergencies and disasters over the past 40 years. Over this time, CEQ has developed 47 alternative arrangements for compliance with NEPA in this context.⁸² As noted in the final rule, CEQ has approved alternative arrangements to allow a wide range of proposed actions in emergency circumstances including catastrophic wildfires, threats to species and their habitat, economic crisis, infectious disease outbreaks, potential dam failures, and insect infestations. CEQ’s proposal clarifies that alternative arrangements are still meant to comply with section 102(2)(C) of NEPA’s requirement for a “detailed statement.” The change is consistent with CEQ’s long-standing position that it has no authority to exempt Federal agencies from compliance with NEPA, but that CEQ can appropriately provide conditions and alternate pathways for complying with NEPA where appropriate and consistent with applicable law.

Comment: One commenter recommended that CEQ provide a definition of “emergency” within the CEQ regulations.

CEQ Response: CEQ declines to include a definition of “emergency.” Emergencies are often unique and fact-specific, and therefore do not necessarily lend themselves to a universal definition. Additionally, CEQ has consulted successfully with Federal agencies and developed alternative arrangements in 47 instances without a specific definition. Based on this experience, a specific definition is unnecessary.

⁸² See https://ceq.doe.gov/nepa-practice/alternative_arrangements.html.

Comment: One commenter recommended that CEQ strike the reference to section 102(2)(C) of NEPA in the proposal. The commenter recommended that compliance be with the entire NEPA statute, not one particular section, even in the event of “emergency circumstances.”

CEQ Response: CEQ has no authority to issue an exemption from NEPA or exempt Federal agencies from compliance with NEPA. However, CEQ can provide for exceptions to specific requirements of the CEQ regulations implementing the procedural provisions of NEPA to address emergencies that are not addressed by agency implementing procedures previously approved by CEQ. A Federal agency taking an action should consult with CEQ about alternative arrangements for compliance with section 102(2)(C) of NEPA. Such arrangements are limited to actions necessary to control the immediate impact of the emergency. All other actions remain subject to NEPA review.

Comment: Commenters recommended that CEQ add the term “timely remediate” after “control” and strike “the immediate” in the second sentence of § 1506.12. The commenters note the importance of quickly implementing remediation measures to avoid further harm to the environment. Commenters urged CEQ to clarify that agencies should coordinate and develop plans for expedited environmental reviews for disaster recovery projects.

CEQ Response: Section 1506.12 of the final rule provides direction to agencies seeking alternative arrangements for compliance under section 102(2)(C) of NEPA, which may include remediation of the impacts of the emergency. For example, in 2015, CEQ approved the USDA Forest Service’s request for alternative arrangements for the Rim Fire Recovery project in the Stanislaus National Forest, recognizing that immediate action was required to restore the affected lands and mitigate future risks of wildfire.

Comment: A commenter proposed a revision to the second to last sentence of § 1506.12 to read, “Agencies and CEQ will limit such arrangements to actions necessary to control the immediate impact of the emergency to protect life and improved properties. Projects conducted to protect life and improved properties are statutory [*sic*] excluded from EIS.”

CEQ Response: The commenter’s proposed changes would unnecessarily narrow the application of emergency procedures. NEPA does not authorize CEQ to exclude projects conducted to protect life and improve properties. Generally, NEPA does not exclude projects designed to protect life and improve properties, and although they are statutorily excluded under certain circumstances. For example, section 316 of the Stafford Act (42 U.S.C. 5159) waives NEPA procedures for certain Federal actions taken or carried out within a presidentially declared emergency or disaster area. However, many infrastructure projects are designed to protect lives and improve properties. Depending upon particular facts and circumstances, those infrastructure projects are subject to, and their design may benefit from, analysis under NEPA.

Comment: A commenter suggested CEQ should pre-approve NEPA documents for typical situations, e.g., hurricanes, tornadoes, earthquakes, sea level rise, and then apply a corresponding CE for such activities.

CEQ Response: CEQ has developed significant experience with NEPA in the context of emergencies and disaster recoveries over the past 40 years. Over this time, CEQ has developed 47 alternative arrangements for compliance with NEPA in this context.⁸³ CEQ’s final rule clarifies that alternative arrangements are still meant to comply with section 102(2)(C) of

⁸³ *Supra* note 83.

NEPA's requirement for a "detailed statement." The change is consistent with CEQ's long-standing position that it has no authority to exempt Federal agencies from compliance with NEPA, but that CEQ can appropriately provide conditions for complying with NEPA where appropriate and consistent with applicable law.

13. Effective Date (§ 1506.13)

Comment: Some commenters requested clarification as to whether agencies must comply with the revised final regulations upon their publication or whether agencies' compliance may be delayed until agencies revise their respective NEPA procedures. Commenters requested clarification as to whether agencies must withdraw their existing NEPA procedures immediately upon promulgation of the final rule or whether the allotted time frame of 12 months will allow agencies to continue operating under their existing procedures during that period. Additionally, commenters recommended that agency procedures remain in effect for a reasonable length of time to provide agencies time to conform their own procedures to the new rule. Some commenters requested CEQ clarify that the final rule will take precedence over any agency NEPA procedures that are inconsistent with the final rule. Some commenters raised questions regarding agencies that have ongoing regulatory reform efforts that involve NEPA procedures, in light of the language directing agencies to revise existing agency NEPA procedures to eliminate any inconsistencies with the final rule within 12 months. Some commenters stated that the final rule should not impede these ongoing agency rulemakings. Some commenters stated that CEQ should require an agency with a revision currently underway to incorporate as many of the new CEQ requirements at the earliest possible date, even if a more comprehensive subsequent revision occurs later.

CEQ Response: The final rule clarifies that these regulations would apply to all NEPA processes begun after the effective date, but agencies have the discretion to apply it to ongoing NEPA processes. The final rule allows agencies 12 months after the effective date, or 9 months after the establishment of a new agency, whichever comes first, to propose agency NEPA procedures or revisions, as necessary. The final rule clarifies in § 1507.3(a) that to the extent existing agency NEPA procedures are inconsistent with the final rule, the final rule shall apply, consistent with § 1506.13, unless there is a clear and fundamental conflict with the requirements of another statute. Further, CEQ determines in § 1507.3 (a) of the final rule that CEs contained in agency NEPA procedures as of the effective date of the final rule are consistent with the final rule. Agencies are not required to withdraw their existing agency NEPA procedures immediately upon the effective date of the final rule, but agencies are advised to conduct a consistency review of their existing agency NEPA procedures in order to proceed appropriately for new proposed actions. An agency that is in the process of revising its procedures is required to make any necessary changes to be consistent with the final rule. The final rule provides agencies with flexibility to address other transitional issues consistent with §§ 1506.13 and 1507.3(a).

Comment: Commenters stated that the proposed changes would alter the rules of the game in the middle of an environmental review process, creating confusion for the public and agency decision makers, which potential legal challenges would exacerbate. Commenters stated that retroactive rulemakings are not favored in the law and agencies do not have retroactive authority unless explicitly granted by Congress, citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). Some commenters stated there should be no option to complete ongoing environmental documents under the final rule, while others stated that if an NOI has been published before the final rule, the EIS or EA should be processed under the existing rules.

Other commenters supported providing agencies with the discretion to apply the proposed regulations to NEPA processes begun before the effective date. Some commenters requested clarification that completed environmental documents do not need to be redone. Some commenters recommended that agencies apply the new regulations only to NEPA reviews initiated after the effective date of the rule, or alternatively, apply the new regulations to ongoing reviews only when applicants make a request. Commenters recommended clarifying that agencies should limit application of the final rule to ongoing reviews only in instances where no further delay will result. Some commenters stated that CEQ could consider how to enable a “reset” of an ongoing review under the final rule with full credit and incorporation of work already performed. Some commenters suggested revisions to the second sentence of § 1506.13 to accelerate the implementation of the final rule “to the maximum extent practicable.”

CEQ Response: The final rule requires agencies to comply with the final rule for proposed actions begun after the final rule’s effective date. For ongoing activities and environmental documents begun before the final rule’s effective date, agencies may choose whether to apply the final rule or existing agency NEPA procedures. This choice is intended merely to provide a flexibility necessary to transitioning to the new NEPA regulations. The final rule is flexible in its application to ongoing reviews because agencies are better positioned to assess whether applying the final rule to ongoing reviews is appropriate. This approach does not create any retroactivity concerns. As to any agency action that is not yet complete, CEQ could have specified that the new NEPA regulations govern. By providing additional flexibility, even if retroactivity were a concern as to non-final agency action (and it is not), CEQ’s chosen approach is entirely rational and consistent with the law.

Comment: Commenters requested clarification as to whether the final rule would apply to an EIS or EA that is being developed while litigation on the final rule is ongoing.

CEQ Response: As discussed above, after its effective date, the final rule shall control to the extent there is any inconsistency with existing NEPA procedures. The impact of litigation on the final rule will be case-specific. CEQ notes for those interacting with the NEPA process of the provision concerning severability. *See* § 1500.3(e).

J. Comments Regarding Agency Compliance (Part 1507)

1. Compliance (§ 1507.1)

Comment: Commenters stated that the deletion of the second sentence in 40 CFR 1507.1 does not provide consistency with § 1507.3. Rather, commenters stated that § 1507.1 should briefly mention the supplementary policy of section 105 of NEPA, 42 U.S.C. 4335, that NEPA requirements are supplemental to existing authorizations of Federal agencies under other statutes.

CEQ Response: CEQ declines to make the requested change. As stated in the preamble to the NPRM, CEQ strikes this sentence to conform to the language of § 1507.3. The final rule in § 1507.3(b) contains language that allows agencies to revise or develop their agency procedures in a manner that takes into consideration requirements of other statutes.

2. Agency Capability to Comply (§ 1507.2)

Comment: Commenters stated that § 1507.2 involves substantial budgetary and procedural implications because of the personnel and resources needed to comply with the final rule, such as the time limits for environmental analyses. Some commenters supported the reiteration of the requirement that each agency shall have adequate personnel and other resources necessary to fully comply with NEPA because of the proposed changes in § 1506.5 that will encourage project sponsors to prepare NEPA documents and the time limits imposed in

§ 1501.10 that will constrain agencies' consideration of applicant-prepared NEPA documents. Commenters observed that some agencies do not presently have adequate resources to oversee the preparation of such documents and conduct an informed evaluation of their accuracy.

CEQ Response: CEQ expects agencies will allocate appropriate personnel and resources needed to comply with the final rule. Further, the final rule includes numerous procedures that are anticipated to lower the overall administrative cost to implement NEPA, including the use of other environmental documents that may be incorporated by reference, adopted, or determined to be functionally compliant (*see* RIA Appendix).

Comment: Commenters stated that § 1507.2(d) is ambiguous as written and should be revised to clarify that the requirement of section 102(2)(E) of NEPA extends to all such proposals contained in an EA or EIS.

CEQ Response: In response to comments, the final rule uses the phrase, "consistent with section 102(2)(E) of NEPA," while striking language said to create confusion regarding the reach of Section 102(2)(E) of NEPA.

Comment: Some commenters who agreed with the changes in § 1507.2 requested further revisions to require early and active participation throughout the process, as needed, based on the degree of interest.

CEQ Response: Throughout the final rule, CEQ requires agencies to identify and consider relevant environmental information early in the process in order to ensure informed decision making. §§ 1500.5, 1501.2, 1501.9, and 1502.5. Further revisions to § 1507.2 regarding early and active participation are not needed.

Comment: Commenters stated that the regulatory text in § 1507.2 regarding the senior agency official does not track with the specific responsibilities described in the preamble to the

NPRM regarding dispute resolution among lead and cooperating agencies and enforcing page limits. Commenters stated that CEQ should provide clarification regarding the qualifications of the senior agency official.

CEQ Response: The final rule sets forth the responsibilities of the senior agency official in §§ 1501.5, 1501.7, 1501.8, 1501.10, 1502.7, and 1507.2. In response to comments, the final rule clarifies the responsibilities of the senior agency official. Section 1507.2 provides that the senior agency official shall be responsible for overall review of agency NEPA compliance, including resolving implementation issues. Section 1508.1(dd) provides that a senior agency official should have the rank of assistant secretary or higher, or equivalent. Section II.J.30 of the final rule describes these changes accordingly.

Comment: Commenters stated that senior agency officials often do not give necessary time to the NEPA process among competing priorities, and the people in these positions often change which results in delays. Commenters recommended adding text that permits delegation of NEPA authority to enhance efficiency in NEPA practice. Other commenters stated that political appointees and responsible agency officials should be prevented from corrupting the NEPA process.

CEQ Response: Without senior agency official leadership and effective management of NEPA reviews, the process can be lengthy, costly, and subject to uncertainty and delays. CEQ seeks to advance efficiencies to ensure that agencies use their limited resources to effectively consider environmental impacts and make timely and informed decisions. While there may be a number of staff at an agency involved in NEPA implementation, designating a senior agency official ensures that an individual at the agency is responsible and accountable for overall agency NEPA compliance including for the quantity, quality, and timelines of environmental analyses

developed in support of agency decision making. This is also consistent with the Constitution and the design of the Executive branch. The Constitution's Appointments Clause, *see* U.S. const., art. II, § 2, contemplates that the President "shall appoint . . . all other Officers of the United States" as Congress establishes with the "Advice and Consent of the Senate." The involvement of these officials in agency decision making is a vital component of ensuring the Executive branch functions properly.

Comment: Commenters requested the deletion of the phrase "and other participants in the NEPA process" because it allows agencies to use the applicant or project proponent's staff to comply with the final rule when they may have a conflict of interest.

CEQ Response: The final rule retains the language from the proposed rule in § 1507.2. Agencies are to have sufficient capacity to evaluate the work that an applicant or project proponent may provide before the agency makes a final decision. As addressed elsewhere in connection with § 1506.5, an agency must independently evaluate the quality of draft NEPA documents submitted to it.

Comment: Commenters stated that requiring agencies to fulfill the requirements of Executive orders in § 1507.2(f) gives the cited Executive orders the force and effect of law. Commenters requested that the regulation provide the full text of E.O. 11514, E.O. 11991 and E.O. 13807.

CEQ Response: E.O. 11991 amended section 3(h) to require CEQ to issue regulations to implement the procedural provisions of NEPA and section 2 of E.O. 11514, requiring agency compliance with the regulations issued by CEQ. E.O. 11991 was based on the President's Constitutional and statutory authority, including NEPA, the Environmental Quality Improvement Act, 42 U.S.C. 4371 *et seq.*, and section 309 of the Clean Air Act, 42 U.S.C. 7609. The

President has a constitutional duty to ensure that the laws are faithfully executed, U.S. Const. art II, § 3, which may be delegated to appropriate officials. 3 U.S.C. 301. The text of the E.O. 11514, as amended by 1991, is found in the United States Code in the note to 42 U.S.C. 4321, and the text of E.O. 13807 is found in the note to 42 U.S.C. 4370m. *See* 42 U.S.C. 4321 note (E.O. 11514, Protection and Enhancement of Environmental Quality); 42 U.S.C. 4370m note (E.O. 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects), which can be accessed on the U.S. Government Publishing Office (GPO) website, www.gpo.gov. The Executive orders also are published and made available to the public in the *Federal Register*, which is also accessible on the GPO website.

Comment: Some commenters recommended the addition of language in § 1507.2 to provide that non-Federal applicants who request a Federal action or Federal funding should be responsible for the lead agency's costs of NEPA compliance.

CEQ Response: CEQ declines this suggested revision. Agencies may have separate statutory authorities to charge fees to defray their administrative costs; however, NEPA does not provide authorities for cost recovery.

Comment: Multiple commenters noted the importance of sufficient funding in agency's budgets and adequate staffing to accomplish the objectives of NEPA. Commenters recommended training for agency staff and encouraged agencies to devote more funding to NEPA overall.

CEQ Response: CEQ acknowledges the comment.

Comment: Commenters stated that proposed § 1507.2(d) would seemingly require the development and consideration of alternatives for CEs, which is not currently required.

Commenters requested clarification as to the applicability of this language to CE projects, as well as the meaning of “unresolved conflict.”

CEQ Response: Section 1507.2(d) does not require agencies to develop alternatives as they develop CEs, however, use of § 1507.2(d) may be helpful to agencies in identifying or developing extraordinary circumstances for CEs. The referenced language has been retained from the 1978 regulations and in CEQ’s experience has not been a source for confusion with the development or application of CEs.

Comment: Commenters stated that in § 1507.2(f), all words after the phrase “Environmental Quality” should be deleted because they believe the purpose of E.O. 13807 is contrary to section 102 of NEPA.

CEQ Response: As discussed elsewhere, E.O. 13807 provided direction to CEQ to enhance and modernize the Federal environmental review and authorization process, including issuing such regulations as may be necessary to make the NEPA process efficient and effective. Therefore, E.O. 13807 is an appropriate authority to cite. E.O. 13807 is not contrary to section 102 of NEPA, and builds on prior efforts to modernize and improve the environmental review process. *See* section I.E of the of the final rule.

Comment: Commenters stated that “environmental design arts,” which appears in §§ 1501.2 1502.6, 1502.8, 1507.2, is not an appropriate description of the environmental sciences. Commenters stated that the appropriate term is “Environmental Science.”

CEQ Response: Section 102(2)(A) uses the terminology “environmental design arts,” therefore CEQ declines the suggested terminology change.

Comment: Commenters recommended revising § 1507.2 to add at the end “shall so evaluate and shall account for and give attribution to the contributions of others.”

CEQ Response: CEQ declines to adopt the recommendation in the final rule as it is not necessary. Section 1507.2 concerns agency capability in terms personnel and resources rather than giving attribution to the particular contributions of agencies.

3. Agency NEPA Procedures (§ 1507.3)

Comment: Some commenters generally opposed the use of functional equivalence because agencies cannot substitute processes under other laws for NEPA compliance and stated that the relevant proposed revisions should be eliminated. Commenters were concerned the proposal was not sufficiently justified and violated the congressional requirement to comply with NEPA to the “fullest extent possible” to complete a “detailed environmental statement,” and opposed any revisions that give agencies more or new latitude to develop or use “functional equivalent” documents. Commenters view NEPA section 101 as a substantive mandate to ensure protection of the environment and stated that only statutes that required protection of the environment could serve as a functional equivalent to a NEPA document. Commenters were also concerned that allowing agencies to determine that a process could be the functional equivalent of a NEPA process would undercut the goal of NEPA to ensure informed agency decision making and public involvement. Commenters were specifically concerned that allowing consideration of a functional equivalent process could subvert the environmental review and public participation requirements of NEPA.

CEQ Response: Courts have long recognized that agency compliance with statutes requiring consideration of environmental issues through procedures analogous to NEPA serve as the “functional equivalent” to compliance with NEPA’s procedural requirements. *See Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 387 (D.C. Cir. 1973) (finding an exemption from

NEPA for Clean Air Act section 111);⁸⁴ *see also* *Envtl. Def. Fund, Inc. v. U.S. EPA*, 489 F.2d 1247, 1254–56 (D.C. Cir. 1973) (concluding that the standards of FIFRA provide the functional equivalent of NEPA); *Cellular Phone Taskforce v. Fed. Commc’ns Comm’n*, 205 F.3d at 94–95 (concluding that the procedures followed by the Federal Communications Commission were functionally compliant with NEPA’s EA and FONSI requirements); *W. Neb. Res. Council v. U.S. EPA*, 943 F.2d 867, 871–872 (8th Cir. 1991) (concluding that EPA’s procedures and analysis under the Safe Drinking Water Act were functionally equivalent to NEPA); *Wyoming v. Hathaway*, 525 F.2d 66, 71–72 (10th Cir. 1975) (concluding that EPA need not prepare an EIS before cancelling or suspending registrations of three chemical toxins used to control coyotes under FIFRA); *State of Ala. ex rel. Siegelman v. U.S. EPA*, 911 F.2d 499, 504–05 (11th Cir. 1990) (holding that EPA did not need to comply with NEPA when issuing a final operating permit under the Resource Conservation and Recovery Act); *Envtl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 661-62 (D.D.C. 1978) (EPA need not prepare an EIS before granting an emergency exemption to a state to use an unregistered pesticide); *State of Md. v. Train*, 415 F. Supp. 116, 121 (D. Md. 1976) (Ocean Dumping Act functional equivalent of NEPA).

The Supreme Court has stated, “It is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.” *Methow Valley*, 490 U.S. at 350; *see also Pub. Citizen*, 541 U.S. at 76 (“NEPA imposes only procedural requirements on Federal agencies with a particular focus on requiring agencies to undertake analyses of the environment impact of their proposals and actions.”). The purpose of NEPA is to ensure that agencies consider the relevant environmental impacts of their proposed actions and inform the public of

⁸⁴ Congress subsequently provided a statutory exemption from NEPA for actions taken under the Clean Air Act. *See* 15 U.S.C. 793(c)(1).

about their decision-making. In considering whether a statute is the functional equivalent to NEPA, courts have generally focused on whether the agency is primarily engaged in examining environmental questions and whether the substantive and procedural standards under the statute ensure full and adequate consideration of environmental issues. Courts have also considered whether the documentation and action the agency has taken under another statute “substantially compl[y]” with the requirements of section 102(2)(C) of NEPA and noted that while section 102(2)(C) calls for a “detailed statement” to address five key issues, it does not prescribe any particular framework or procedure.⁸⁵ While the courts have generally limited application of functional equivalence to statutes administered by EPA, the United States Court of Appeals for the Second Circuit held that the Federal Communications Commission’s procedures for a rulemaking related to health and safety standards of radio frequency radiation were functionally compliant with NEPA and CEQ’s regulatory requirements for EAs and FONSIIs.⁸⁶

The 1978 regulations prescribe the framework and procedure to be used to comply with section 102(2)(C) and the final rule updates those procedures. As discussed elsewhere in the final rule, CEQ revises §§ 1501.1(a)(5), 1506.9, and 1507.3 in response to comments. In the final rule, § 1501.1(a)(6), proposed as § 1501.1(a)(5), states that in determining whether NEPA applies or is otherwise fulfilled, agencies should consider whether the proposed action is an action for which another statute’s requirements serve the function of agency compliance with NEPA. In relation to proposals for regulations, § 1506.9 clarifies that procedures and documentation pursuant to other statutory or Executive order requirements may satisfy some or all of the

⁸⁵ *Supra* note 78.

⁸⁶ *Supra* note 79.

requirements of the CEQ regulations. When a procedure or document satisfies some or all of the requirements of the CEQ regulations, the agency may substitute it for the corresponding requirements in the CEQ regulations and need not carry out duplicative procedures or documentation. Agencies must identify which corresponding requirements in the CEQ regulations are satisfied and consult with CEQ to confirm such determinations.

In the final rule, § 1507.3(b)(5) states that agency NEPA procedures shall require the combining of environmental documents with other agency documents, especially where the same or similar analyses are required for compliance with other requirements. Agencies may designate one or more procedures or documents under other statutes or Executive orders as satisfying some or all of the requirements of the CEQ regulations, and substitute such procedures and documentation to reduce duplication. When an agency substitutes one or more procedures or documents for the requirements in the CEQ regulations, the agency shall identify the respective requirements that are satisfied. Section 1507.3(d)(6) also states that in the agency NEPA procedures, agencies should identify those actions or decisions that are not subject to NEPA, including actions where the agency has determined that another statute's requirements serve the function of agency compliance with the Act. These requirements are consistent with cases where courts have considered whether the documents prepared and procedures used under other statutes are functionally equivalent to those required under NEPA and will ensure functional compliance with NEPA and its procedural requirements. This will assure that NEPA's twin aims of considering relevant environmental impacts of proposed actions and informing the public of about agency decision-making are fulfilled, while reducing the duplicative procedures and documentation that lead to unnecessary delay.

Comment: Some commenters were concerned that the CEQ regulations references to consideration of functionally equivalent documents would expand the doctrine of functional equivalence and conflict with NEPA’s requirement to mitigate or prevent environmental damage.

CEQ Response: The Supreme Court has stated, “It is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.” *Methow Valley*, 490 U.S. at 350; *see also Pub. Citizen*, 541 U.S. at 756-757 (“NEPA imposes only procedural requirements on [F]ederal agencies with a particular focus on requiring agencies to undertake analyses of the environment impact of their proposals and actions.”). NEPA and the CEQ regulations require “that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated,” but NEPA and the regulations do not establish “a substantive requirement that a complete mitigation plan be actually formulated and adopted” before the agency can make its decision. *Methow Valley*, 490 U.S. at 352. The final rule’s requirements are consistent with cases where courts have considered whether the documents prepared and procedures used under other statutes are functionally equivalent to those required under NEPA and will ensure functional compliance with NEPA and its procedural requirements. This will assure that NEPA’s twin aims of considering relevant environmental impacts of proposed actions and informing the public of about agency decision-making are fulfilled, while reducing duplicative procedures and documentation.

Comment: Commenters stated that the proposed revisions to § 1507.3(c)(5) (proposed § 1507.3(b)(6)) are broader than those proposed for § 1501.1.

CEQ Response: The context for considering functional compliance differs between applying the NEPA thresholds pursuant to § 1501.1(a)(6) (proposed § 1501(a)(5)) and developing agency procedures pursuant to § 1507.3(c)(5) (proposed § 1507.3(b)(6)). Section

1501.1 addresses circumstances when NEPA does not apply or is otherwise fulfilled. When making determinations on the NEPA thresholds pursuant to § 1501.1(a)(6), the agency is reviewing the applicability of the entire NEPA process and not merely use of a specific document or procedural step.

Section 1507.3(c)(5) provides flexibility for agencies to combine environmental documents with other agency documents to satisfy compliance with one or more of the requirements of the CEQ regulations, which agencies must include in their agency NEPA procedures. Agencies may utilize this flexibility to designate procedures or documents under other statutes or Executive orders that satisfy the requirements of the CEQ regulations to improve agency efficiency. In this context, NEPA applies and the regulatory provisions at §§ 1506.9 and 1507.3(c)(5) concern the process agencies must follow when designating procedures or documents under other statutes and Executive orders that satisfy some or all of the requirements of the CEQ regulations, and substituting such procedures and documentation to reduce duplication.

Comment: Multiple commenters opposed the proposed rule's language in § 1507.3 that would make the CEQ NEPA regulations a "ceiling" rather than a "floor" for agency NEPA procedures that implement the final rule. Some commenters stated that this approach will not further NEPA's objectives of informed agency decision making and public disclosure. Commenters stated that NEPA places responsibility for complying with NEPA on Federal agencies, not only on CEQ. Other commenters asserted that the proposed rule is ultra vires or beyond CEQ's authority to the extent it requires Federal agencies to include certain requirements such as limitations on public participation in their agency NEPA procedures. Commenters stated that Congress recognized a role for CEQ in implementing NEPA, but did not provide CEQ with

regulatory authority. For these reasons, commenters stated that agencies should be free to implement whatever procedures or requirements they believe will implement NEPA “to the fullest extent possible,” 42 U.S.C. 4332, which may vary according to agency resources, the details of the project, and the particularities of potential sites. Commenters stated that allowing agencies to impose additional requirements when implementing NEPA could allow agencies and CEQ to learn from one another and better implement NEPA. Commenters stated that the preamble to the NPRM did not provide evidence that taking away agencies’ flexibility to include additional procedures has increased costs or delays. Some commenters stated that this section is vague and unclear, which will make it difficult for agencies to meet the spirit and intent of this provision when their regulations undergo review by the Office of Management and Budget. Other commenters supported CEQ’s clarification that agency NEPA procedures should not contain additional requirements beyond the CEQ regulations. Some of these commenters encouraged CEQ to consider stating in the final rule or its preamble that CEQ is the only agency that may issue formal interpretations of the NEPA statute and CEQ regulations. Commenters also stated that allowing agencies flexibility to impose tailored NEPA procedures regarding public comment periods has diminished the risk of later delays.

CEQ Response: Successful implementation of NEPA across the Federal government depends on agencies having review processes that can be integrated and are under the direction of CEQ. The statute requires all agencies of the Federal Government to “identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.” 42 U.S.C. 4332(2)(B). The need for integration was recognized in Title 41 of Fixing America’s

Surface Transportation (FAST-41), which established new procedures to standardize interagency consultation and coordination practices. 42 U.S.C. 4370m. The integration of NEPA implementation was further strengthened under E.O. 13807, including the creation of the OFD policy. For these reasons, it is important that agencies do not revise their procedures in a way that will impede integration or otherwise result in heightened costs or delays.

NEPA established CEQ and assigned to it duties and functions related to environmental quality, including “review[ing] and apprais[ing] the various programs and activities of the Federal Government in light of the policy set forth in title I of [NEPA].” 42 U.S.C. 4344(3). CEQ’s final rule and, by extension, its ability to place limits on agency procedures, is grounded in its authority under E.O. 11991.⁸⁷ E.O. 11991 directed CEQ to “[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA] . . . to make the environmental impact statement process more useful to decision[]makers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives,” and to “require [environmental] impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses.” E.O. 11991 also amended section 2 of E.O. 11514, requiring agency compliance with the regulations issued by CEQ.

The Supreme Court has cited approvingly to CEQ’s regulations and stated that “CEQ’s interpretation of NEPA is entitled to substantial deference.” *Andrus*, 442 U.S. at 358 & n.20, 23; *see also Methow Valley*, 490 U.S. at 355–56; *Pub. Citizen*, 541 U.S. at 757 (“The [CEQ], established by NEPA with authority to issue regulations interpreting it, has promulgated

⁸⁷ *Supra* note 16.

regulations to guide [F]ederal agencies in determining what actions are subject to that statutory requirement.”) (citing 40 CFR 1500.3); *Warm Springs Dam Task Force*, 417 U.S. at 1310 (stating that CEQ is “ultimately responsible for administration of the NEPA and most familiar with its requirements for Environmental Impact Statements,” and its agency determination “is entitled to great weight”). The D.C. Circuit has noted that CEQ was empowered through E.O. 11991 to promulgate binding regulations. *See City of Alexandria v. Slater*, 198 F.3d 862, 866 n.3 (D.C. Cir. 1999); *see also TOMAC v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006). The Supreme Court has further explained that E.O. 11991, 3 CFR 124 (1978), requires all “heads of Federal agencies to comply” with the “single set of uniform, mandatory regulations” that CEQ issued to implement NEPA’s provisions. *Andrus*, 442 U.S. at 357. The final rule does not purport to override an agency’s interpretation of its obligations under a statute that agency is charged with administering. The regulatory mandate in § 1500.3 that makes the CEQ regulations binding on all Federal agencies is not changed from the prior version of these regulations. In addition, the final rule makes clear that, consistent with Section 104 of NEPA, the CEQ regulations should not be construed “to limit an agency’s other authorities or legal responsibilities.”

Courts have affirmed CEQ’s authority to issue regulations, and E.O. 11911 directs Federal agencies to comply with such regulations. In addition, under E.O. 13807, CEQ was directed to enhance and modernize the Federal environmental review and authorization process, by developing a list of actions including issuing such regulations as CEQ seems necessary to: (1) ensure optimal interagency coordination of environmental review and authorization decisions; (2) ensure that multi-agency environmental review and authorization decisions are conducted in a manner that is concurrent, synchronized, timely, and efficient; (3) provide for use

of prior Federal, State, Tribal, and local environmental studies, analysis, and decisions; and (4) ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays, including by using CEQ's authority to interpret NEPA to simplify and accelerate the NEPA review process. E.O. 13807, sec. 5(e)(i). To meet the requirements of FAST-41 and E.O. 13807, it is essential for agency procedures to allow for integrated processes.

For these reasons, the final rule requires agency procedures to be fully consistent with the CEQ regulations, unless for reasons of agency efficiency or where there is a clear and fundamental conflict with another statute. Further, agency procedures that impose additional NEPA requirements beyond the final rule are not necessary because the final rule fully meets NEPA's purposes of fostering informed agency decision making and public disclosure.

Comment: Commenters stated that CEQ would exceed its statutory authority if it restricts an individual agency's reasonable, though perhaps different, interpretation of its NEPA obligations. This is especially true if an agency's interpretation would result in added protections for the environment, which is one of the underlying goals of NEPA. CEQ cannot override statutory direction in NEPA or other sources, and lacks authority to place limits on agencies' environmental consideration.

CEQ Response: CEQ has not proposed to alter the basic framework for NEPA implementation established by E.O. 11514, as amended by E.O. 11991, which mandated that CEQ issue regulations that make the NEPA process more useful to decision makers at Federal agencies and to the public and required Federal agencies to comply with the CEQ regulations. E.O. 11991, Sec. 2(g), 3(h). Under the CEQ implementing regulations, agencies have been tasked with developing agency-specific NEPA procedures that adapt the government-wide provisions of the CEQ regulations to the specific authorities and decision-making processes,

subject to CEQ review for “conformity” with NEPA. § 1507.3(b)-(c). The final rule provides for updates to agency NEPA procedures for a higher degree of uniformity in agency implementation of NEPA, but still allows for agency-specific variations where necessary to achieve efficient implementation or accommodate statutory requirements. The specific requirements of § 1507.3(c) to adopt, as necessary, agency NEPA procedures to improve agency efficiency and ensure that agencies make decisions in accordance with the Act’s procedural requirements are largely a restatement of the 1978 rule requirements at 40 CFR 1505.1.

Comment: Commenters stated that some existing agency NEPA procedures have requirements more stringent than the final rule because the agency procedures are also used for compliance with substantive statutes or organic acts. Commenters stated that CEQ has no authority to direct agencies to ignore the requirements of other laws or to limit those agencies’ discretion. All Federal agencies are charged with implementing their own statutory responsibilities in a manner consistent with NEPA’s purposes and directives, whether CEQ’s regulations encompasses the other statutes’ requirements or not.

CEQ Response: CEQ recognizes that its authority and expertise is generally limited to the NEPA statute and that certain agencies may be constrained by other statutory mandates. The phrase, “[e]xcept . . . as otherwise required by law,” in § 1507.3(b) provides agencies the flexibility to implement both NEPA and their respective statutory mandates in combined regulations serving to comply with NEPA and other sources of law. Any agency NEPA procedures that go beyond the CEQ final rule, however, must be grounded in other substantive statutes or organic acts. In developing or revising agency NEPA procedures to conform to the final rule, agencies should reference the statute(s) that requires procedures beyond the CEQ final rule.

Comment: Commenters stated that CEQ should not remove the requirement in 40 CFR 1507.3(a) for agencies to continue to review their own NEPA regulations to ensure full compliance with the purposes of the Act. Commenters stated that CEQ should make clear that an agency needs CEQ to approve of its NEPA procedures before they are finalized.

CEQ Response: The final rule in § 1507.3(b)(1) requires agencies to consult with CEQ when developing or revising their procedures to implement the final rule. CEQ intends that the use of the term “develop or revise” will encompass future updates to agency procedures after the initial conformity with the final rule. Including further regulatory language regarding continued review of agency NEPA procedures is not necessary.

Comment: Some commenters were concerned about the lengthy amount of time that would be needed for agencies to revise their procedures. Commenters expressed support for an outer time limit for agencies to complete their revised regulations.

CEQ Response: The final rule provides time frames for developing or revising agency proposed procedures that are comparable to the amount of time the 1978 regulations allowed in 40 CFR 1507.3 for agencies to adopt procedures. To ensure efficient implementation of NEPA, it is important for agencies to expeditiously revise their procedures to conform to the changes made in the final rule.

Comment: Some commenters asserted that the 12-month time frame for revising agency NEPA procedures is not feasible because the CEQ final rule creates uncertainty and given likely litigation over the CEQ rulemaking. Some Tribal commenters stated that reviewing many individual agencies’ NEPA procedures within 12 months would be burdensome, especially when the interplay with State laws and regulations are also considered.

CEQ Response: The final rule contains critical improvements to the NEPA process, and each agency should expeditiously review and propose revisions to their procedures to eliminate inconsistencies in the implementation of the final rule. The final rule allows agencies 12 months after the effective date, or 9 months after the establishment of a new agency, whichever comes first, to propose agency NEPA procedures or revisions, as necessary. CEQ acknowledges that there may be litigation relating to the final rule, and that litigation could result in uncertainty depending on the ultimate outcome.

Comment: Some commenters believed the 12-month time frame would not be feasible because departmental NEPA procedures would need to first be revised before agency-level NEPA procedures could be finalized. Some commenters raised the question of what would happen if an agency takes more than 12 months to update its agency NEPA procedures. Commenters stated that it will be challenging for CEQ to review and approve NEPA procedures for 80 Federal agencies within the 12-month time period.

CEQ Response: Consistent with § 1507.2, CEQ expects that agencies will allocate the necessary resources to propose agency NEPA procedures or revisions, as necessary, before the applicable deadline in the final rule. The final rule at § 1507.3(b) clarifies that agencies may consider agency efficiency when addressing the adoption of agency NEPA procedures at the departmental and major subunit levels. CEQ notes that the final rule requires agencies to propose, not finalize, their revised procedures within 12 months.

Comment: Commenters requested clarification on whether agency NEPA procedures would be required to proceed through formal notice and comment rulemaking under E.O. 13891.

CEQ Response: The final rule requires public review and review by CEQ before an agency adopts its NEPA procedures. § 1507.3(b)(2). Public review typically occurs through

notice and comment rulemaking, but may sometimes be issued as a guidance document. E.O. 13891 contains a requirement that significant guidance documents, as determined by OMB's Office of Information and Regulatory Affairs, must receive 30 days of public notice and comment before issuance. OMB's Office of Information and Regulatory Affairs will determine the appropriate application of E.O. 13891's requirements to agency NEPA procedures.

Comment: Commenters stated that requiring agencies to issue their own agency NEPA procedures is duplicative and will cause delay. Commenters recommended that the CEQ regulations be made effective immediately and that agency roles be limited to supplementation and clarification.

CEQ Response: The final rule directs that agency procedures should address certain topics that are better suited for an individual agency to determine based on its particular programs and expertise. The final rule will be effective in the shortest period of time allowed under applicable laws. Section 1507.3(b) does not make agency-specific NEPA procedures mandatory, directing only that agencies should develop or revise such procedures "as necessary." CEQ expects that agency NEPA procedures will be tailored to the final rule and specific agency programs and circumstances, and focused on adding efficiencies, including CEs, where appropriate.

Comment: Some commenters asserted that the proposed rule's exception for procedures or requirements "otherwise provided by law or for agency efficiency," does not sufficiently address situations where a procedure or requirement may not accelerate the production of NEPA documents, but does in fact streamline the process as a whole by protecting against potential drawn-out litigation.

CEQ Response: The final rule includes several provisions that establish a clearer and more consistent process. Agencies should not engage in unnecessary analysis and procedures. As stated in § 1500.1(a), NEPA's purpose is not to generate paperwork or litigation. Agencies may consider, when designing their NEPA procedures, whether there are practices that can avoid unnecessary litigation.

Comment: Commenters observed that the proposed rule could impede coordination with States. Some States have State laws that track with the Federal NEPA requirements. Prohibiting Federal agencies from adopting NEPA regulations that integrate with State review processes with more stringent requirements and procedures than those set out in the proposed rule will create uncertainty, delays, and more paperwork. Some Tribal commenters raised the issue of Tribal consultations and coordinating among a number of substantive statutes, which requires more than mere consideration of agency efficiency.

CEQ Response: Under the final rule, agencies will retain the discretion to consult with State, Tribal, and local agencies to reduce duplication between NEPA and State, Tribal, and local requirements. *See* § 1506.2.

Comment: Commenters stated that the proposed changes would require Federal agencies, State or local governments to update existing guidance and procedures to conform to new language in the final rule. Commenters stated that the need to update existing procedures would lead to inefficiency, delay, and litigation.

CEQ Response: CEQ acknowledges that changes in the final rule will likely require conforming changes in agency NEPA procedures and may require corresponding updates in various sources of law and in guidance documents issued by non-Federal entities. CEQ believes

that despite an initial adjustment period, the changes in the final rule will ultimately lead to more clarity and efficiency and better coordination.

Comment: Some commenters recommended that CEQ use stronger, more limiting language in connection with “agency efficiency” to ensure that agencies do not interpret “efficiency” in connection with agency operations generally. These commenters recommended that CEQ add language stating that any inconsistencies with the final rule should be “necessary to achieve additional efficiency in connection with NEPA reviews.” Other commenters were concerned that the proposed exception for “agency efficiency” would be inadequate to prevent the wiping away of certain standards the Federal Aviation Administration has used to provide certainty and upon which industry has come to rely. Some commenters asked CEQ to codify the language in the preamble to the NPRM that clarified that proposed § 1507.3(a) would “prevent agencies from designing additional procedures that will result in increased costs or delays.”

CEQ Response: CEQ declines to make the requested changes in the final rule. Agencies may interpret “agency efficiency” broadly to help carry out the requirements of NEPA in a cost-effective and timely manner. CEQ notes its formal role to consult with agencies on updates to their procedures to ensure conformity and work with agencies on any potential misapplication of agency efficiency.

Comment: Commenters stated that allowing agencies to identify actions that are not subject to NEPA in § 1507.3(c) of the proposed rule allows agencies too much free will, which could lead to mistakes. Commenters requested further clarification on this section to avoid confusion. Some commenters asked for clarification on who would have oversight of the agency’s actions and what recourse is available if any decisions are made incorrectly.

CEQ Response: Under the final rule, agencies have the flexibility to make a determination in their NEPA procedures that certain agency actions do not fit within the definition of major Federal action or are otherwise exempt from the application of NEPA. As discussed elsewhere, requiring a NEPA analysis for an action that is not a major Federal action fails to advance the goals of the statute. The development or revision of agency NEPA procedures through rulemaking would undergo public notice and comment. Agencies must consult with CEQ on their procedures while developing or revising their proposed procedures and before publishing them in the *Federal Register* for public comment. The final rule also requires CEQ to review an agency's procedures for conformity with NEPA and the CEQ regulations before the procedures are finalized.

Comment: Commenters recommended that CEQ revise the last sentence of § 1507.3(a) of the proposed rule to read: "To the extent practicable and not inconsistent with applicable law, agency NEPA procedures shall be used in the evaluation of compliance with other substantive law provisions. For example, unless explicitly prohibited by other law, procedures regarding reliance on existing reliable data shall be used in the evaluation of compliance with other substantive law provisions if such evaluation is undertaken during the NEPA process." Commenters stated this revision would significantly improve permit streamlining in the context of Clean Water Act compliance because it would address issues of requiring new research.

CEQ Response: CEQ declines to add this language in the final rule because the language pertains to compliance with other substantive laws besides NEPA. The final rule already directs agencies to implement and follow NEPA "[e]xcept . . . as otherwise required by law." § 1507.3(b). The language proposed by the comment is unnecessary.

Comment: Commenters recommended that CEQ add a paragraph (b) to § 1507.3(a) of the proposed rule to require that the statutory authorities for a proposed action be read together with NEPA and the CEQ regulations to guide decision-making for the NEPA process on the individual project.

CEQ Response: CEQ declines to add this language in the final rule because how agencies meet requirements in other substantive laws besides NEPA is beyond the purview of CEQ's statutory authority.

Comment: Commenters stated that CEQ should require agencies in their agency NEPA procedures to describe any additional procedures associated with implementation of § 1506.5 of the final rule regarding the preparation of NEPA documents by applicants or project sponsors.

CEQ Response: CEQ declines to make further changes to the final rule to require agencies in their agency NEPA procedures to provide additional procedures associated with implementation of § 1506.5. To the extent such procedures may further agency efficiency or implementation of another statute, agencies may identify such procedures in their regulations. Agencies should consider referencing the appropriate statutory authority for those additional procedures.

Comment: Some commenters requested clarification on the agency "decision maker" referenced in § 1507.3(b)(4), and whether "agency official" should be used instead.

CEQ Response: The final rule retains the use of "decision maker" in § 1507.3(c)(4). An agency decision maker may have delegated authority to authorize a final agency decision, but may not be the senior agency official defined in § 1508.1(dd) who has overall responsibility for NEPA compliance.

Comment: Commenters stated that the § 1507.3(b)(5) of the proposed rule should reference both EAs and EISs.

CEQ Response: In response to comments, the final rule in § 1507.3(c)(4) replaces “environmental impact statement” with “environmental documents,” which pursuant to the definition in § 1508.1(i) now encompasses EAs and EISs, among other documents.

Comment: Some commenters objected to the language in § 1507.3(e)(1) of the proposed rule that allows agencies to make special exceptions to their NEPA procedures for “classified proposals.” Commenters stated that the subsection’s references to Executive orders should be eliminated because the President is not authorized to carve out exceptions to NEPA’s public disclosure requirements via Executive order.

CEQ Response: The operative language at § 1507.3(e)(1) of the proposed rule was in the 1978 regulations. The final rule simply moves the subsection to § 1507.3(f)(1) without making any substantive change. Agencies should follow applicable authorities and requirements regarding public disclosure and classified information in developing or revising their agency procedures. Exemption 1 of FOIA authorizes the withholding of classified information. *Weinberger v. Catholic Action of Hawaii/ Peace Educ. Project*, 454 U.S. 139, 144-45 (1981).

Comment: Commenters stated that § 1507.3(e)(1) of the proposed rule fails to provide any means for public interest review. One commenter stated the proposed changes preclude the U.S. Army’s practice of allowing personnel with appropriate security clearances at other agencies to review classified material.

CEQ Response: This comment appears to be based on a mistaken understanding of § 1507.3(e)(1) of the proposed rule, which expressly states that agency procedures may provide specific criteria for the handling of classified information. The final rule retains this language at

§ 1507.3(f)(1). The final rule does not preclude the practice of agencies to allow the review of classified information in NEPA documents by personnel with proper security clearances.

Comment: Commenters supported the proposed statement in § 1507.3(e)(3) that agency procedures shall provide for publication of supplemental notices to inform the public of any pause in the agency's preparation of an EIS.

CEQ Response: The final rule at § 1507.3(f)(3) retains this change from the proposed rule.

Comment: Commenters stated that the language in § 1507.3(f)(3) regarding supplemental notices to inform the public of a pause in an agency's preparation of an EIS and for any agency decision to withdraw its notice should apply to EAs as well.

CEQ Response: The final rule retains the language of the proposed rule in this subsection. EISs require more public involvement than EAs, and no initial NOI is issued for an EA. Accordingly, a supplemental notice in the context of EAs is not necessary.

Comment: Commenters stated that allowing agencies to combine their scoping and EA processes is problematic because the proposed rule does not require public comment on draft EAs (§ 1507.3(e)(4)). Some commenters observed that because CEQ regulations serve as a ceiling in terms of administrative burden, any agency NEPA procedures that require public comment on a draft EA would be called into question and undermine the overall goal of agency efficiency. Some commenters stated that combining the EA process with scoping would result in less informed agency decision making. Other commenters stated that the proposed language in § 1507.3(e)(4) should be a useful step toward focusing analysis and decision-making.

CEQ Response: The final rule at § 1507.3(f)(4) includes language which is similar to the 1978 regulations in 40 CFR 1501.7(b)(3). Scoping has never been required for an EA under

CEQ's NEPA regulations, although agencies had the discretion to circulate an EA for public comment. The final rule retains this flexible approach. Agencies may adopt procedures to combine scoping and NEPA processes when it is efficient to do so.

Comment: Some commenters stated that it is important that agency procedures allow local governments an opportunity to review agency analyses. These commenters stated that agencies could structure their processes to allow government-to-government coordination with affected local governments regarding the on-the-ground impacts of decisions.

CEQ Response: Section 1506.2 of the final rule authorizes Federal agencies to cooperate with local agencies.

Comment: Commenters stated that CEQ should make clear that State agencies that have been delegated NEPA responsibilities from Federal agencies shall have flexibility to implement the regulations in a way that streamlines the NEPA process.

CEQ Response: The definition of "Federal agency" in § 1508.1(k) includes States, units of general local government, and Tribal governments assuming NEPA responsibilities from a Federal agency pursuant to statute. States and other entities with delegated NEPA authority from a Federal agency may exercise the same flexibilities and streamlining benefits provided in the final rule.

Comment: Some commenters sought transparency on where agencies' lists of CEs are located, and the process for submitting public comments on CEs. Commenters recommended that CEQ publish a comprehensive list of CEs so that agencies did not need to promulgate their own lists.

CEQ Response: CEQ maintains a list of CEs. List of Agency CEs, *supra* note 44. CEQ endeavors to keep the list of currently available CEs up to date. Federal agencies and

stakeholders should also review the relevant agency's NEPA procedures for applicable extraordinary circumstances and for confirmation that a particular CE is currently available. Under § 1507.3, an agency's revision of its procedures, including establishing or revising any CEs, would be subject to public review and comment. Congress has also established or directed agencies to establish CEs in statute as discussed in section I.D of the of the final rule.

Comment: Commenters stated that CEQ should consider when and how MOUs or policy agreements between Federal agencies may be useful in efficiently carrying out NEPA requirements.

CEQ Response: CEQ declines to address MOUs or other policy agreements in the final rule. Many MOUs or policy agreements are entered into for reasons other than NEPA, and thus beyond the scope of this rulemaking.

Comment: Commenters stated that CEQ should not delete the sentence in 40 CFR 1507.3(a) stating that agency NEPA procedures shall not paraphrase the CEQ regulations. Commenters stated that paraphrasing leads to confusion and inconsistency.

CEQ Response: The final rule retains the deletion of this sentence in § 1507.3 because it is unnecessarily limiting on agencies. Agencies have the flexibility to address the requirements of the CEQ regulations as they relate to their programs and need not engage in restatement.

Comment: A commenter recommended the implementation of a common structure for producing EAs and EISs across Federal agencies to ensure that pertinent information is easily found within the documents regardless of which agency was the preparer.

CEQ Response: Agencies administer a variety of statutes for which NEPA reviews are conducted. With the update to these regulations, CEQ has included revisions to promote greater alignment and consistency in the development of EAs and EISs.

Comment: Tribal commenters recommended that CEQ also require agencies to consult with Tribal governments and that Tribal governments be involved in interagency consultations on the development or revision of agency NEPA procedures.

Response: CEQ declines to adopt the recommended change in the final rule. Section 1507.3(b)(2) of the final rule requires public review and review by CEQ before an agency adopts its NEPA procedures. As part of this process, agencies will consider whether it is appropriate to consult with Tribes under E.O. 13175.

Comment: Commenters stated that § 1507.3(e)(2)(ii) (proposed § 1507.3(d)(2)(ii)) should be clarified with respect to whether agencies may provide notifications of agency CEs through means other than publication in the *Federal Register*.

CEQ Response: CEQ addresses publication in § 1508.1(y) and provides that publication includes methods found by the agency to efficiently and effectively make environmental documents available for review by interested persons, including electronic publication. Publication is not limited to the *Federal Register*.

Comment: Commenters recommended that proposed § 1507.3(b)(6) be applicable to EAs.

CEQ Response: The final rule in § 1507.3(c)(5) no longer references an EIS but refers to environmental documents.

Comment: Commenters stated that proposed § 1507.3(e)(3) should be revised to replace “decision” with “scoping” because certain agencies do not make a formal decision as to whether to prepare an EIS. Commenters also stated that “decision” in the context of withdrawing an NOI is also not the proper use of the word.

CEQ Response: The NOI, published in the *Federal Register*, as well as notices to withdraw an NOI, also published in the *Federal Register*, reflect the agency's decision with respect to proceeding with an EIS or pausing activity.

Comment: Commenters stated that moving 40 CFR 1505.1 to § 1507.3 aligns similar sections and reduces redundancy, which maintains clarity for NEPA practitioners.

CEQ Response: CEQ acknowledges the comment.

Comment: Commenters requested clarification regarding proposed § 1507.3(b)(5), which encourages agencies to make decision documents that relate to the comparison of alternatives available to the public before a NEPA decision is made. Because it is unclear as to when a CE decision becomes final, commenters were unsure if these other decision documents would be made available to the public prior to the final agency decision.

CEQ Response: The final rule retains the language of proposed § 1507.3(b)(5) in § 1507.4(c)(4). Agencies may exercise their discretion to make documents available to the public prior to the final agency decisions, consistent with any statutory disclosure requirements.

Comment: Commenters stated that language in § 1507.3 that prohibits agencies from imposing additional procedures or requirements beyond those in the final rule will prevent agencies who carry out Tribal trust responsibilities from creating more protections when considering Tribal interests.

CEQ Response: Tribal trust responsibilities are a substantive duty that may have independent requirements that go beyond the scope of this rulemaking.

Comment: Commenters stated CEQ should encourage agencies to adopt a uniform process for scoping, comments, drafts, and resolving objections to the extent practicable.

CEQ Response: CEQ acknowledges the comment. Specific advice that CEQ may provide to agencies as they consult with CEQ on their NEPA procedures is beyond the scope of this rulemaking.

Comment: A commenter requested that CEQ afford Tribes the opportunity to “638” contract agency NEPA functions. Regulations should be reformed, consistent with Congress policy favoring Tribal self-determination, to eliminate regulatory obstacles preventing Tribes from entering into self-determination contracts under the 1975 Indian Self-Determination and Education Assistance Act (ISDEAA) (25 U.S.C. 5301 *et. seq.*) for performing an agency's NEPA responsibilities. For example, CEQ should interpret broadly the “programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law” as including DOI and Department of Health and Human Services’ NEPA functions. A broad interpretation would enable Tribes to contract with the agency under the ISDEAA for administration of those functions. At a minimum, CEQ should encourage those agencies, as the agencies subject to the ISDEAA, and consistent with the Federal policy encouraging Tribal self-determination, to consider interpreting the ISDEAA broadly to allow Tribes to contract those agencies’ NEPA functions.

CEQ Response: The final rule allows agencies to satisfy CEQ’s regulatory requirements where another statute serves the function of NEPA, or where one or more processes or documents prepared under another statute or Executive order also satisfies these regulations. Agencies that administer self-determination contracts may apply these flexibilities to the extent applicable. For proposed actions sponsored by a Tribe, the Tribe may at the request of and under the supervision of an agency also prepare environmental documents pursuant to § 1506.5 to assist the agency in its review of the proposed action. Agencies should review their authorities

to identify any further actions that may be taken to facilitate self-determination contracts and incorporate into their procedures, as appropriate.

Comment: Asserting that agencies already misuse CEs, commenters expressed concern about the proposed changes to allow agencies to use another agency's CE in their NEPA procedures. Some commenters expressed concern that the proposal would enable an agency to use a CE without public notice. Other commenters stated that CEs are an important tool that many agencies are underutilizing including using another agency's CE, a common-sense approach to reducing time and effort (and uncertainty) associated with relatively routine projects where there is unlikely to be significant impact. Some commenters that were supportive of these changes recommended explicit language noting that public involvement is not a requirement to determine CEs.

CEQ Response: All existing CEs meet the requirements of the final rule and therefore agencies may continue their use. In the future, agencies would develop new CEs in their agency NEPA procedures, which must comport with this final rule. When an agency is interested in applying a CE listed in another agency's NEPA procedures, it may include a process for doing so in its agency procedures. *See* § 1507.3(f)(5). The process must include consultation with the agency that had originated the CE, and should ensure documentation of the consultation and the identification to the public of the CEs the agency may use for its proposed actions. The final rule continues to require public review before adopting new agency NEPA procedures. This general process for relying on another agency's CEs, which may be established in agency NEPA procedures, is distinct from the procedure set forth in the regulations by which an agency adopts another agency's determination that a CE applies to a particular proposed action, which is addressed in § 1506.3(d). For further discussion, see sections II.H.3 and II.I.3 of the final rule.

Comment: Commenters referenced proposed § 1507.3, where Federal agencies can develop a procedure in which a Federal agency can consult with and adopt another agency's CE. Commenters recommend that the proposed changes also include a requirement to coordinate with affected State fish and wildlife agencies.

CEQ Response: State fish and wildlife agencies are an important resource for Federal agencies to consult in the development of CEs, including adoption of another Federal agency's CE. In the final rule, Federal agencies can consult with State governments prior to and during development of the agency's NEPA procedures. CEQ declines to make further changes in the final rule to establish an affirmative requirement to consult.

Comment: Commenters objected to establishing a process in the agency NEPA procedures to adopt another agency's CE in § 1507.3(e)(5) stating this may weaken Tribal consultation.

CEQ Response: Agencies are required to consult, as appropriate, on their NEPA procedures. During Tribal consultation on agency procedures, Tribal governments have the opportunity to discuss the process used by an agency for adopting another agency's CE. Circumstances specific to Tribal interests can be addressed at that time and incorporated into the agency's procedures.

4. Agency NEPA Program Information (§ 1507.4)

Comment: CEQ requested comment on the creation of a single NEPA application that facilitates consolidation of existing datasets and can run several relevant geographic information system (GIS) analyses to help standardize the production of robust analytical results. Most commenters supported the development of a single NEPA application because it would streamline the NEPA process and increase coordination, transparency, and accountability. Some

commenters observed that databases are only useful when frequently updated and maintained for underlying data quality, and may require adequate training for their use. Some commenters who supported this development expressed concerns about privacy and security of the application in the event of a data breach, which could impact the protection of confidential information regarding cultural sites or burial sites for Tribes, or the private data of public land users.

CEQ Response: CEQ notes the commenters' concerns. CEQ invited comment on this proposal of a single NEPA application, including comment on whether additional regulatory changes could help facilitate streamlined GIS analysis to help agencies comply with NEPA. CEQ did not receive sufficient comment to lead CEQ to make additional regulatory changes to facilitate streamlined GIS analysis to help agencies comply with NEPA, and the final rule does not contain any changes from the proposal.

Comment: Most commenters supported the proposed update in § 1507.4 to include publishing information on agency websites regarding NEPA reviews and maintaining public access to agency records of NEPA reviews. Some commenters stated that the CEQ regulations should not specify types of technology to allow for flexible use of new technologies as they become available. Commenters stated that the websites should be user-friendly and not require a complex docket search. Some commenters noted that producing and maintaining a website could be costly and burdensome for smaller agencies. Some commenters stated that publishing documents electronically, coupled with online public meetings, could limit access for individuals with limited English proficiency or limited financial means. Commenters recommended that in addition to making documents available electronically, they should be provided as hard copy, jump drive, or other format that allows them to be accessible to communities with low

bandwidth, as these are frequently areas with substantial Tribal and/or rural populations that are often the most impacted by development.

CEQ Response: The final rule requires agencies to make available on their websites information on NEPA reviews. Smaller agencies are able to cooperate with larger agencies to reduce administrative burden. The final rule contains language to ensure that use of electronic media does not adversely impact communities that lack adequate access to high-speed internet.

Comment: Commenters requested that searchable databases be made available to the public, not only agencies. Commenters recommended that the background documents that agencies rely on also be made available to the public for independent review of supporting documents.

CEQ Response: The final rule requires agencies to make publicly available environmental documents, relevant notices, and other relevant information. Such information may include background documents and a publicly searchable database.

Comment: Commenters urged CEQ and the Office of Management and Budget to take a leadership role in coordinating agency investments in information architecture to provide an integrated by decentralized platform for public and agency access. Commenters recognized that a Federal budget infusion would be needed for such an effort.

CEQ Response: CEQ acknowledges the comment, but it goes beyond the scope of this rulemaking.

Comment: Commenters requested that CEQ require agencies to update applicants on a regular basis of the status of completing reviews. Commenters stated these progress reports could be included on the CEQ website along with relevant documentation and records. Commenters also requested that the website include a centralized database with prior reviews

and decisions to better facilitate the use of past research and promote more consistent decision making. Some commenters stated that specifying the details of a NEPA application could be challenging for CEQ to cover within its regulations.

CEQ Response: Due to the potential administrative burden on some agencies, CEQ declines to require the posting of regular status updates or to specify the extent to which the database should include information on prior reviews and decisions.

Comment: Commenters asked for clarification on whether § 1507.4 applies to CEs in addition to EISs and EAs.

CEQ Response: The requirements at § 1507.4 encompass agencies' overall NEPA program including CEs.

Comment: Commenters recommended that a new section be added requiring the appointment of a liaison officer to coordinate NEPA implementation between different agencies and facilitate dissemination of information. Commenters stated that this liaison role could facilitate implementation of the requirements of § 1507.4, especially in smaller agencies. Commenters recommended that the process to request needed expertise from cooperating agencies should be clarified.

CEQ Response: Under the final rule in §§ 1508.1(dd) and 1507.2(a), agencies are required to designate a senior agency official for overall review of agency NEPA compliance, including resolving implementation issues. The process for requesting needed expertise from cooperating agencies is addressed §§ 1501.7(h) and 1501.8(a). Given the broad purview of the senior agency official, it is unnecessary to designate any additional liaison officer.

K. Comments Regarding Definitions (Part 1508)

1. Definition of Affecting (§ 1508.1(b))

Comment: CEQ received general comments of support and opposition to the proposed changes to part 1508. Some commenters noted that reducing ambiguity could also reduce the need for litigation, whereas others suggested revisions to existing definitions will lead to further litigation. Some commenters disagreed with moving language from the definitions section to other sections of the regulations. A commenter was critical of changing the heading of this section from “Terminology” to “Definitions.”

CEQ Response: CEQ is simplifying many of the definitions in the final rule that may have caused confusion in interpretation and led to unnecessary litigation. In an effort to reduce duplication and improve clarity, the final rule moves and consolidates much of the operative language, which is language that provides specific direction rather than defining a term, from the definitions to the relevant regulatory provisions. In the 1978 regulations, provisions on certain topics are scattered throughout, making it unnecessarily difficult to navigate the requirements.

Comment: Commenters recommended that CEQ add new definitions for “marginal details,” “unnecessarily delay,” “reasonably available,” “substantive,” “interagency,” “programmatic,” “applicants,” “management agency,” “record of environmental consideration,” “regulatory agency,” “inter-disciplinary preparation,” “proposal,” “significant issue,” “State and local agency,” “environmental analysis,” “irreversible or irretrievable commitments of resources,” “record of decision,” “short-term uses of (the human) environment and the maintenance and enhancement of long-term productivity,” “affected interest,” “extraordinary circumstances,” “public commenter,” and “stakeholder.”

CEQ Response: Several of the terms, including “marginal details,” “unnecessarily delay,” “record of environmental consideration,” “management agency,” “regulatory agency,” “affected interest,” “stakeholder,” and “short-term uses of (the human) environment and the maintenance and enhancement of long-term productivity,” are not used in the regulatory text and therefore do not require a definition. “Inter-disciplinary preparation” is used as a header and does not have independent meaning in the regulatory text. Some terms, including “environmental analysis” and “reasonably available,” appear only once in the regulations. Both “record of decision” and “irreversible or irretrievable commitments of resources” have dedicated sections to describe their application in § 1505.2 and § 1506.1, respectively. Other terms remain unchanged from the 1978 regulations and have not been a source of confusion. For these reasons, CEQ declines to add the requested definitions.

Comment: Some commenters suggested CEQ should retain the individual section numbers for each definition in part 1508 rather than consolidating definitions into a single section and using paragraph letters.

CEQ Response: Because CEQ would have to renumber the sections in part 1508 to keep the terms in alphabetical order and consistent with the recommendations of the *Federal Register*, CEQ consolidates the definitions into a single section. Rather than just an alphabetical list, CEQ includes paragraph letters to facilitate citation to the specific defined terms.

Comment: Commenters recommended that the definition of “Affecting” in § 1508.1(b) be changed to parallel § 1508.1(g)’s definition of “effects or impacts.”

CEQ Response: CEQ did not propose any changes to this definition and has not included any revisions in the final rule. Each term has a distinct meaning in the regulations and the definition of “affecting” includes a reference to “effect.” CEQ does not find a change from the

1978 regulations is necessary. The definition of “affecting” inherently parallels the changes to the definition in “effects” because § 1508.1(b) uses the phrase “effect on.”

2. Definition of Authorization (§ 1508.1(c))

Comment: Commenters recommended adding “funding” to the definition of “authorization” in § 1508.1(c).

CEQ Response: CEQ declines to make the change because “funding” has a different meaning than “authorization.” As discussed in the proposed rule, the definition of “authorization” is consistent with the definition in FAST-41, 42 U.S.C. 4370m(3), and E.O. 13807, and was added to refer to the types of authorizations that may be required for siting, constructing, reconstructing or commencing operations for a proposed action, including infrastructure projects. While an approval for funding may require an authority, funding itself is not an authorization and is not included in the definition of “authorization” in either FAST-41 or E.O. 13807.

Comment: Some commenters recommended that CEQ modify the term “Authorization” to remove findings and determinations from the definition as these may be interim steps in agency decision-making, not the conclusion of the authorization process.

CEQ Response: This definition is consistent with the definition included in FAST-41 and E.O. 13807. Findings and determinations may be either interim or final agency actions. The use of “authorization” does not imply that any such action constitutes a final agency action for the purposes of APA or other statutes. CEQ prefers to have a more inclusive list and declines to make the recommended change.

3. Definition of Categorical Exclusion (§ 1508.1(d))

Comment: Commenters stated that the proposed changes to the definition of “categorical exclusion” render it unclear because CE now refers to actions, instead of the process used to treat a category of actions. Further, the changes are inappropriate because there may be situations where an action of a type that is typically categorically excluded instead has significant effects that would require preparation of an EA or EIS. Commenters recommended changing the definition so CE refers to the process for a category of actions, rather than the category of actions themselves. In addition to being clearer, commenters stated these changes would also better parallel the definition of CE and the proposed definition of FONSI in § 1508.1(l).

CEQ Response: The 1978 regulations use the phrase “categories of actions” to describe the development of CEs and it has not been a source of confusion for Federal agencies. The process for evaluating the applicability of a CE to a particular action is described in § 1501.4.

Comment: Commenters requested that CEQ retain the original definition of a CE because the new definition does not differentiate between what would constitute a CE and an EA. Commenters stated that actions with significant impacts is the only category mentioned that would result in an agency going from a CE to an EIS.

CEQ Response: A CE applies to “categories of actions,” which is distinct from an EA. Neither a CE nor an EA have significant effects; however, agencies would use an EA where a proposed action does not fall under a category of actions for which the agency has determined a CE is appropriate and established that CE in its agency NEPA procedures. The process for applying a CE is explained in § 1501.4.

4. Definition of Cooperating Agency (§ 1508.1(e))

Comment: Commenters suggest revising the definition of cooperating agency in § 1508.1 so that it applies to EISs and EAs by removing the final phrase significantly affecting the quality of the human environment.

CEQ Response: In response to comments, CEQ has made further changes to expand the practice of using cooperating agencies to the preparation of complex EAs. CEQ has also made a conforming revision to the definition of cooperating agency to include major Federal actions that “may” significantly affect the quality of the human environment.

5. Definition of Effects (§ 1508.1(g))

Comment: Commenters expressed support for substituting the standard of reasonably foreseeable and reasonably close causal relationship to the proposed action. Commenters stated that Federal agencies’ implementation of the cumulative effects analysis has been confusing, leads to frequent litigation, and lacks consistency across Federal agencies, and there is uncertainty as to the extent of the effects that must be considered. Commenters further noted that there is no independent textual source in NEPA requiring agencies to assess cumulative effects, and agreed that the definition appropriately adopted Supreme Court case law. Commenters stated that the revised definition would improve the quality of analysis by focusing agency resources on meaningful effects of proposed actions.

CEQ Response: CEQ finalizes the definition of “effects” to mean changes that are “reasonably foreseeable and have a reasonably close causal relationship” to the proposed action or alternatives. The language is consistent with the Supreme Court’s holding in *Public Citizen*, 541 U.S. at 767–68. This close causal relationship is analogous to proximate cause in tort law. *Id.* at 767; *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774

(1983) (interpreting section 102 of NEPA to require “a reasonably close causal relationship between a change in the physical environment and the effect at issue” and stating that “[t]his requirement is like the familiar doctrine of proximate cause from tort law.”).

Comment: Commenters stated that, to the extent there continues to be confusion regarding the interpretation of direct, indirect, and cumulative effects, CEQ should issue further guidance rather than eliminate the definitions.

CEQ Response: Since issuing the regulations in 1978, CEQ has issued over 30 separate guidance documents to aid implementation of NEPA, including guidance entirely focused on implementation of the cumulative effects analysis.⁸⁸ Retaining the definitions from the 1978 regulations and issuing further guidance would not achieve the desired goal, which is to apply NEPA effects analyses consistently while adhering to all legal requirements. Moreover, guidance documents are not substitutes for regulations, since guidance documents are not themselves sources of law.

Comment: Commenters expressed support for the definition of “effects” in the 1978 regulations, emphasizing that the definition has been in use for 40 years and supporting separate categories in the definition of direct, indirect, and cumulative effects. Commenters also stated that changing the definition of effects is not sufficiently justified. In support of these points, commenters referenced previous CEQ guidance and regulations extending back to its 1971 guidance.

CEQ Response: Over time, Federal agencies independently developed procedures and methods to analyze what was referenced as cumulative effects with “mixed results,” prompting

⁸⁸ See Considering Cumulative Effects Under the National Environmental Policy Act (Jan. 1997), https://ceq.doe.gov/publications/cumulative_effects.html.

CEQ to issue the Cumulative Effects Guidance in 1997. CEQ's extensive guidance categorized cumulative effects as four distinct types and provided several different examples, including time crowding, time lags, space crowding, cross-boundary, fragmentation, compounding effects, indirect effects, and triggers and thresholds. The examples of cumulative effects could also be characterized as direct and indirect effects interacting with variable baseline conditions in the affected area, as noted by several commenters. It is not clear how classifying such types of interactions as cumulative effects is necessary or improves implementation of effects analyses. Despite over 20 years of experience with Federal agencies implementing the, public comments on the ANPRM and proposed rule noted inconsistent interpretation by the courts and Federal agencies, further demonstrating that CEQ has not successfully addressed the concerns regarding consistent and clear interpretation and application of the concept. Additionally, the terms direct and indirect effects, and cumulative impact do not appear in the statute and thus their use is not required by NEPA. Consistent with *Chevron* and related cases, those concepts can be changed in new regulations.

The final rule incorporates the Supreme Court's holding in *Public Citizen*, 541 U.S. 752, and establishes a revised approach for Federal agencies to analyze those effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. Under this standard, agencies will continue to analyze effects that fall within the scope of the statute, but will no longer be required to unnecessarily characterize effects as direct, indirect, or cumulative.

Further, even the 1978 regulatory definitions for direct and indirect effects are inconsistent with those used in other disciplines including the field of ecology. In ecology, an indirect effect is commonly referred to as the impact of one organism or species on another that

is mediated or transmitted by a third. A direct effect is where one organism or species impacts another, and the impact is not mediated through a third individual. Differences between commonly used definitions of direct and indirect effects in environmental science, and the definitions in the 1978 regulations, reinforce the need for a revised approach bounded by proximate cause and its principles.

Comment: Commenters stated that the proposed changes to the definition of effects, and specifically precluding consideration of cumulative effects, narrows the scope of analysis. Commenters discussed numerous examples and stated that the proposed changes would omit certain environmental impacts from the analysis, leading to a less-informed public and decision makers. Commenters stated that agencies would fail to consider effects that are individually insignificant but significant when combined. The result of the proposed changes would include adverse impacts to public health, environmental justice communities, and the environment (especially climate change). Commenters also discussed whether specific actions would be analyzed differently as a result of the proposed changes (e.g., forest and other road construction, mineral leasing and development, electricity transmission and production, dredging and marine infrastructure, renewable energy), as well as the analysis of particular impacts (e.g., greenhouse gas emissions and climate change, ESA listed species and critical habitat). Commenters stated that the proposed changes would benefit certain industries (e.g., fossil fuels). Commenters stated that the narrow definition would constrain the scope of judicial review. Commenters stated that the proposed changes were inconsistent with the statute, legislative history, and applicable case law (e.g., *Kleppe*, 427 U.S. at 390; *Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019); *NRDC v. Callaway*, 524 F.2d 79 (2d Cir. 1975); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); *Minnesota Public Interest Research Group v. Butz*, 498

F.2d 1314 (8th Cir. 1974); and *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972)).

Commenters referenced inconsistencies with specific parts of NEPA sections 101(a), “recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment” and 102(2)(A), “utilize a systematic, interdisciplinary approach.”

CEQ Response: Defining effects as those that are reasonably foreseeable and have a reasonably close causal relationship does not narrow the scope of analysis relative the requirements of the Act because the Supreme Court has already recognized that the statute itself must embed the parameters of proximate cause. Moreover, the text of the Act requires analysis of only the environmental impact of the proposed action; it does not require that the analysis be further differentiated as direct, indirect, or cumulative. The requirement that agencies consider effects (which could include interrelated effects) that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action is consistent with the language and intent of the statute and binding precedent of the Supreme Court. This standard reduces confusion and can be more consistently implemented across Federal agencies. Under this definition, Federal agencies will continue to analyze any adverse environmental effects that cannot be avoided should a proposal be implemented. 42 U.S.C. 4332(C).

How examples provided by commenters would be analyzed under the final rule will depend on the particular factual records. The mere fact that a referenced EIS included the analysis of indirect or cumulative effects does not mean the analysis would exclude those same effects under the final rule. There may be examples where the application of the new definition of effects will find some interactions not to be reasonably foreseeable or lacking in a reasonably close causal relationship to the proposed action. It is not possible to state affirmatively that a specific example would be analyzed differently under the final rule.

To avoid further confusion with cumulative effects, the final rule does not include the language, “Analysis of cumulative effects is not required” and instead revises § 1508.1(g)(3) to state, “An agency’s analysis of effects shall be consistent with this definition. Cumulative impact, defined in 40 CFR 1508.7 (1978), is repealed.” Based on the final rule’s requirements, agencies will analyze all effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. *See* related discussion on connected actions (§ 1501.3) and reasonably foreseeable environmental trends and planned actions (§ 1502.15). *See also* sections II.C.3 and II.D.15 of the final rule.

Comment: Commenters stated that the standard, “reasonably foreseeable and reasonably close causal relationship,” is an impermissible standard for reviewing effects, and that the circumstances underpinning the Supreme Court case law cited in the proposed rule cannot be extrapolated to all NEPA projects. Some commenters supported expressly codifying a proximate causation standard while other commenters objected to it. Some commenters discussed that application of proximate causation is often confusing and inconsistent, and some commenters requested that CEQ provide examples and a detailed explanation of the tort law model. One commenter requested that CEQ further clarify “close causal relationship” and recommended adding to the definition, “A reasonably close causal relationship requires a manageable line between the proposed agency action and alleged environmental effect.”

CEQ Response: The Supreme Court has adopted the “reasonably foreseeable” and “reasonably close causal relationship” standard for effects. The Supreme Court held in *Metropolitan Edison Co.*, 460 U.S. at 774, that “a reasonably close causal relationship” is the appropriate standard under NEPA and “is like the familiar doctrine of proximate cause from tort law.” The Supreme Court reinforced the suitability of that standard in *Public Citizen*, 541 U.S.

at 767. Moreover, when CEQ amended its NEPA regulations to replace the “worst case” analysis requirement with a provision for the consideration of incomplete or unavailable information regarding reasonably foreseeable significant adverse effects, the Supreme Court found this reasoning to be a well-considered basis for the change, and held that the new regulation was entitled to substantial deference. *Methow Valley*, 490 U.S. at 356.

There is no indication that the Supreme Court intended to narrow the scope of its holding in either *Metropolitan Edison Co.* or *Public Citizen* to a subset of NEPA actions, thereby applying a standard akin to proximate cause to some NEPA actions and a “but for” standard to other NEPA actions. Applying two different standards of causation would make the implementation of NEPA unnecessarily complex.

A “manageable line” is a useful concept to understand whether a “close causal relationship” exists. *See Metro. Edison Co.*, 460 U.S. at 776 (“courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.”). CEQ has determined that its approach in the final rule will ensure that agencies implement a manageable line in assessing effects.

Comment: Some commenters requested that CEQ revise the rule to include cumulative impact but make further revisions to align with the standard of reasonable foreseeability. For example, a commenter recommended revising the definition of “cumulative effects” in the final rule to state that cumulative effects are those significant effects on the environment that are reasonably foreseeable and result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. The commenter further recommended

stating that significant cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. Other commenters similarly supported retaining a definition of cumulative impact while applying a causation connection such as cumulative effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. A commenter suggested limiting cumulative effects analysis to large-scale or unique projects to protect the public, safeguard public interests, protect funding and reduce foreseeable risks.

CEQ Response: Agencies should only consider effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action, consistent with applicable Supreme Court case law. Adding “reasonably foreseeable” and other language to a revised definition of “cumulative impact” as suggested by commenters, would lead to further confusion.

Comment: Commenters recommended that CEQ delete “may include” from the sentence “Effects include reasonably foreseeable effects that occur at the same time and place and may include reasonably foreseeable effects that are later in time or farther removed in distance.” Given that such effects are reasonably foreseeable, they should be disclosed and considered consistent with the first part of the definition. Some commenters expressed concern that use of “may include” suggests that it is optional to analyze effects later in time and farther removed in distance.

CEQ Response: The use of “may include” does not mean that it is optional for agencies to analyze reasonably foreseeable effects that occur later in time or farther removed in distance; such effects should be fully disclosed and considered. The intent of “may include” is to clarify that elements of time and distance are important for the purposes of establishing reasonable foreseeability. For these reasons, CEQ declines to remove or make further changes to “may

include.” The overall approach of the “effects” definition is to allow a causal chain that excludes remote effects while also avoiding an overly narrow focus.

Comment: A commenter recommended adding “astronomical (such as the effects on human enjoyment of the observable dark sky, optical astronomy, radio astronomy, and space debris)” to the definition of effects.

CEQ Response: CEQ declines to make the requested revision to the final rule. The specific activity of astronomical observations would be reflected in several other types of impacts mentioned in the definition (e.g., aesthetic, economic) where such impacts are reasonably foreseeable and have a reasonably close causal relationship to the proposed action.

i. “But for” Causation

Comment: Commenters supported clarifying that a “but for” causation standard is insufficient to make an agency responsible for a particular effect under NEPA. Commenters also stated that expressly requiring analysis of cumulative effects leads agencies to analyze potential impacts that exceed the requirements of NEPA, and discussed numerous examples where this has occurred such as permits under section 404 of the Clean Water Act. Commenters cited supporting case law, noting that although courts have “struggle[d] . . . to articulate a precise definition of the concept of ‘proximate cause,’” it is “impossible to announce a black-letter rule that will dictate the result in every case.” *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535–36 (1983). Commenters supported the general view that “proximate cause” refers to a set of “tools used to limit a person’s responsibility for the consequences of that person’s own acts.” *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992).

CEQ Response: A lack of clarity in the previous regulations allowed for inappropriate application of a “but for” causal relationship to the proposed action, whereby an agency analyzed nearly all potential modifications to the human environment, regardless of their proximity to the proposed action. The comparative benefit of a test akin to proximate cause is that it is rationally bounded and therefore can be more consistently implemented. Causation does not stretch out without limit in the fashion of “This is the House That Jack Built.” *See, e.g., BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 755 (7th Cir. 2011) (citations omitted) (For instance, “a creditor who suffers a default because his debtor was injured by a tort cannot sue the tortfeasor for the damages resulting from the default. If the creditor could sue, why not the creditor's son who had to borrow for his tuition because his father could no longer afford to pay it? Or the college, if the son was turned down for a loan and had to withdraw? Or the bookstore at which the son would have bought the books for his courses had he remained a student? Or the publisher of the books sold by the bookstore? Or the companies that sold paper to the publishers? Or the authors?”) (internal citations omitted). Causation lines must be drawn somewhere and drawn rationally.⁸⁹

A “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. *See Pub. Citizen*, 541 U.S. at 767. The final rule establishes that effects must be reasonably foreseeable and have a reasonably close causal relationship to the

⁸⁹ *See Holmes.*, 503 U.S. at 287 (1992) (Scalia, J., concurring) (“Life is too short to pursue every human act to its most remote consequences; ‘for want of a nail, a kingdom was lost’ is a commentary on fate, not the statement of a major cause of action . . .”). Causation stopping points are commonplace in the law. *See, e.g., United States v. Comstock*, 560 U.S. 126, 150 (2010) (Kennedy, J., concurring) (“The inferences must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum* in a veritable game of ‘this is the house that Jack built.’”) (citing Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), 31 *The Papers of Thomas Jefferson* 547 (B. Oberg ed. 2004); *United States v. Patton*, 451 F.3d 615, 628 (10th Cir. 2006)).

proposed action or alternatives. This close causal relationship is analogous to proximate cause in tort law. *See Metro. Edison Co.*, 460 U.S. at 774 (interpreting section 102 of NEPA to require “a reasonably close causal relationship between a change in the physical environment and the effect at issue” and stating “[t]his requirement is like the familiar doctrine of proximate cause from tort law”).

Statutes other than NEPA may require agencies to apply a different standard of causation or definition of effects (e.g., the ESA) than what is required under NEPA. The final rule does not alter any other environmental statutes or regulations, including how a Federal action is evaluated in terms of its environmental effects. Where agencies apply a different standard of causation or definition of effects, they should state clearly the standard that is being applied and the resources and analyses to which it applies, as well as the statute that requires the use of a different causation test.

Comment: Commenters stated that, in proposing changes to the definition of effects, CEQ has misapplied the case law in *Public Citizen* and *Metropolitan Edison Co.* Concerning effects that the agency has no ability to prevent due to its limited statutory authority, commenters stated that even where an agency cannot consider the environmental consequences for the sole purpose of adopting alternatives that would avoid or mitigate them, it can perform the vital function of informing the public. Commenters discussed how agencies with jurisdiction may be prompted to take actions to avoid or mitigate adverse environmental effects and the potential benefit of prompting Congress to expand an agency’s authority. Commenters cited case law that is purportedly inconsistent with the proposed changes to the definition of effects at § 1508.1(g)(2) (e.g., *White Tank Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033 (9th Cir. 2009); *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017)). Some commenters stated that

limiting analysis to those effects that fall under an agency's jurisdiction is contrary to congressional intent as expressed in section 102(2)(C) (“[T]he responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”) to change agency culture and democratize Federal decision-making processes. Such jurisdictional limits are inconsistent with an agency taking a “hard look.” Commenters discussed examples where such impacts would occur, such as a project that requires a permit under the Clean Water Act section 404 and also impacts air emissions.

CEQ Response: The purpose of NEPA is not to analyze effects that are beyond an agency's ability to prevent due to its limited statutory authority, and is not served when agencies analyze resulting effects that the agency has “no ability to prevent due to its limited statutory authority.” § 1508.1(g)(2). Further, CEQ's extensive experience administering NEPA indicates that Federal agencies sometimes improperly analyze such impacts as effects and therefore added this clarification in its regulations. The Supreme Court expressly used this as an example of “but for” causation, finding that NEPA does not require it. CEQ notes that environmental impacts that would occur regardless of the proposed action are more appropriately analyzed as part of the affected environment rather than as an effect of the proposed action. Further, the final rule requires extensive coordination with any cooperating Federal agencies with jurisdiction or special expertise, as well as State, Tribal, or local agencies of similar qualifications. CEQ's changes are important because information-acquisition based on “but for” causation has no end and diverts limited resources from analyzing more relevant effects. “The boundlessness of but-for causation is well-illustrated by the following rhyme: ‘For want of a nail the shoe was lost. For want of a shoe the horse was lost. For want of a horse the rider was lost. For want of a rider

the battle was lost. For want of a battle the kingdom was lost. And all for the want of a horseshoe nail.” *United States v. Maali*, 358 F. Supp. 2d 1154, 1159 n.3 (M.D. Fla. 2005), (quoting Benjamin Franklin, Poor Richard’s Almanac, Preface: Courteous Reader (1758)), *aff’d sub nom. United States v. Khanani*, 502 F.3d 1281 (11th Cir. 2007). As the Supreme Court has stated, “no legislation pursues its purposes at all costs.” *Rodriguez v. United States*, 480 U.S. 522, 525–526 (1987) (per curiam).

Comment: As a consequence of eliminating consideration of cumulative effects, commenters stated that agencies would no longer consider long-term effects of projects.

CEQ Response: Under the final rule, agencies will continue to consider long-term effects, to the extent they are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. CEQ notes that a long-term effect is different than an effect that is remote in time.

Comment: Commenters objected to excluding from the definition of effects those impacts that are remote in time, geographically remote, or the product of a lengthy causal chain. Commenters stated that excluding such effects had no legal basis and may nonetheless be reasonably foreseeable. Commenters cited examples of Federal actions (e.g., licenses or permits) that have a long duration and expressed concern that the proposed changes would preclude consideration of effects over the duration of the action. Some commenters requested further clarification of the terms. Commenters cited various case law to support the view that agencies must analyze effects that are remote in time (e.g., *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079 (D.C. Cir 1973)), geographically remote (*Sierra Club v Coleman*, 405 F. Supp. 53 (D.D.C. 1975)), or the product of a lengthy causal chain. One commenter recommended revising the definition of effects to include those that are “later in time

or farther removed in distance, but reasonably foreseeable and susceptible of quantification.” The commenter noted that the effects of an action, particularly an ongoing action, may occur over a period of years and the effects of the action on a particular resource may intensify over that period. The addition of clarifying language would ensure that effects more distant in the future would be fully analyzed in the NEPA document.

CEQ Response: CEQ notes that some commenters confused a long-term effect with an effect that is remote in time. A long-term effect is a change to the human environment that has an extended duration. Whereas, an effect that is remote in time is a change to the human environment that does not occur until a distant point in the future. Agencies should apply the definition of effects in the context of the proposed action. In the example of a major infrastructure project, an agency should analyze the project’s effects into the future to the extent the effects continue to be reasonably foreseeable.

The Supreme Court has endorsed use of proximate cause doctrine for purposes of interpreting and implementing NEPA. *Pub. Citizen*, 541 U.S. at 767; *see also Metro. Edison Co.* 460 U.S. at 774 (interpreting section 102 of NEPA to require “a reasonably close causal relationship between a change in the physical environment and the effect at issue” and stating that “[t]his requirement is like the familiar doctrine of proximate cause from tort law.”). In applying proximate cause, the Supreme Court examines remoteness. *See, e.g., Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1305 (2017) (“It is a ‘well established principle of [the common] law that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.’ We assume Congress ‘is familiar with the common-law rule and does not mean to displace it *sub silentio*’”) (additional internal quotation marks and citation omitted); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) (“That

venerable principle reflects the reality that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing.”) (internal quotation marks and citation omitted); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 712 (1995) (O’Connor, J., concurring) (citing “*Benefiel v. Exxon Corp.*, 959 F.2d 805, 807–08 (9th Cir. 1992) (in enacting the Trans–Alaska Pipeline Authorization Act, which provides for strict liability for damages that are the result of discharges, Congress did not intend to abrogate common-law principles of proximate cause to reach ‘remote and derivative’ consequences).”).

Comment: Commenters stated that CEQ misapplied the Supreme Court’s opinion in *Public Citizen*, 541 U.S. 752 and that it stands for the proposition that effects that are remote in time need to be examined to be sure that the requisite causation is present. Commenters stated that consideration of the distant future is particularly important when assessing certain types of actions such as climate change and geologic repositories for the disposal of radioactive wastes. Some commenters provided examples and asserted or inquired as to whether those examples would be analyzed differently under the final rule (e.g., mineral leasing).

CEQ Response: The analysis of effects is bound by a rule of reason. *Metro. Edison Co.*, 460 U.S. at 776 (“The scope of the agency’s inquiries must remain manageable if NEPA’s goal of ‘[insuring] a fully informed and well-considered decision’ . . . is to be accomplished.”) (citing *Vt. Yankee*, 435 U.S. at 558). When interpreting what constitutes “remote in time,” agencies should consider the context of the specific action under consideration. Certain proposed actions, such as the disposal of radioactive waste, may have effects in the distant future that should be analyzed. For this reason, it is not possible to know whether a specific EIS would be analyzed differently under the final rule without an extensive review of the particular facts and

circumstances. Beyond that observation, CEQ declines to address unripe situations as to how the final rule will be applied in particular factual settings.

Comment: Commenters stated that a joint EIS must assess the impacts of all of the agencies' actions and should include effects within the lead agency's and cooperating agencies' statutory authorities. Commenters requested clarification that agencies developing a joint EIS cannot rely on the proposed definition of effects to avoid addressing relevant impacts.

CEQ Response: The definition of effects applies to all agencies involved in preparing a joint EIS. CEQ has further revised the definition of effects at § 1508.1(g)(2) to clarify that effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.

Comment: Commenters stated, "effects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain" is incorrect and confusing. Some commenters recommended CEQ delete "significant" or, alternatively, replace "significant" with "relevant." Other commenters stated that "significant" is used elsewhere in definitions, creating potential inconsistencies in its interpretation.

CEQ Response: In response to comments, CEQ has revised § 1508.1(g)(2) to state, effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. The word "significant" was removed because it caused confusion with respect to its use in § 1501.3, and the word "generally" was added to capture the fact that there may be some limited instances where an effect that is remote in time, geographically remote, or the product of a lengthy causal chain is reasonably foreseeable and has a reasonably close causal relationship to the proposed action.

Comment: A commenter requested further clarification of the “ability to prevent” in § 1508.1(g)(2) and expressed concern that, as written, the definition could cause a long-range study of “effects” and be done differently across agencies.

CEQ Response: The phrase “ability to prevent” is further clarified by “due to its limited statutory authority or would occur regardless of the proposed action.” This language is sufficient to understand the phrase.

ii. Indirect Effects

Comment: Some commenters expressed support for affirmatively stating that consideration of indirect effects is not required. Commenters stated that indirect effects is an ambiguous term and creates opportunities for litigation. These commenters further noted that there is no text in the NEPA statute requiring agencies to assess indirect effects. Other commenters opposed including an affirmative statement that consideration of indirect effects is not required and stated that such a change is inconsistent with the statute and legislative history, as well as CEQ guidance, long-standing practice, and case law. Commenters noted that indirect effects fall within the statutory requirement to submit a detailed statement on “any adverse environmental impact,” and related case law. Furthermore, an affirmative statement that analysis of indirect effects is not required would significantly curtail the scope of impacts considered under NEPA and harm the environment and affected communities.

CEQ Response: Under the final rule, any effect that is reasonably foreseeable and has a reasonably close causal relationship to the proposed action must be disclosed and considered. The final rule follows the Supreme Court's holding in *Public Citizen*, 541 U.S. at 767-68, which is to analyze effects that are “reasonably foreseeable and have a reasonably close causal relationship” to the proposed action or alternatives regardless of the type of effect. Under this

standard, agencies will continue to analyze indirect effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action, but agencies will not have to categorize effects. CEQ does not anticipate that the change will reduce the completeness of environmental review. Categorizing effects as direct, indirect, and cumulative was unnecessary and led to confusion and inconsistency in implementation despite extensive attempts to clarify in guidance and training. To better inform agency decision making, CEQ has revised the definition of effects to align with Supreme Court decisions and provide an approach that can be applied consistently across agencies.

iii. Climate Change

Comment: Commenters expressed concerns that the impacts of climate change *on a proposed project* would no longer be taken into account. Commenters emphasized the importance of climate change and discussed various actions being undertaken both domestically and internationally. Commenters discussed the National Climate Assessment and other references with information on changes to the Earth's climate and impacts to its ecosystems and many aspects of society. Commenters also cited numerous examples of case law where courts found that agencies failed to fully consider effects from climate change (*e.g., Sierra Club v. FERC*, 867 F.3d. 1357). Commenters emphasized that failing to consider climate change could result in the Federal funding of major infrastructure projects that are inadequately designed for future environmental conditions and associated misallocation of taxpayer dollars and public harm.

CEQ Response: Under the final rule, agencies will consider predictable trends in the baseline analysis of the affected environment. Trends associated with a changing climate would in appropriate cases be characterized in the baseline analysis of the affected environment. CEQ

has further revised the final rule to require that agencies describe the environment of the area(s) to be affected or created by the alternatives under consideration, including the reasonably foreseeable environmental trends and planned actions in the area(s). Agencies should project predictable trends in the baseline analysis into the reasonably foreseeable future in order fully to understand the proposed action. Reasonably foreseeable environmental trends in the affected environment should not be treated as an effect of the proposed action.

Comment: Commenters stated agencies would no longer consider the impact of a *proposed action on climate change*, including greenhouse gas emissions, and its associated environmental and social impacts. Commenters emphasized the impacts of actions involving fossil fuel and agriculture production. Commenters provided numerous examples of how climate change and ocean acidification are causing global change. Other commenters expressed concerns with various climate research and stated that effects on climate change are not a proper subject of NEPA review.

CEQ Response: The final rule applies broadly to all types of proposed actions and effects on the environment. The precise way in which a given proposed action should be reviewed under the final rule will be based on the particular circumstances. The analysis would depend on whether the purported effects of the action are reasonably foreseeable and have a reasonably close causal relationship to the proposed action, or are remote because of the length of the causal chain and the distance into the future at which effects would be manifested.

Comment: Most commenters opposed codification of CEQ's draft greenhouse gas guidance, Draft National Environmental Policy Act Guidance on Consideration of Greenhouse

Gas Emissions (“Draft GHG Guidance”).⁹⁰ Some commenters asserted that the draft guidance is deficient and codifying it would reinforce the deficiencies. Other commenters agreed with the reasoning in the proposed rule that greenhouse gas emissions are a single category of impacts and therefore not in need of special treatment. Some commenters preferred that CEQ either reinstate the 2016 guidance, or revise the current draft before codifying any portion of it in regulations. Some commenters requested adding a section in the rule that is specific to climate-related impacts.

CEQ Response: In the proposed rule, CEQ stated that it would be inappropriate to address any impact category in the regulations. CEQ has anticipated the need to review the Draft GHG Guidance for potential revisions consistent with the final rule. Based on the public’s comments, the final rule does not codify any portion of the Draft GHG Guidance. Nothing in this response prejudices any issue concerning that guidance which was premised on the 1978 NEPA regulations.

Comment: CEQ received many comments on aspects of the Draft GHG Guidance, including recommended methods for calculating emissions and global warming potential, ecological, economic, and social impacts (e.g., social cost of carbon and methane); comparing alternatives, and mitigation strategies.

CEQ Response: CEQ acknowledges the comments on the Draft GHG Guidance. The final rule does not codify any aspects of the Draft GHG Guidance.

iv. Segmentation

⁹⁰ 85 FR 30097 (June 26, 2019), https://ceq.doe.gov/guidance/ceq_guidance_nepa-ghg.html.

Comment: Commenters stated that agencies will no longer consider the effects of future projects, and that project proponents would be able to segment a single project into multiple actions to avoid triggering an EIS. Commenters asserted that ignoring cumulative effects and segmenting projects is inconsistent with the Supreme Court’s holding in *Kleppe*, 427 U.S. 390, and other case law. Some commenters recommended that CEQ require analysis of the effects of the proposed action in combination with reasonably foreseeable future projects or programs on resources within the action area. The effects of future projects must be quantifiable (based on the best available science) and must have a reasonably close causal relationship to the proposed action.

CEQ Response: The final rule retains the language in the 1978 regulations concerning the scoping and analysis of connected actions. Where a proposed action is a component or segment of a larger project, the final rule requires Federal agencies under §§ 1501.3(b), 1501.9(e), and 1502.4(a) to evaluate in a single EIS all proposals or parts of proposals that are related closely enough to be, in effect, a single course of action. To the extent future actions, which include ongoing or connected actions, are identified in the scoping process, the final rule would require consideration of all effects that are reasonably foreseeable and have a reasonably close causal relationship to the related Federal actions. In response to comments, the final rule also requires agencies to consider reasonably foreseeable environmental trends and planned actions in the area(s). § 1502.15. A separate requirement for agencies to identify “cumulative effects” is not necessary to be consistent with the Supreme Court’s holding in *Kleppe* and subsequent case law.

v. Other Comments on Effects

Comment: A commenter stated that the term “effects” appears twice in the NEPA statute and “impacts” three times. In particular, Congress asked for a detailed statement on “the environmental impact” of proposed actions and “any adverse environmental effects which cannot be avoided.” Commenters requested that CEQ amend the regulations to explain the distinction between the two concepts.

CEQ Response: “Effects” and “impacts” are used throughout the NEPA statute. In addition to the reference at section 102(2)(C)(ii), there were two references to “effect” and “effects” in section 201, which pertained to an annual reporting requirement that Congress subsequently terminated. Public Law 104-66, § 3003, 109 Stat. 707, 734–36 (as amended, set out as a note under 3 U.S.C. 113). There are seven references to “impact” or “impacts” within Title I, including the provision cited by the commenter.

CEQ has interpreted the terms to have the same meaning. The 1978 regulations defined “effects” and stated that effects and impacts as used in the regulations are synonymous. The proposed rule followed the same interpretation. CEQ declines to create separate definitions in the final rule.

Comment: A commenter recommended that CEQ require agencies to create standards around the development and reuse of cumulative effects analyses.

CEQ Response: A factor contributing to CEQ’s decision to eliminate the requirement to identify and discuss cumulative effects specifically is the lack of consistency in the cumulative effects analysis among Federal agencies. Commenters raising concerns with the cumulative effects analysis often cited variability among Federal agencies regarding its elements and structure. Such variability would make it difficult to reuse an analysis in multiple EISs or EAs.

Comment: A commenter stated that CEQ should develop technical standards and quantification protocols for the cumulative effects analysis for individual resources like sequestered carbon stock, greenhouse gas emissions, and water quality, noting that quantitative standards exist for many of these resources.

CEQ Response: CEQ has revised the definition of effects as described above. In implementing the CEQ regulations, Federal agencies should use their experience and expertise in examining resource issues and base their analyses on the particular facts and circumstances. The commenter's request for technical standards or quantification protocols is outside the scope of this rulemaking, which is also not medium-specific.

Comment: A commenter stated that if one is unable to discern the difference in direct, indirect, and cumulative effects then it is not possible to know how much of a project should be curtailed or the level of mitigation to be applied.

CEQ Response: It is not necessary to categorize the types of effects in order to inform the public and decision makers about the environmental impacts of a proposed action and potential means of mitigating adverse impacts.

Comment: Commenters requested that CEQ add or remove specific types of effects in the definition of effects. Commenters requested to remove "aesthetic, historical, cultural, economic, and social" impacts from the rule because it opens the door to litigation contrary to existing case law and the intended purpose of NEPA. Commenters wanted to add "welfare" to the definition because it is vital to the economy.

CEQ Response: CEQ declines to make the requested changes to the final rule. The human environment as defined at § 1508.1(m) includes all of the suggested considerations. In

the final rule, CEQ expressly mentions changes to the human environment in the definition of effects.

Comment: One commenter recommended using the definition of “effect” from the Merriam-Webster Dictionary, “something that inevitably follows an antecedent (such as a cause or agent).”

CEQ Response: CEQ has revised the definition of effects to retain the full scope of types of effects “ecological, aesthetic, historic, cultural, economic, social, and health,” while also including important clarifying language regarding the applicable standard of causation. CEQ finds the definition recommended by the commenter lacks the necessary specificity and declines to make the recommended revision.

Comment: A commenter expressed concern that many of the proposed changes, and specifically changes to the definition of effects, could hamper the ability to use the NEPA process to facilitate compliance with the requirements of the Coastal Zone Management Act (CZMA) by diminishing the ability of Federal agencies to identify and obtain data and information necessary for completing the consistency review process in a timely manner.

CEQ Response: The final rule does not supersede other statutory requirements such as the requirements under the CZMA. NEPA serves as an umbrella procedural statute, and agencies may integrate analysis under other environmental laws into NEPA documents. Similar to the 1978 regulations, in the final rule CEQ directs agencies to integrate the NEPA process with other planning and authorization processes. *See* §§ 1501.2(a), 1501.9(c), 1502.24, 1505.2(a).

Comment: A commenter recommended that CEQ revise the proposed definition of “effects or impacts” in § 1508.1 to more closely mirror the joint Fish and Wildlife Service and

National Marine Fisheries Service regulations implementing the ESA. The ESA regulations include a two-part test for effects caused by a proposed action: (1) “it would not occur but for the proposed action” and (2) “it is reasonably certain to occur.” 50 CFR 402.02, 402.17. The commenter stated that requiring agencies to meet different standards under NEPA and ESA causes needless confusion and delay.

CEQ Response: As described elsewhere, a “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. NEPA and ESA are two different statutes with different standards, definitions, and underlying policies. Where agencies are considering the effects of a proposed action on listed species and critical habitat, they are required to apply the causation standards associated with 50 CFR part 402. However, other environmental effects are subject to NEPA’s causation standard, unless another statute applies. Additionally, the ESA regulatory test requires not just “but for” causation but also requires effects to be “reasonably certain to occur.” The ESA regulatory test is similar to the test included in the NEPA final rule defining “effects.”

6. Definition of Environmental Document (§ 1508.1(i))

Comment: Commenters suggested the definition of “environmental document” in § 1508.1(i) be expanded to include the ROD. One commenter also suggested expanding the definition of “environmental document” to include any written record, letter, email or permit supporting compliance with the NEPA process. One commenter suggested that this definition could be confusing if alternative documents can serve the function of NEPA.

CEQ Response: CEQ is finalizing the definition of “environmental document” as proposed. The definition is limited to an EA, EIS, FONSI or NOI. These documents are

analytical environmental documents that are developed by a Federal agency to inform decision making.

CEQ has not expanded the definition to include a ROD because that is a formal decision document containing any relevant factors rather than the underlying environmental analysis developed to inform decision making. The ROD, addressed in § 1505.2, may be combined with other documents, and is not the type of documentation that CEQ is referring to when it uses the term “environmental document” in the regulations.

CEQ also has not expanded the definition to apply to supporting documentation because such a revision would not be consistent with how the term “environmental document” is used in the relevant provisions of the regulations. In the regulations, “environmental document” refers to the analytical environmental documents that the agency prepares to comply with NEPA, namely the EA, EIS, FONSI, and NOI, rather than documentation prepared or submitted to support those analyses.

The provisions relating to a finding by the agency that another statute may serve the function of agency compliance with NEPA will not make this definition confusing. The definition of “environmental document” in the final rule identifies four specific types of documents. CEQ addresses functional equivalence, and the designation of documents that individually or in the aggregate may satisfy the requirements in CEQ’s regulations in §§ 1506.9 and 1507.3(c)(5).

7. Definition of Federal Agency (§ 1508.1(k))

Comment: Some commenters supported the proposed changes to the definition of “Federal agency” to include States, Tribes, and units of local government to the extent that they have assumed NEPA responsibilities.

CEQ Response: In response to comments, CEQ has further revised the definition of “Federal agency” to clarify that “Federal agency” includes States, Tribes and units of local government that assume NEPA responsibilities from a Federal agency pursuant to a statute. The definition is similar to the 1978 regulations, which included in the definition agencies that assumed NEPA responsibilities and specifically referenced the Housing and Community Development Act of 1974. Since 1978, Congress has enacted additional legislation authorizing non-Federal agencies to assume NEPA responsibilities. *See, e.g.*, Surface Transportation Project Delivery Program, 23 U.S.C. 327. The revised definition referencing assumption generally updates the definition to reflect that there are additional statutes under which States, Tribes and units of local government may assume NEPA responsibilities.

Comment: Some commenters opposed the revisions to the definition of “Federal agency.” They raised concerns that the change could lead to confusion, and that even where State, Tribal or local governments assume lead NEPA responsibilities, non-Federal agencies should not be referred to as Federal agencies given the importance of Federal, State, Tribal and local distinctions throughout the NEPA regulations. One commenter recommended that the term “lead agency” be used to denote the agency, whether Federal, State, Tribal or local, having responsibility for preparing a given NEPA document instead of using “Federal agency” as a catch-all for all such agencies in the lead agency role.

CEQ Response: The definition of “Federal agency” expands the term to include a State, Tribal or local government only in those limited circumstances in which State, Tribal or local agencies are by statute assuming NEPA responsibilities. The 1978 regulations included such entities when they were assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974. CEQ’s revision to the definition updates the 1978

regulations to refer to such entities generally because of the enactment of additional NEPA assignment statutes since 1978, including assumption under the Surface Transportation Project Delivery Program, 23 U.S.C. 327. This clarification is helpful to entities assuming NEPA responsibilities under such statutes and will assist them in carrying out their role in the place of the Federal agencies.

CEQ declines to adopt the recommendation in the comment that State, Tribal and local agencies assuming NEPA responsibilities should be included under the term “lead agency.” The term “lead agency” is a different term, which relates to roles and responsibilities an agency will serve as the lead for an environmental document when its preparation involves multiple agencies. While a State, Tribal or local agency assuming responsibilities under the statutes referenced above typically will serve as the “lead agency,” that is a separate concept from the assumption of NEPA responsibilities.

8. Definition of Human Environment (§ 1508.1(m))

Comment: CEQ received comments supporting the revisions to the definition of “human environment” in §1508.1(m).

CEQ Response: CEQ’s revisions to the definition of “human environment” more closely align to section 101(a) of NEPA and move operative text to the relevant section of the regulations. CEQ has replaced the term “people” with “present and future generations of Americans” to reflect the express language in section 101(a) of the statute, which clarifies that the term “human environment” refers to the natural and physical environment and the relationship of both present and future generations of Americans with that natural and physical environment. CEQ has also moved the operative text that states that economic or social effects by themselves do not require preparation of an EIS to § 1502.16(b), which is the section of the

regulations that addresses when agencies should consider economic or social effects in an EIS. These revisions will assist agencies in understanding and implementing the statute and regulations.

Comment: CEQ also received comments opposing the revisions to the definition of “human environment.” Some commenters objected to the revisions in the first sentence revising “people” to “Americans” and raised concerns that this would lead to factoring in nationality or citizenship of a population. Other commenters stated that the revisions to this definition are not consistent with E.O. 12898 relating to environmental justice. Other commenters stated that the revisions would limit analysis to national rather than global effects, preclude consideration of transboundary impacts, or that the revisions were inconsistent with section 102(2)(F) which “recognizes the worldwide and long-range character of environmental problems.” One commenter contended referencing future generations would introduce unnecessary ambiguity, and that the revisions to the definition may narrow the purposes and policies of NEPA in 42 U.S.C 4321 and 42 U.S.C 4331(a). Finally, other commenters opposed the revised definition as unnecessary because as revised the definition restates the statutory text.

CEQ Response: As discussed in the proposed rule, CEQ’s intent in replacing “people” with “current and future generations of Americans” is to align the CEQ regulations with the express text of the statute, and the revision to move operative language to the relevant section of the regulations will assist agencies in implementing that section. These changes will not limit analysis as represented by commenters. Rather, they will better conform the regulations to the statute and move operative text to a relevant section of the regulations, in order to assist agencies in understanding and complying with NEPA.

It is necessary to include a definition of “human environment” because it is a term that appears in the statute and throughout the regulations. It also more closely aligns the definition with the statutory text (including by referring to future generations) and will provide greater clarity and consistency with the statute. To the extent commenters maintain the revisions to the definition of “human environment” are not consistent with section 102(2)(F), that section is a separate provision in the statute that relates not to an agency’s consideration of major Federal actions under section 102(2)(C), but rather to participation by Federal agencies in international initiatives, resolutions and environmental programs where consistent with U.S. foreign policy.⁹¹

The revisions to § 1508.1(m) are not intended to exclude any segment of the population of the United States or to create issues of racial injustice. The revisions are consistent with the clarifications that NEPA does not apply extraterritorially. There is thus nothing improper in interpreting NEPA as focused on the residents of this country and not the residents of other countries.

Comment: Commenters also requested CEQ further revise the definition to provide that “human environment” and “environment” are interchangeable.

CEQ Response: CEQ has not revised the definition to provide that the terms are interchangeable because there are limited instances in the rule where the term “environment” is used for a more specific purpose. In particular, the final rule references the term “environment” where it used for the more specific purpose of referencing the “affected environment” (*see* § 1502.15) or the “built environment.” *See* § 1502.16(a)(8).

⁹¹ Section 102(2)(F) provides that the Federal Government shall “recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment.” 42 U.S.C. 4332(2)(F).

Comment: Commenters also requested further revisions to incorporate or reference the economic or social relationship of humans with the physical environment, or to include revisions to state that the human environment includes the cultural, social and economic aspects of society. Other commenters requested revisions to ensure that agencies conduct more balanced analyses that allow for productive use of resources. Some commenters raised concern that removing the terms “social and economic” from the definition would effectively allow agencies to ignore the impact of their decisions on small businesses, communities and local governments. One commenter requested that everywhere the term “human environment” is used that CEQ include “human and ecological environment.” Another commenter recommended removing “human” from any sentence that uses the term “human environment.”

CEQ Response: CEQ has retained the definition of “human environment” as proposed, and it is appropriate to continue to use that term in the regulations because it is consistent with its use in section 102(2)(C) of NEPA. As noted above, the second sentence of the definition in the 1978 regulations directing that “economic or social effects” themselves to not require the preparation of an EIS has been moved to § 1502.16(b) because it is operative text. While CEQ has not referenced economic or social effects in the definition of “human environment,” CEQ has continued to include a cross-reference to the definition of “effects,” which includes ecological, social, economic, cultural and other effects, and which CEQ has revised to clarify that economic effects may include effects on employment. *See* § 1508.1(g). CEQ has also made a number of other revisions to clarify that economic and social effects are relevant, including expressly referencing that the policy established by NEPA is to “fulfill the social, economic, and other requirements of present and future generations of Americans,” consistent with section 101(a) of NEPA. *See* § 1500.1(a). CEQ has also amended the regulations to include direction to

agencies to consider, where applicable, economic and technical considerations, including the economic benefits of the proposed action. *See* § 1502.16(a)(10). CEQ anticipates these revisions will help ensure agencies include social and economic, as well as other appropriate considerations, in their NEPA analyses.

Comment: Commenters requested making reference to Earth's orbital space in the definitions of "human environment" and "effects." Another commenter requested that the definition of "human environment" be limited to "on U.S. soil" based on the commenter's view that the regulations do not apply extraterritorially.

CEQ Response: In the 1978 regulations, CEQ did not include a reference to jurisdictional boundaries in the definition of "human environment," and in the final rule CEQ has continued not to include such a reference in the definition. Both the requested revision to reference Earth's orbital space in the definition of "human environment," and the requested revision to limit the definition of "human environment" to "on U.S. soil," raise issues relating to jurisdictional boundaries and extraterritorial actions. The definition of major Federal action, including the treatment of extraterritorial actions, is addressed elsewhere in the regulations. *See* § 1508.1(q). Under those provisions, a major Federal action does not include agency actions or decisions with effects located entirely outside of the jurisdiction of the United States. § 1508.1(q)(1)(i). The Restatement of Foreign Relations Law provides that the areas within the territorial jurisdiction of the United States include "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.”⁹² Determinations of territorial jurisdiction are appropriately analyzed by the relevant agencies based on the specific proposed action. It is appropriate to address extraterritorial actions through the definition of major Federal actions, rather than further revising the definition of “human environment” or “effects.”

9. Definition of Jurisdiction by Law (§ 1508.1(n))

Comment: Commenters stated the proposed rule did not contain a definition for the term “jurisdiction by law” and inquired as to whether another definition was intended to include “jurisdiction by law.”

CEQ Response: The final rule retains the definition from 40 CFR 1508.15 as the “agency authority to approve, veto, or finance all or part of the proposal.” *See* § 1508.1(n).

Comment: A commenter recommended adding “projects carried out” to definition for the term “jurisdiction by law.”

CEQ Response: The definition of “jurisdiction by law” has not been a source of confusion and the change recommended by the commenter is not necessary to ensure projects carried out by the agency are covered by the definition.

10. Definition of Major Federal Action (§ 1508.1(q))

Comment: Commenters stated that the definition of “action” as synonymous with “major Federal action” creates confusion and uncertainty because other sections of the regulations use “action” in a manner that does not mean “major Federal action.” Commenters recommended that the definition in § 1508.1(q) be limited to “major Federal action.”

⁹² Restatement (Fourth) of Foreign Relations Law sec. 404 (2018). In considering whether the presumption applies, courts look to see whether there is any indication of Congressional intent to apply it to “places over which the United States has sovereignty or some measure of legislative control.” *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

CEQ Response: In response to comments and upon further consideration, the final rule revises the definition in § 1508.1(q) to provide that major Federal action or action means an activity or decision subject to Federal control and responsibility subject to the following. This change will alleviate confusion that arose from inclusion of the term “action” in the definition.

Comment: Some commenters opposed the proposed rule’s change to the definition of “major Federal action” which would heighten the degree of Federal control required for an action to be considered major by striking the word “potentially,” which the 1978 regulations had included. Commenters asserted that at the beginning of the NEPA process, it may be hard to know the extent of Federal control over a proposed action. Other commenters supported the deletion of the word “potentially” because at the beginning of the NEPA process before the agency has done its environmental analysis, it may be difficult to know whether there will be aspects of Federal control.

CEQ Response: Under the final rule, agencies must determine whether an activity or decision is subject to Federal control and responsibility as part of its determination as to whether there is a major Federal action. If there is a potential for an action to be subject to Federal control and responsibility, then the agency should evaluate that potential and make a determination whether it is subject to Federal control and responsibility. Including “potentially” in the definition is confusing and may lead to inconsistent application when, in fact, Federal control and responsibility should be clearly established. For these reasons, the final rule does not include the word “potentially” when discussing the degree of Federal control or involvement.

i. Independent Meaning of Major

Comment: Several commenters stated that deleting the sentence, “Major reinforces but does not have a meaning independent of significantly” (40 CFR 1508.27), is contrary to CEQ’s

prior interpretation of the statute and legislative history. Commenters stated that no court has used the principles of statutory construction to disagree with CEQ's interpretation since CEQ issued the 1978 regulations. One commenter also suggested striking the word "major" from the definition of "major Federal action." Another commenter opposed the proposed revision and cited the use of "other" before "major Federal action" in section 102(2)(C) as a meaningful word in the statute.

CEQ Response: The final rule deletes the sentence, "Major reinforces but does not have a meaning independent of significantly," which the 1978 regulations included at 40 CFR 1508.27. Although the 1978 regulations treated the terms "major" and "significantly" as interchangeable, there is an important distinction between the two terms and how they apply in the NEPA process. "Major" refers to the type of action, including the role of the Federal agency and its control over any environmental impacts. "Significant" relates to the effects stemming from the action, including consideration of the affected area, resources, and the degree of the effects. In the NEPA statute, "major" appears twice, and in both instances is a modifier of "Federal action." It is used in section 102(2)(C) as part of the phrase "other major Federal actions significantly affecting the quality of the human environment," and again in section 102(2)(D) as part of the phrase, "any major Federal action funded under a program of grants to States." "Significantly" is also used twice, and in both instances is a modifier of the similar words "affecting" in section 102(2)(C) and "impacts" in section 102(2)(D)(iv).

By making a distinction between "major" and "significantly," the final rule is intended to establish a more transparent and efficient process, and one that is more aligned with the statutory text. As CEQ stated in the preamble to the proposed rule, this is a change in position as compared to CEQ's 1978 interpretation of NEPA. Under the 1978 interpretation, however, the

word “major” was rendered virtually meaningless. In the final rule, interpretation of “major” as a term separate from “significantly” is more consistent with long-standing principles of statutory interpretation, as it assigns meaning to each of the individual words and their placement in the text. *See, e.g., Bennett*, 520 U.S. at 173 (“It is the cardinal principle of statutory construction . . . that it is our duty to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section.”) (internal quotations and citations omitted) (quoting *United States v. Menasche*, 348 U.S. 528, 538 (1955)).

The legislative history of NEPA reflects that Congress used the term “major” independently of “significantly,” and provided that, for major actions, agencies should make a determination as to whether the proposal would have a significant environmental impact. Specifically, the Senate Report for the National Environmental Policy Act of 1969 (Senate Report) states, “*Each agency which proposes any major actions, such as project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs, shall make a determination as to whether the proposal would have a significant effect upon the quality of the human environment.*” S. Rep. No. 91–296, at 20 (1969) (emphasis added).⁹³ Although some commenters pointed to another location in the legislative history that appeared to use “major” and “significant” interchangeably, that legislative history in fact supports the interpretation in the final rule. Further, the Senate Report shows that OMB’s predecessor, the Bureau of the Budget, submitted comments on the legislation to provide the views of the Executive Office of the President and recommended that Congress revise the text of the bill to include two separate modifiers: “major” before Federal actions and “significantly”

⁹³ <https://ceq.doe.gov/docs/laws-regulations/Senate-Report-on-NEPA.pdf>.

before affecting the quality of the human environment. *See id.* at 30 (Bureau of the Budget’s markup returned to the Senate on July 7, 1969). The enacted legislation included these revisions. Although the terms “major and “significant” can be synonyms in other contexts, here they modify separate phrases and thus should be given independent meaning and effect.

The use of the word “other” in the phrase “include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment” does not indicate that “major” does not have independent meaning. “Other” is used as an adjective in the text of section 102(2)(C) to modify “major Federal actions,” and its use simply distinguishes recommendations or reports on legislative proposals from “other major Federal actions.”

CEQ acknowledges that in the 1978 regulations, CEQ followed the Eight Circuit’s approach in *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1321–22 (8th Cir. 1974). In that case, the court required an EIS on Forest Service contracts for the Boundary Waters canoe area stating, “[t]o separate the consideration of the magnitude of Federal action from its impact on the environment does little to foster the purposes of the Act, i.e., to ‘attain the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable or unintended consequences.’ By bifurcating the statutory language, it would be possible to speak of a ‘minor Federal action significantly affecting the quality of the human environment,’ and to hold NEPA inapplicable to such an action.” *Id.* However, other courts interpreted “major” and “significantly” as having independent meaning before CEQ issued its 1978 regulations. *NAACP v. Med. Ctr., Inc.*, 584 F.2d 619, 629 (3d Cir. 1978) (analyzing the Secretary of Health, Education, and Welfare’s ministerial approval of a capital expenditure under a framework that first considered whether there had been agency action, and

then whether that action was “major”); *Hanly v. Mitchell*, 460 F.2d 640, 644–45 (2d Cir. 1972) (“There is no doubt that the Act contemplates some agency action that does not require an impact statement because the action is minor and has so little effect on the environment as to be insignificant.”); *Scherr v. Volpe*, 466 F.2d 1027, 1033 (7th Cir. 1972) (finding that a highway project qualifies as major before turning to the second step of whether the project would have a significant effect); *Julius v. City of Cedar Rapids*, 349 F. Supp. 88, 90 (N.D. Ind. 1972); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877, 879 (D. Or. 1971) (discussing whether a proposed building project was “major”); *S.W. Neighborhood Assembly v. Eckard*, 1978 U.S. Dist. LEXIS 19994, *12 (D.D.C. 1978) (“The phrase ‘major Federal action’ has been construed by the Courts to require an inquiry into such questions as the amount of [F]ederal funds expended by the action, the number of people affected, the length of time consumed, and the extent of government planning involved.”); *Natural Res. Def. Council v. Grant*, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972) (“Certainly, an administrative agency as the Soil Conservation Service may make a decision that a particular project is not major, or that it does not significantly affect the quality of the human environment, and, that, therefore, the agency is not required to file an impact statement.”).

Over the past four decades, a number of courts have recognized that NEPA does not apply in circumstances where the Federal agency’s role involves minimal Federal funding or control, and by extension such actions do not rise to the level of “major Federal action.” See *Rattlesnake Coal. v. U.S. EPA*, 509 F.3d 1095 (9th Cir. 2007) (Federal funding comprising 6 percent of the estimated implementation budget not enough to federalize implementation of entire project); *Macht v. Skinner*, 916 F.2d 13 (D.C. Cir. 1990) (funding for planning and studies not enough to federalize a project); *Dep’t of Envtl. Prot. & Energy v. Long Island Power Auth.*,

30 F.3d 403, 417 (3rd Cir. 1994) (Federal approval of a private party's project, where that approval is not required for the project to go forward, does not constitute a major Federal action); *United States v. S. Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1572 (11th Cir. 1994) ("The touchstone of major [F]ederal activity constitutes a [F]ederal agency's authority to influence nonfederal activity. '[T]he [F]ederal agency must possess actual power to control the nonfederal activity.'" (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988)); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 512 (4th Cir. 1992); *Save Barton Creek Ass'n v. Fed. Highway Admin.*, 950 F.2d 1129, 1134–35 (5th Cir. 1992); *Vill. of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1482 (10th Cir. 1990); *Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th Cir. 1998) (finding that the Bureau of Land Management's review of Notice mines is "only a marginal [F]ederal action rather than a major action"); *Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269, 272 (8th Cir. 1980) ("Factual or veto control, however, must be distinguished from legal control or 'enablement'"); *Atlanta Coal. on the Transp. Crisis v. Atlanta Reg'l Comm'n*, 599 F.2d 1333, 1347 (5th Cir. 1979); *Ctr. for Biological Diversity v. HUD*, 541 F. Supp. 2d 1091, 1099 (D. Ariz. 2008), *aff'd*, 395 Fed. Appx. 781, 783, 2009 WL 4912592 (9th Cir. Nov. 25, 2009) (unpublished); *Touret v. NASA*, 485 F. Supp. 2d 38 (D.R.I. 2007). These holdings that weigh the Federal role with respect to NEPA take an approach that distinguishes the concept of "major Federal action" from an analysis of the degree of environmental effects. This line of cases implicitly acknowledges a category of Federal actions that are not major, and thus do not require any consideration of the significance of effects before determining that NEPA does not apply in contrast to *Minnesota Public Interest Research Group v. Butz*, which wrongly focuses only on the latter term concerning the significance of effects. 498 F.2d at 1322. In revising the NEPA regulations after 40 years and recognizing the subsequent case law, CEQ has determined

that it is appropriate to align the definition of “major Federal action” with the statute and give independent meaning to the two terms.

Comment: Some commenters recommended that CEQ make a distinction between minor proposals with no or minimal effects and large projects with major impacts on the landscape.

CEQ Response: As discussed in this section, the final rule acknowledges a category of Federal actions that are not major, and thus do not require any consideration of the significance of effects before determining that NEPA does not apply. Sections 1501.1, 1501.3, and 1507.3 provide a framework for making NEPA threshold determinations and determining the appropriate level of NEPA review.

Comment: Commenters stated that the proposed rule’s changes to the definition of “major Federal action” to remove certain types of projects based on the portion of Federal funding and Federal agency control are inconsistent with NEPA’s legislative history, which lists “project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs.” S. Rep. No. 91-296, at 20 (1969).

CEQ Response: The final rule reflects the text of the statute, which would control if there was a material distinction between NEPA’s text and its legislative history. In any case, the Senate Report included the language quoted in the comment for illustrative purposes only. This snippet of legislative history, moreover, is essentially recognizing that project and legislative proposals, regulations, policy statements, or changes in the scope of a program could be major Federal actions. CEQ has not taken the position that any of these categories of actions necessarily falls outside of what is major Federal action. The final rule establishes criteria for when an activity will meet the definition of major Federal action.

Comment: Commenters recommended that for projects that have minimal Federal funding, approval, or involvement, but may warrant some level of analysis above a CE, CEQ could allow for a review via an EA Form, similar to what is used under the New York State Environmental Quality Review Act. This document includes standard questions that a project applicant can easily answer to help an agency determine if a project has significant impacts, and requires less time to prepare than an EA or EIS.

CEQ Response: CEQ declines to adopt the recommendation in the final rule because it could create confusion. As discussed elsewhere, NEPA is not applicable to Federal financial assistance programs that do not fit the definition of major Federal action.

Comment: Some commenters requested that CEQ exclude “non-Federal projects with only a minor Federal funding component” and “non-Federal projects completed by a nonprofit organization that receives minor Federal funding.” These commenters would define “minor” as an amount that if withheld, would not prevent the project from moving forward in general.

CEQ Response: CEQ declines to adopt the recommended language because § 1508.1(q)(1)(vi) of the final rule sufficiently addresses these categories.

Comment: Commenters discussed specific actions that purportedly would not be covered under the revised definition of major Federal action. Commenters emphasized the language in the definition that excludes activities that have minimal Federal involvement or funding, as particularly problematic.

CEQ Response: Applying the definition of major Federal action as recommended by the commenters would fail to distinguish any Federal action from a “major Federal action.” The final rule gives meaning to all words in the statute, consistent with principles of statutory construction. *Bennett*, 520 U.S. at 173. The final rule gives meaning to “major” in the phrase

“major Federal action” by excluding from the definition activities where there is minimal Federal funding or minimal Federal involvement and where the agency does not exercise sufficient control and responsibility over the outcome of the project. As explained elsewhere, this approach is consistent with a number of cases that have found certain Federal actions insufficient to federalize a project because of the minimal Federal funding or control.

Comment: Multiple commenters supported the proposed rule’s definition of major Federal action to exclude non-discretionary agency decisions and some suggested broadening non-discretionary actions to include actions where environmental concerns are not part of an agency’s “legal responsibility.” Other commenters were opposed to this change because mandatory activities could still have significant effects. Some commenters noted that agencies often proffer a modest view of their discretion when considering NEPA’s applicability, even though they retain discretion over aspects of a proposed action. Some commenters observed that the language regarding non-discretionary actions would result in less disclosure to the public regarding environmental effects.

CEQ Response: The final rule continues to state that major Federal action does not include non-discretionary decisions made in accordance with the agency’s statutory authority. The Supreme Court held that analysis of a proposed action’s effects under NEPA was not required where an agency has limited statutory authority and “simply lacks the power to act on whatever information might be contained in the EIS.” *Pub. Citizen*, 541 U.S. at 768; *see, e.g., South Dakota*, 614 F.2d at 1193 (holding that the DOI’s issuance of a mineral patent was a ministerial act did not come within NEPA); *Milo Cmty. Hosp. v. Weinberger*, 525 F.2d 144, 148 (1st Cir. 1975) (NEPA analysis of impacts not required when agency was under a statutory duty to take the proposed action of terminating a hospital).

Comment: Some commenters who opposed the proposed rule’s definition of major Federal action were concerned that the non-discretionary language could be used to exempt mining leasing, exploration, and development activities from NEPA analysis. Other commenters asked CEQ to expressly state in the final rule that an action with respect to any mining NOI shall not be a “major Federal action.” Some commenters recommended that CEQ consider applying a minimum percentage for Federal ownership of the mineral interest in a project, below which the project would not be subject to NEPA reviews. Other commenters were concerned that allowing privately funded mining projects on public lands to operate outside of the NEPA process would preclude public comment and prevent State agencies from participating in project planning and analysis.

CEQ Response: The final rule does not expressly address mining activities. The definition of major Federal action recognizes that there may be other statutory authorities that constrain agency discretion. Regarding mining activities, various courts have addressed whether certain mining activities are non-discretionary. *See, e.g., Voyager Outward Bound Sch. v. United States*, 2020 U.S. Dist. LEXIS 45876, *44 (D.D.C. Mar. 17, 2020) (upholding DOI Solicitor’s M-opinion that found no agency discretion to deny a mineral lease renewal); *Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th Cir. 1998) (finding that Bureau of Land Management’s review of Notice mines is “only a marginal [F]ederal action rather than a major action” and that “approval of Notice mines without an EA does not constitute major Federal action within the scope of NEPA”); *South Dakota*, 614 F.2d at 1193 (holding that the DOI’s issuance of a mineral patent that was a ministerial act did not come within NEPA); *see also Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (distinguishing *Penfold* as a NEPA case addressing “major Federal action” and holding that Forest Service

approval of a Notice of Intent to conduct mining activities was discretionary “agency action” under the ESA). In their NEPA procedures, relevant agencies would apply their interpretation of statutory authorities to the definition of major Federal action.

Comment: Some commenters supported the proposed rule’s statement that the definition of major Federal action does not include activities that are not a final agency action. One commenter recommended that CEQ clarify that the proposed definition of major Federal action does not include the Forest Service’s acceptance of a master development plan submitted pursuant to a ski area special use permit under the Ski Area Permit Act of 1986, as amended. Other commenters opposed the proposed rule’s statement regarding activities that are not a final agency action, asserting that this language could call into question the continued validity of programmatic EAs and EISs.

CEQ Response: The final rule continues to state that major Federal action does not include activities that do not result in a final agency action. The basis for including only final agency actions is the statutory text of the APA, which provides a right to judicial review only of all “final agency action[s] for which there is no other adequate remedy in a court.” 5 U.S.C. 704. This interpretation is in accord with Supreme Court cases that have held that reports making recommendations that required presidential decision were not final agency actions subject to challenge. *Dalton v. Specter*, 511 U.S. 462, 476–77 (1994); *Franklin*, 505 U.S. at 796–801. The final rule adds the language, “or other statute that also includes a finality requirement” to acknowledge that other statutes may include their own in the course of providing a cause of action outside of the APA (the APA provides a default cause of action and set of remedies that can be superseded by other statutes. 5 U.S.C. 559. CEQ declines to address the specific instance of ski areas in the final rule. The reference to final agency action in the definition of “major

Federal action” does not alter of the procedures for preparing programmatic EAs and EISs in accordance with §§ 1501.3(a), 1502.4, 1506.1.

Comment: Commenters stated that striking the word “guide” in § 1508.1(q)(2)(ii) of the proposed rule could lead to the conclusion that land and resource management plans do not constitute a “major Federal action.”

CEQ Response: The final rule retains the language of the proposed rule at § 1508.1(q)(3)(ii). The deletion of the word “guide” was not intended to mean that land and resource management plans would not constitute major Federal actions.

Comment: Commenters stated that the language “Projects include actions approved by permit or other regulatory decision as well as Federal and federally assisted activities” in § 1508.1(q)(2)(iv) of the proposed rule could be construed to contradict the language in § 1508.1(q) that requires more than “minimal” Federal funding and involvement. Some commenters stated that § 1508.1(q)(2)(iv) of the proposed rule should be clarified to recognize that certain mining permits do not constitute “major Federal action.” Some commenters requested that CEQ retain the categories as written in 40 CFR 1508.18(b).

CEQ Response: The final rule retains the language of the proposed rule at § 1508.1(q)(3)(iv). The language in § 1508.1(q)(3) providing that “Major Federal actions tend to fall within one of the following categories” sufficiently indicates that there are exceptions to the general categories listed. As a result, specific clarification regarding mining permits is not needed in the final rule. CEQ clarifies that the language in § 1508.1(q)(3) does not contradict the definition in § 1508.1(q)(1) because the listed categories are merely examples.

Comment: Some Tribal commenters suggested adding language to exclude from the definition of “major Federal action” in § 1508.1(q) “any Federal action taken as the trustee for

land or resources the Federal government holds in trust for the sole and beneficial interest of an American Indian or Alaska Native Tribe or one or more individual members thereof.” Some Tribal commenters stated that the definition of CEQ should consider whether NEPA should apply to Indian lands at all because Congress did not specifically apply NEPA to Indian lands and the legislative history is silent, although case law and regulations have determined that NEPA applies to major Federal actions on Indian lands. These commenters stated that Federal involvement for projects on Tribal lands is often limited to ministerial Secretarial approvals which nonetheless receive full NEPA review to the detriment of Indian Tribes. Another commenter suggested expanding the definition of “major Federal action” to include Tribal traditional use lands of spiritual significance.

CEQ Response: The final rule declines to adopt these changes in the definition of “major Federal action.” Federal actions taken in the capacity as the trustee for Tribes or members of Tribes may involve activities or decisions that involve minimal Federal funding or involvement, and agencies exercising trust responsibilities may address that in their agency NEPA procedures. NEPA does not distinguish actions taken by a Federal agency when it is acting in a trustee capacity. Although CEQ declines to make this change in the final rule, other sections of the final rule provide avenues for Tribal self-determination and involvement in the NEPA process. *See* §§ 1501.7, 1501.8, 1501.9, 1502.16, 1503.1, 1506.2, 1506.6. Section 1506.2 provides for cooperation with Tribal governments to the fullest extent practicable unless specifically prohibited by law in order to reduce duplication with Tribal requirements. Under the definition of “Federal agency” in § 1508.1(k), Tribal governments may assume NEPA responsibilities from a Federal agency pursuant to statute. In addition, the final rule allows for agencies to determine that another statute’s requirements serve the function of agency compliance with NEPA and may

designate procedures or documents under other statutes as satisfying NEPA requirements.

§§ 1501.1(a)(6), 1507.3(c)(5), 1507.3(d)(6). Tribal traditional use lands of spiritual significance are not a Federal activity or decision and therefore are not appropriate for inclusion in the definition of “major Federal action,”

Comment 11.9-12: Some commenters stated that the proposed changes would limit the ability of the public, especially environmental justice communities, to provide public comment on projects. Tribal commenters stated that the proposed changes would limit Tribal involvement.

CEQ Response 11.9-12: CEQ acknowledges the comment, however, to the extent the proposed changes would affect projects that are currently subject to categorical exclusions, no public comment would have been required under the 1978 regulations.

Comment: Commenters stated that the use of the word “outcome” in § 1508.1(q) is confusing because it is unclear whether it refers to the ability to commence a project or to successfully complete it. These commenters recommended that CEQ use the phrase “where the agency cannot preclude project completion.”

CEQ Response: The final rule retains the use of the word “outcome” in § 1508.1(q)(1)(vi) and (vii). The word is used in the context of control over the environmental effects of the project, which could occur during project implementation and continue after its completion.

Comment: Commenters stated that major Federal actions should not include individualized adjudications, such as the issuance of individual permits under the ESA.

CEQ Response: Under the final rule, a Federal agency that issues individual permits may determine that such actions do not trigger NEPA as a threshold matter under § 1501.1 and

§ 1507.3(c). The final rule will not further revise the definition of “major Federal action” to address specific ESA permitting matters.

Comment: Commenters stated that the proposed changes in § 1508.1(q) will lead to fewer actions with a Federal nexus and therefore push more projects into section 10 consultation under the ESA. Commenters stated that section 10 consultations take significantly longer than consultations under section 7, thereby reducing efficiencies for project applicants. For efficiency, some commenters recommended aligning the triggers for NEPA as closely as possible for the ESA.

CEQ Response: In revising the definition of major Federal action, CEQ has incorporated long-standing practice and applicable case law and therefore does not anticipate significantly fewer actions being exempt from NEPA. CEQ declines to make further changes to align the applicability of NEPA with other environmental statutes, since the applicability of other environmental statutes is based on the language of the particular legislative authority.

Comment: Commenters stated that NEPA documents associated with the issuance of incidental take permits (ITP) under the ESA frequently examine the impacts of the broader, underlying non-Federal activity, even where issuance of an ITP is not critical for the project to proceed. Commenters requested that CEQ make further changes to the definition of major Federal action to clarify that, where the only Federal nexus for a non-Federal project is an ITP under the ESA, the analysis under NEPA is circumscribed by the Federal action of issuing an ITP.

CEQ Response: Agencies should not engage in analysis that goes beyond the purpose and need of the proposed action. An application for an ITP should be based on its purpose and need. The final rule clarifies that the agency shall base the purpose and need on the goals of the

applicant and the agency's authority. § 1502.13. CEQ declines to revise the definition of major Federal action to address the comment.

Comment: Commenters stated that, based on Congress's definition of "major rule" in the Congressional Review Act, the definition of "major Federal action" should be clarified by adding a new subparagraph stating that a Federal action shall not be considered major unless it is likely to result in: (i) an annual effect on the economy of \$100,000,000 or more; (ii) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (iii) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

CEQ Response: CEQ declines to adopt language from the definition of "major rule" in the Congressional Review Act into the final rule's definition of "major Federal action" because the Congressional Review Act is a different statute.

Comment: Some commenters stated that the changes in the definition of major Federal action will be used by agencies to argue that a supplemental analysis is not needed even when environmental impacts were not adequately analyzed.

CEQ Response: Whether a supplemental NEPA analysis is needed depends on whether the conditions in § 1502.9(d) are met. Among other requirements, supplementation is necessary only when major Federal action remains to occur. This is consistent with Supreme Court case law as discussed elsewhere.

Comment: Some commenters recommended that CEQ revise the definition of "major Federal action" to limit it to "new" activities rather than "new and continuing activities." These commenters requested that CEQ clarify that a "major Federal action" does not include proposed

operational changes to ongoing activities unless the change itself has independent effects that will be major and which are subject to Federal control and responsibility. Another commenter stated that “continuing activities” must be removed from the definition of “major Federal action” in § 1508.1(q)(1) as it is inconsistent with *S. Utah Wilderness Alliance*.

CEQ Response: CEQ declines to adopt these recommendations in the final rule. CEQ clarifies that the reference to “continuing activities” in the definition of “major Federal action” should be read in conjunction with § 1502.9(d) of the final rule. Section 1502.9(d) provides that agencies shall prepare supplemental EISs only if a major Federal action remains to occur which is consistent with *Southern Utah Wilderness Alliance*. 542 U.S. at 73 (“As we noted in *Marsh*, supplementation is necessary only if ‘there remains “major Federal action[n]” to occur,’ as that term is used in § 4332(2)(C).”) (quoting *Marsh*, 490 U.S. at 374).

Comment: Commenters stated that the proposed insertion of “implementation of” before “treaties and international conventions or agreements” in § 1508.1(q)(2)(i) of the proposed rule will delay NEPA compliance until a treaty, international convention, or agreement has already been negotiated and ratified or executed. Some commenters also objected that the definition of “legislation” in § 1508.1(p) would not include requests for ratification of treaties. These commenters stated that this change would preclude NEPA from applying before a treaty has been ratified. They also asserted that this change is contrary to past practice.

CEQ Response: The final rule retains the language of the proposed rule in § 1508.1(q)(3)(i) and clarifies that this includes an agency’s action to implement a treaty pursuant to statute or regulation. In addition, the final rule retains the change to § 1508.1(p) and strikes the reference to “significant cooperation and support” to more closely align the provision with the statute. The President is not a Federal agency, and therefore a request for ratification of

a treaty would not be subject to NEPA. The “major Federal action” is not the treaty itself, but rather an agency’s action to implement that treaty pursuant to domestic legislation.

Under the Constitution, the President has “Power, by and with the Advice and Consent of the Senate, to make Treaties” Art. II, § 2, cl. 2. The Constitution also provides that the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices” *Id.*, cl. 1. Congress may not impose conditions on the President’s exercise of these two powers, which would be the case, for example, if NEPA were construed to require the Secretary of State, before advising the President on whether to approve a treaty, to first undertake an EA or EIS. By construing NEPA not to impose conditions on the President’s exercise of these two powers, CEQ avoids a constitutional difficulty. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Rescue Army v. Mun. Court of L.A.*, 331 U.S. 549, 569 (1947).

One or more commenters noted that agencies prepared environmental analyses in the past on certain proposed treaties, although there has been no uniform practice. Examples given include State Department NEPA work on proposed ratification of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters and the NOAA’s NEPA work concerning the proposed Interim Convention on Conservation of North Pacific Fur Seals prior to its submission to the Senate. Considering the constitutional constraints, CEQ concludes that this analysis was done as a matter of agency discretion rather than as a requirement of NEPA. An important caveat, however, is that agencies are free to prepare a variety of documents concerning the adoption of treaties by the Senate, including environmental analysis as they determine appropriate. The final rule’s revisions to the NEPA regulations in

§§ 1508.1(p) and 1508.1(q)(3)(i) make clear that such NEPA documentation is not mandatory and avoids serious constitutional questions that are raised by reading NEPA to the contrary.

Comment: Commenters requested clarity as to how the proposed changes to the definition of “major Federal action” would be applied by the Federal Aviation Administration (FAA) in the context of airports.

CEQ Response: The final rule does not generally address the specific application of the new definition of “major Federal action” to specific agency programs. Agencies such as the FAA may provide further clarity in the context of specific programs in their agency NEPA procedures.

Comment: Some commenters opposed the proposed rule’s changes to the definition of “major Federal action” that would exclude circumstances when the agency failed to act. Some commenters noted that the preamble to the proposed rule did not fully explain the reason for this omission. Some commenters stated that the removal of this provision is inconsistent with *Southern Utah Wilderness Alliance*, 542 U.S. at 70–73, and the APA. Some commenters stated that including the reference to a failure to act would promote transparency and accountability. Other commenters supported the deletion of a reference to an agency’s failure to act because it would enhance efficiency.

CEQ Response: The final rule retains the proposed rule’s deletion of the sentence stating that “Actions include the circumstance where the responsible agency officials fail to act and that failure to act is reviewable by courts or administrative tribunals,” which was formerly included in 40 CFR 1508.18. The Supreme Court clearly established in *Southern Utah Wilderness Alliance*, 542 U.S. at 70–73, that judicial review is available only when an agency fails to take a discrete action it is required to take. As the preamble to the NPRM stated, in situations when

there is a failure to act, there is no proposed action and therefore no alternatives that the agency may consider. In omitting the reference to a failure to act from the definition of “major Federal action,” CEQ does not contradict the definition of “agency action” under the APA at 5 U.S.C. 551(13), and recognizes that the APA may compel agency action that is required but has been unreasonably withheld. If and when an agency is compelled to take such agency action, it should prepare a NEPA analysis at that time as appropriate.

Comment: In response to CEQ’s invitation for comment on whether the definition of “major Federal action” should be further revised to exclude other *per se* categories of activities common to agencies, several commenters were opposed to adding more categories that would be exempt from NEPA. Some commenters stated that a categorical approach is contrary to case law stating that NEPA requires individualized consideration and balancing of environmental factors. Commenters stated that “major Federal action” should not include a variety of types of projects, including grazing permit renewals, oil and gas leasing and permit renewals, mining projects or other linear infrastructure projects that are located on a minimal amount of Federal land or resources. Other commenters requested excluding flood control or erosion control projects, as well as excluding non-Federal actions on leased Federal lands from the definition of “major Federal action.” Some commenters recommended excluding maintenance and operation of existing facilities, structures, or sites in the manner originally intended. Some commenters recommended excluding permits for short-term uses of existing facilities, structures, or sites in the manner originally intended. Some commenters further support including in the NEPA database a list of actions that have been found not to meet the definition of “major Federal action.”

CEQ Response: In response to comments, the final rule will not identify *per se* categories of activities that should be considered a non-major Federal action. Several of the suggested types of categories were not common across agencies. Agencies may identify types of activities that should be considered a non-major Federal action in their respective NEPA procedures.

Comment: Commenters stated that CEQ's proposed exclusion of loans, loan guarantees or financial assistance from NEPA where the Federal agency does not exercise sufficient control and responsibility over the effects of the action is contrary to the underlying policy of NEPA at 42 USC 4331(a) and statute in general. Some commenters objected to the proposed removal of Federal loan guarantees from the definition of "major Federal action" on the grounds that, in the absence of the extension of such financial assistance by a Federal agency, some private projects which might significantly affect the quality of the human environment would not otherwise proceed. Such commenters, either explicitly or impliedly, maintained that the definition of "major Federal action" should be sufficiently comprehensive such that it encompasses any Federal action about which it can be determined that but for its occurrence the project at issue would not have moved forward. Some commenters stated that a Federal agency could control the outcome of a non-Federal project by saying no, such as by declining to extend a loan guarantee or other financial assistance in the first place, or by placing conditions on a commitment of financial assistance.

Some commenters stated that whether an action is "Federal" for purposes of NEPA does not turn on whether the agency exercises "sufficient control and responsibility" but whether the agency has the ability to influence the outcome of the project. Commenters stated that the agency need not actually exercise "sufficient control" to render a private or State action

“Federal,” so long as the agency has the authority to exercise such control. Some commenters stated the relevant inquiry depends on whether the agency has the ability to influence the outcome of the project, whether the agency has the authority to exercise sufficient control, and whether Federal funds are provided. Some commenters recommended the phrase “subject to Federal jurisdiction,” rather than language about Federal control and responsibility. Commenters stated that the proposed rule’s use of the phrase “sufficient control” was vague and required further clarity. Other commenters suggested CEs would be more appropriate for loan programs.

CEQ Response: The final rule in § 1508.1(q)(1)(vi) excludes non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project. The final rule in § 1508.1(q)(1)(vii) excludes loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of the assistance, and references, as illustrative examples, certain loan guarantees issued by the Farm Service Agency and the Small Business Administration. The language in these subsections was included in § 1508.1(q) and § 1508.1(q)(1) of the proposed rule, and has been retained in the final rule with minor word changes and reorganization for clarity. The purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information and informed the public regarding the decision-making process. *See Marsh*, 490 U.S. at 373–74; *Vt. Yankee*, 435 U.S. at 558. NEPA’s requirement to prepare an analysis of environmental impacts is intended to “ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.” *Pub. Citizen*, 541 U.S. at 768. Whether an agency is required to prepare a NEPA document before taking an action depends in part on “the usefulness of any new potential information to the

decisionmaking process.” *Id.* at 767. In the context of loans, loan guarantees or other financial assistance when there is minimal Federal funding or minimal Federal involvement or where the agency does not exercise sufficient control and responsibility over the outcome of the assistance, requiring NEPA analysis would provide little value because the outcome or environmental effects would remain the same.

Prior court decisions have recognized that a minimal amount of Federal funding for a project is not a “major Federal action” subject to NEPA. *See Rattlesnake Coal.*, 509 F.3d 1095 (Federal funding comprising 6 percent of the estimated implementation budget not enough to federalize implementation of entire project); *Macht*, 916 F.2d 13 (funding for planning and studies not enough to federalize a project); *NAACP*, 584 F.2d 619; *Hanly*, 460 F.2d 640; *Touret*, 485 F. Supp. 2d 38. The examples identified in the final rule for certain FSA and SBA loan guarantee programs illustrate Federal agency programs that have been determined by CEQ in the final rule to lack sufficient control and responsibility to warrant NEPA review. By excluding programs where Federal agencies do not exercise sufficient control and responsibility from the definition of major Federal action, Federal agencies will be able to focus environmental reviews where they are needed most, namely on major Federal actions that will significantly affect the human environment.

Where an action, such as FSA loan guarantees, involves non-Federal entities, courts have found an action is not federalized—and therefore does not trigger NEPA—where there is neither (1) “significant Federal funding” nor (2) Federal “power, authority, or control” over the project. *See, e.g., Rattlesnake Coal.*, 509 F.3d 1095 at 1101 (quoting *Ka Makani ‘O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 960 (9th Cir. 2002)); *Atlanta Coal.*, 599 F.2d at 1347. The issuance of a loan guarantee by a Federal agency to a private lender to back a percentage of

a loan that the lender decides to make to a borrower falls short of federalizing the activity and requiring that it be treated as a major Federal action under both inquiries. In determining whether Federal funding federalizes a non-Federal action, courts have considered the proportion of Federal funds in relation to funds from other sources must be “significant.” *See, e.g., Ka Makani*, 295 F.3d at 960 (“While significant [F]ederal funding can turn what would otherwise be a [S]tate or local project into a major Federal action, consideration must be given to a great disparity in the expenditures forecast for the [S]tate [and county] and [F]ederal portions of the entire program. . . . In the present case, the sum total of all of the [F]ederal funding that was ever offered . . . is less than two percent of the estimated total project cost.”) (internal quotation marks and citation omitted); *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 329 (9th Cir. 1975) (holding Federal funding amounting to 10 percent of the total project cost not adequate to federalize project under NEPA); *Sancho v. DOE*, 578 F. Supp. 2d 1258, 1266 (D. Haw. 2008) (Federal provision of less than 10 percent of project costs not sufficient to federalize project); *Landmark West! v. U.S. Postal Serv.*, 840 F. Supp. 994, 1009 (S.D.N.Y. 1993), *aff’d*, 41 F.3d 1500 (2d Cir. 1994) (holding U.S. Postal Service’s role in private development of new skyscraper was not sufficient to federalize the project).

In the context of guaranteed loans, FSA does not provide any Federal funding to the borrower. FSA’s guaranteed loan regulations concern the lender, not the borrower. Under the farm ownership and operating loan programs at 7 U.S.C. 1925 and 1941 through 1949, FSA does not control the lender or borrower. FSA’s participation in guaranteed loans is limited to providing a guarantee to the private lender. No Federal money will be expended unless the borrower defaults on the private third-party loan and the lender is unable to recover its debt through foreclosure. Only then would the lender invoke the guarantee for that portion of the loan

not recovered. And, in the event of default, the guarantee is paid to the lender, not to lender's borrower.

The SBA business loan programs under 15 U.S.C. 636(a), 636(m), and 695 through 697g, operate in similar fashion. The overwhelming preponderance of SBA business loans (*i.e.*, SBA-guaranteed loans made pursuant to SBA's 7(a), 504, and Microloan programs) are extended not by SBA itself, but, rather, by private lenders, under authority granted to them in connection with SBA's Preferred Lender Program or Premier Certified Lender Program, or by the provisions of SBA's Microloan program, without SBA's prior review and approval. Under SBA's business loan guarantee programs, SBA does not recruit or work with the borrower, or service the loan unless, following a default in payment, the lender has collected all that it can under the loan. Under the 7(a) Program, SBA guarantees a percentage of the loan amount extended by a commercial lender to encourage such lenders to make loans to eligible small businesses. The lender seeks and receives the guarantee, not the applicant small business. In over 80 percent of loans stemming from the 7(a) Program, the lender approves the loan without SBA's prior review and approval through the 7(a) Program's Preferred Lender Program ("PLP program"). 15 U.S.C. 636(a)(2)(C)(iii). Further, SBA does not expend Federal funds unless there is a default by the borrower in paying the loan; in such cases, SBA reimburses the lender in accordance with SBA's guarantee percentage. Under the 504 Program, the Premier Certified Lender Program ("PCLP program") provides for only limited SBA review of eligibility, and SBA delegates the responsibility to private entities to issue an SBA guarantee of debenture for eligible loans without prior approval by SBA. 15 U.S.C. 697e. SBA's role in the 504 Loan Program is generally limited to issuing a guarantee that is less than a majority of the overall financing of a standard section 504 project. SBA does not expend Federal funds unless there is a default by the

borrower in paying the debenture-funded loan, in which case SBA pays the outstanding balance owed on the debenture to the investors.

Based on the factual support that FSA and SBA have provided, CEQ finds that the FSA and SBA guarantees of private loans lack the requisite Federal funding to constitute a major Federal action. Under these FSA and SBA loan guarantee programs, no Federal funds are expended and provided to the lender unless there is a default by the borrower paying the loan. In the event of a default that cannot be cured, properties are sold in an attempt to recover value for the lender, and the Federal agency never takes physical possession of, operates, or manages any facility. The Federal agency never controls the use of the underlying loan funds. As the court in *Center for Biological Diversity v. HUD* explained in holding that HUD and SBA loan guarantees were not major Federal actions subject to NEPA, “Defendants do not directly fund the various projects that are at issue in this case. Rather the Defendants guarantee loans, dispersed to various recipients by private lenders. Therefore, the actual funding by Defendants is negligible or non-existent.” 541 F. Supp. 2d at 1098.

The final rule’s “sufficient control” test is consistent with cases that found an action does not trigger NEPA when there is not Federal “power, authority, or control” over the action. *Rattlesnake Coal.*, 509 F.3d at 1101; *see also id.* at 1102 (“The United States must maintain decision-making authority over the local plan in order for it to become a major Federal action.”); *Ka Makani*, 295 F.3d at 961 (“Because the final decision-making power remained at all times with [the State agency], we conclude that the [Federal agency] involvement was not sufficient to constitute ‘major Federal action.’”) (citation omitted); *Ringsred v. Duluth*, 828 F.2d 1305, 1338 (8th Cir. 1987) (finding construction of a parking ramp was not a major Federal action when agency had no input in the design or construction of the ramp); *Winnebago Tribe*, 621 F. 2d at

272 (“Factual or veto control, however, must be distinguished from legal control or ‘enablement’”). Regardless of the amount of Federal money involved, the key test for determining whether NEPA is triggered for such an action is whether there is a significant degree of Federal involvement with, and control over, the subject project. *Ctr. for Biological Diversity*, 541 F. Supp. 2d at 1099 (noting the agencies issuing loan guarantees did not exercise “discretionary authority over development.”). Under NEPA and its regulations, the Supreme Court has concluded that “but for” causation is not sufficient to make a Federal agency responsible for the effects of an action. *Pub. Citizen*, 541 U.S. at 767. Instead, the Federal agency must “possess actual power to control the nonfederal activity.” *Vill. of Los Ranchos*, 906 F.2d at 1482 (quotation omitted). This requirement of actual Federal authority ensures proper effectuation of NEPA, which “applies only when there is [F]ederal decision-making and not merely [F]ederal involvement in nonfederal decision-making.” *S. Fla. Water Mgmt.*, 28 F.3d at 1573. In light of these cases, the final rule’s use of the language “where the Federal agency does not exercise sufficient control and responsibility over the effects of the assistance” is an appropriate articulation of the relevant inquiry.

Based on the factual support that FSA and SBA have provided, CEQ finds that in the context of loan guarantees, FSA and SBA do not possess the degree of control or actual decision-making authority over the loan or the facility to be funded. In extending loan guarantees to private lenders, FSA and SBA do not control the lender or the borrower; do not control the subsequent use of loan proceeds; are not statutorily empowered to issue permits for a project or otherwise provide prior approval regarding any technical aspect relating to its undertaking; and do not manage or operate the borrower’s facilities. Because no action by either FSA or SBA constitutes a legal condition precedent enabling the commencement or operation of the private

party's project, such loan guarantees do not fall within the definition of "major Federal action" as that term has generally come to be understood within the bulk of the relevant case law.

Finally, CEQ notes that a CE may be appropriate for loans, loan guarantees, or other forms of financial assistance where the Federal agency does exercise sufficient control and responsibility over the effects of the assistance but the assistance does not normally have significant effects on the human environment. Any CE would need to be developed by the agency, in consultation with CEQ, as part of their agency NEPA procedures which must be proposed and published in the *Federal Register* for public comment consistent with § 1507.3.

Comment: Commenters stated that Federal agencies exercise sufficient control and responsibility over loans and other forms of financial assistance such that they meet the definition for a major Federal action under NEPA. Commenters noted that the court in *Buffalo River Watershed Alliance v. Dep't of Agric.*, No. 4:13-cf-450-DPM, 2014 WL 6837005, 2014 U.S. Dist. LEXIS 168750 (E.D. Ark. Dec. 2, 2014), found that FSA had ongoing involvement with the farm and lender after FSA issued a loan guarantee because FSA provided notification of scheduled inspections. Commenters stated that, although FSA may not control the lender or borrower, the agencies have discretion over granting a loan guarantee, which impacts the borrower's ability to obtain a loan. FSA also has discretion to place conditions on loan guarantees, including conditions to mitigate environmental impacts, and can revoke its guarantee if those conditions are violated. Commenters also discussed *Food & Water Watch v. U.S. Dep't of Agriculture*, 325 F. Supp. 3d 39 (D.D.C. 2018), noting that a condition for eligibility for these loan guarantees was that the borrower could not obtain financing on reasonable terms from other institutions. Commenters also noted that courts required USDA's Rural Utilities Service to

prepare an EIS for debt forgiveness and consent to a lien subordination, as well as approvals relating to the expansion of the Sunflower Electric Power Corporation's coal-fired power plant.

CEQ Response: Commenters both supporting and opposing the proposed definition of “major Federal action” cited *Buffalo River* and *Food & Water Watch*. These cases demonstrate the confusion and regulatory overreach resulting from a lack of clarity in the current definition. The *Buffalo River* and *Food & Water Watch* decisions that commenters referenced, as well as the subsequent merits decision in *Food & Water Watch v. U.S. Dep't of Agric.*, No. 17-1717, 2020 U.S. Dist. LEXIS 52544 (D.D.C. Mar. 26, 2020), involved challenges to EAs FSA completed. FSA had issued a Federal loan guarantee to construct and operate, respectively, hog and poultry CAFOs owned and operated by third parties. In the *Buffalo River* case, SBA was also a defendant. But neither case assesses whether such loan guarantees constitute a “major Federal action,” for purposes of NEPA. The *Buffalo River* case applied a “but for” test in assessing whether plaintiffs have standing to litigate. The court in *Buffalo River* found FSA's EA did not adequately address certain environmental impacts. The *Food & Water Watch* court in addressing standing followed *Buffalo River* to find that causation and redressability were satisfied because FSA retains the ability to require further environmental analysis or impose mitigation measures in connection with the loan guarantee. The court also found that FSA continued to have some degree of oversight over the operations. However, on the merits, the *Food & Water Watch* court found that FSA's EA satisfied NEPA. Neither of these cases held that effects from the CAFOs reached the level of significance.

The two cases reach inconsistent outcomes when reviewing FSA's EAs for strikingly similar circumstances. They both involved: (1) application of the same program regulations for NEPA compliance (7 CFR Part 1940, 1940.301-350); (2) “Class II” agency EA (7 CFR

1940.312) needed for “financial assistance for livestock-holding facility or feedlot located in a sparsely populated farming area having a capacity as large or larger than,” *inter alia*, “2,500 swine or 100,000 laying hens or broilers when [the] facility has unlimited continuous flow watering systems,” 7 CFR 1940.312(c)(9); and (3) “financial assistance for a livestock-holding facility or feedlot, which either could potentially violate a State water quality standard or is located near a town or collection of rural homes which could be impacted by the facility,” 7 CFR 1940.312(c)(10). Both EAs relied on review and permitting by the applicable State regulatory agency’s rules, regulations, review, and permitting as part of the analysis. Furthermore, both the Arkansas Department of Environmental Quality and the Maryland Department of Agriculture found the proposed actions complied with the State rules and regulations for these CAFOs and issued State permits for their operation.

And yet, these two cases reach different conclusions about whether FSA properly relied on the expertise of State regulatory and environmental reviews during FSA’s assessment of whether preparation of an EIS was required. NEPA and CEQ’s regulations strongly support avoidance of duplicative State and Federal reviews. An agency may “reference [another agency’s] standards as a component of its [NEPA] review” and consider [another agency’s] regulations in an appropriate fashion....” *City of Oberlin v. FERC*, 937 F.3d 599, 610–11 (D.C. Cir. 2019); *see also Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). In CEQ’s view, the cases that commenters cite highlight the continuing risk for inconsistent judicial rulings if the CEQ regulations are not further clarified. Based on factual support from USDA and SBA, and in light of these cases, CEQ determines in the final rule that the role of FSA and SBA in their respective loan guarantee programs is insufficient to constitute a major Federal action.

Moreover, FSA guaranteed loan programs are intended to assist family farms, including beginning and historically underserved farmers, as well as those who have suffered financial setbacks due to disasters or other circumstances out of their control, who are unable to obtain other credit at reasonable rates and terms. *See* 7 CFR 762.120(h)(1). Contrary to some commenters' assertions, that a borrower receives a guaranteed loan does not necessarily mean the borrower might not otherwise be able to obtain any loan from a lender. Instead, it means that the otherwise commercially available loan terms would undermine access to credit by family farmers, beginning farmers, and those in historically underrepresented groups. *See* 7 CFR 762.120(h)(1). By guaranteeing loans, FSA is not lending Federal funds; a "guaranteed loan" under FSA regulations is defined in 7 CFR 762.2(b) as a "loan made and serviced by a lender for which the Agency has entered into a Lender's Agreement and for which the Agency has issued a Loan Guarantee."

FSA regulations provide for FSA's involvement to the extent necessary to protect the financial interests of the United States after a guarantee is issued because "the loan guarantee constitutes an obligation supported by the full faith and credit of the United States. The Agency may contest the payment of a guarantee in cases of fraud or misrepresentation by a lender" 7 CFR 762.103(a). To protect the financial interests of the government, FSA requires the lender to submit a lender's certification attesting to the lender's compliance with the conditions necessary for FSA to issue its guarantee. FSA's interactions are with the lender to ensure the financial stability of the loan and ensure proper loan servicing. Although FSA reserves the right to attend inspections of the farming operation during the term of the guarantee (7 CFR 762.130(b)(2)), FSA's participation in inspections "[are] solely for the benefit of the Agency" and are designed to minimize a potential financial loss on the guarantee. Therefore, FSA's regulations are not

guided by environmental compliance but are meant only to ensure that loan proceeds are disbursed by the lender, used properly, and that the project is completed and is operating to produce income for the loan to be repaid. Furthermore, Federal monitoring of private activities to assure that operations comply with the requirements of a legal instrument does not rise to the level of federalizing the activity. *See Hodel*, 848 F.2d 1068 (holding Federal monitoring activities to prevent a non-Federal party from operating outside a right-of-way did not amount to authority to regulate or approve the activity).

Issuance of an FSA loan guarantee loan does require adherence to certain environmental statutes independent of NEPA. These impose restrictions on the use of highly erodible land and wetlands for the term of the loan guarantee. *See* Food Security Act of 1985, as amended, and section 363 of the Consolidated Farm and Rural Development Act (16 U.S.C. 3811 and 3821 and 7 U.S.C. 2006e). FSA sets out these statutory requirements in its loan guarantee regulations by stating: “[l]oans may not be made for any purpose which contributes to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity.” *See* 7 CFR 762.121(d). Moreover, it is the private lender’s responsibility in servicing the loan to monitor the borrower’s compliance with the environmental requirements of the Food Security Act of 1985 and section 363 of the Consolidated Farm and Rural Development Act. 7 CFR 762.140(b)(3). If the lender discovers a potential violation, the USDA Natural Resources Conservation Service reviews compliance with 7 CFR 12 regarding highly erodible land and wetlands – not FSA. FSA’s remedy in the event of a violation is only to refuse payment of the loan guarantee. If the borrower defaults, the collateral is liquidated, and the lender has a loss. In this respect, FSA is in a position no different from any commercial guarantor and does not have

the ability to affirmatively require the borrower to take or refrain from any particular action. As one commenter notes, FSA also does not control the lender.

Additionally, under the existing legal framework, EPA regulates medium and large CAFOs, and delegates primary authority to the states that, in turn, add permit regulations to keep these operations beneath the threshold of having a significant impact on water quality, air quality, and nutrient load. Regardless of whether a producer received an FSA loan guarantee, the CAFO is subject to EPA and State permitting regulations and enforcement.

Comment: Commenters asserted, in connection with Federal loan guarantees, that it is not relevant that Federal funds are expended only upon a default. These commenters stated that many Federal actions, such as the issuance of Federal permits, may trigger the need for a NEPA review even though no funds are expended by the Federal government.

CEQ Response: The extension of a Federal guarantee to a lender to encourage that lender to provide a loan to a non-Federal borrower is not analogous to the issuance of a Federal permit that may constitute a legal condition precedent for the authorized undertaking of specific non-Federal actions. Further, the amount of Federal funding – along with the degree of Federal decision-making power, authority, or control – is to be considered in determining whether a non-Federal action has been “federalized.” Courts have found that, “[t]he possibility that [F]ederal funding will be provided in the future is not sufficient to federalize a [S]tate project, even when such funding is likely.” *Rattlesnake Coal.*, 509 F.3d at 1104 (quotation marks and citation omitted); *Atlanta Coal.*, 599 F.2d at 1347; *S. Fla. Water Mgmt. Dist.*, 28 F.3d at 1573; *Pres. Pittsburgh v. Conturo*, 2011 U.S. Dist. LEXIS 101756, at *13 (W.D. Pa. 2011) (stating that for purposes of triggering NEPA, “The mere possibility of [F]ederal funding in the future is too tenuous to convert a local project into [F]ederal action”). Indeed, in *Sancho*, 578 F. Supp. 2d at

1267, the court observed that “analysis of the ‘major Federal action’ requirement in NEPA must focus upon [F]ederal funds that have already been distributed. Federal funds that have only been budgeted or allocated toward a project cannot be considered because they are not an ‘irreversible and irretrievable commitment of resources.’” The court further stated that “[t]he expectation of receiving future funds will not transform a local or [S]tate project into a [F]ederal project....Regardless of the percentage, consideration of the budgeted future [F]ederal funds is not ripe for consideration in the ‘major Federal action’ analysis.” *Id.* Other district courts have also found that, to federalize a project, the Federal funding must be more than “the passive deferral of a payment” and must be provided “primarily to directly further a policy goal of the funding agency.” *Hamrick v. GSA*, 107 F. Supp. 3d 910, 926 (C.D. Ill. 2015); *Landmark West!*, 840 F. Supp. at 1007). An FSA or SBA loan guarantee received by a lender does not constitute a present distribution of Federal funds or an active funding of the borrower’s project. It is, at most, a representation that Federal funds would be paid out in the future if the lender’s borrower should default, and if requirements otherwise pertaining to the guarantee are met. As noted in *Center for Biological Diversity*, 541 F. Supp. 2d at 1095, “All of the above [loan guarantee] programs share one thing in common, there is no initial investment made by the Federal agencies [including SBA]. The agencies merely provide a guarantee should the borrower default on the loan.” In the context of FSA and SBA loan guarantees, the Federal agencies do not exercise Federal control, authority, or responsibility over the non-Federal actor and project, and they do not expend Federal funds in the present moment. Thus, these loan guarantee programs are insufficient to constitute major Federal action.

Comment: Commenters stated that CEQ's proposed changes would confuse courts, Federal agencies, States, Tribal entities, and private parties seeking financial assistance as these stakeholders scramble to adjust to new expectations.

CEQ Response: CEQ acknowledges that the proposed changes would result in certain new expectations among impacted stakeholders. However, CEQ intends that the changes will significantly expedite the process of extending financial assistance to borrowers and allow Federal agencies to prioritize limited resources to administer the programs. These improvements outweigh any initial transition costs regarding implementation of the final rule.

Comment: One State commenter asserted that the proposed change would result in fewer Federal projects subject to environmental considerations under NEPA, resulting in increased adverse impacts to the environment and State-owned resources that are ecologically connected to Federal lands. Another State commenter noted that, if a de minimis threshold was applied to all projects, the small efficiencies gained by removing small and simple projects from NEPA review would be overwhelmed by the lack of scrutiny for small, yet highly impactful projects. One State commenter asserted that any project with a Federal nexus should require Federal environmental review, even if there is minimal Federal funding or involvement. Otherwise, States with their own environmental review processes would bear a heavier burden to perform environmental review if Federal agencies do not. Without NEPA analysis, States may lack information necessary to coordinate State programs and resources impacted by these Federal decisions.

CEQ Response: Realigning CEQ's regulations with the plain language of the statute will not necessarily result in adverse impacts to State or any other lands. NEPA's procedural requirements do not affect the applicability of any underlying State, Tribal or local laws. As

discussed elsewhere, NEPA does not focus solely upon the impact of a Federal action. The 1978 regulations also addressed whether actions were “potentially subject to Federal control and responsibility.” Some previously reviewed private projects involving minimal Federal funding and involvement may, under the new final rule, not be subject to NEPA reviews. However, such actions are commonly categorically excluded because any impacts are not normally significant.

Some commenters asserted that any nexus with Federal funding or involvement should trigger a NEPA review, or alternately, that excusing small actions with a de minimis Federal involvement might allow actions with significant environmental effects. This is incorrect. NEPA was never intended to apply to or regulate private actions, large or small. Absent major Federal action, NEPA is not the appropriate tool to seek to oversee or regulate private activities. NEPA does not “require agencies to elevate environmental concerns over other appropriate considerations.” *Balt. Gas & Elec. Co.*, 462 U.S.at 97.

Comment: One commenter stated that with regard to minimal Federal involvement, CEQ must clearly state that this language is only for projects that are not located in the National Forest System and other Federal lands.

CEQ Response: CEQ declines in the final rule to apply the definition of major Federal action differently to projects on National Forest System and other Federal lands. Such an interpretation would cause confusion and decrease administrative efficiency in agency NEPA programs.

Comment: Commenters discussed the large role that FSA-guaranteed loans play in North Carolina agriculture, which is home to thousands of CAFOs. These commenters stated that as of 2019, 1,037 distinct borrowers in that State had loans under FSA programs. The commenters stated that 518 loans were made with FSA guarantees during the 2018-19 fiscal year alone, with

a value of \$115,750,000. Between 2016 and 2018, more than 120 poultry CAFOs were established in North Carolina per year, many of which relied on FSA-guaranteed loans. Commenters stated that NEPA review is often the only method to assess the impacts of CAFOs on human health and the environment when some states do not evaluate the environmental impact of these operations.

CEQ Response: The commenters improperly conflate statistics in an attempt to inflate the significance of FSA guaranteed loans for CAFOs in North Carolina, when the relevant question for determining the applicability of NEPA is whether an individual proposed action meets the criteria to be a major Federal action. The commenters first noted the total number of *all* borrowers in the State holding FSA guaranteed loans – regardless of the purpose for which the loans were ultimately used. The commenters then noted the total number and value of loan guarantees FSA issued for one fiscal year in North Carolina and juxtaposed that with the number of CAFOs established in North Carolina over a different two-year period before concluding summarily that “many” of those must have relied on FSA loan guarantees. Although the comments asserted many poultry CAFOs are established each year (120), they recognized that not all of these received an FSA-guaranteed loan. Nationally, however, FSA’s loan guarantees are a small portion of all agricultural credit in the United States. As reflected in the Congressional Research Service report titled, *Agricultural Credit: Institutions and Issues* (March 26, 2018), of about \$374 billion in total farm debt, FSA only provides about 4 to percent through its guaranteed loan program.⁹⁴

⁹⁴ See <https://fas.org/sgp/crs/misc/RS21977.pdf>.

By contrast, the Farm Credit System accounts for 41 percent, and commercial lenders and other primary agricultural lenders account for 42 percent of total farm debt. The Farm Credit System is the largest lender for the purchase of agricultural real estate at 46 percent. The commenters cite no data to support the notion that FSA's share of CAFO loans or loan guarantees is unreasonably out of line with the normal distribution of agricultural credit.

Moreover, CAFOs, including those in North Carolina, remain subject to regulation. EPA regulates CAFOs, including medium and large CAFOs, and delegates primary authority to the States that, in turn, add permit regulations to keep these operations beneath the threshold of having a significant impact on water quality, air quality, and nutrient load. Regardless of whether a producer receives an FSA loan guarantee, the CAFO is subject to EPA and State permitting regulations and enforcement.

Comment: Commenters stated that small communities tend to have smaller projects given the size of the community, while the challenges of NEPA compliance loom large. These commenters supported excluding non-Federal projects, particularly those with minimal Federal funding or involvement, from the NEPA process.

CEQ Response: CEQ acknowledges that commenters noted that “[s]maller loans by their nature have less likelihood for any significant adverse environmental impacts and therefore should not need to undergo environmental assessments and/or studies.” The final rule’s change in the definition of “major Federal action” recognizes that not all Federal actions are subject to NEPA and reinforces the practical concept that Federal involvement must be sufficient enough to warrant invoking NEPA’s procedural requirements. The language of the final rule is grounded in NEPA’s intended distinction between major and non-major activities, as well as recognizing some commenters’ concerns that the imposition of the statute’s requirements can result in

substantial delays or costs that are relevant to NEPA's goal of fostering both environmental protection and fulfillment of the social, economic, and other requirements of present and future generations of Americans. 42 U.S.C. 4331.

Comment: Some commenters recommended that CEQ incorporate into the exclusion for loans, loan guarantees, and other forms of financial assistance an assessment of whether an applicant has other potential options to fund a project without the involvement of the Federal agency.

CEQ Response: CEQ declines to adopt the recommendation in the final rule. These comments are outside the scope of this rulemaking as they involve requirements of an individual Federal agency's program, such as USDA's eligibility requirements in 7 CFR 762.120(h). CEQ defers specific suggestions on program implementation to the respective Federal agency.

Comment: Commenters who supported the proposed changes recommended that, if there is a very large loan for a particular project, if deemed necessary based on the potential for major environmental impacts, lenders or borrowers could submit a one-page "low doc" form certifying their confidence the loan purposes will not have a major detrimental impact on the environment. The low doc form would substitute for any required environmental analysis or studies under NEPA.

CEQ Response: CEQ declines to adopt the recommendation in the final rule as it is outside the scope of this rulemaking. As discussed elsewhere, NEPA is not applicable to Federal financial assistance programs that do not fit the definition of major Federal action. CEQ defers specific suggestions on program implementation to the respective Federal agency.

Comment: Commenters raised concerns about the rule's impact on independent family farms in the context of vertical integration of livestock and poultry production, as well as the

policy choices regarding the use of taxpayer dollars for federally guaranteed loans for factory farms.

CEQ Response: These comments are outside the scope of this rulemaking.

Comment: In response to CEQ's invitation for comments on whether any specific types of financial instruments should be considered a non-major Federal action, one commenter requested that CEQ exempt "pass through monies" for local projects such as Wildland Urban Interface funds (WUI). One commenter stated that loan guarantees issued by the USDA Rural Utilities Service should be treated the same way as the FSA and SBA loan guarantees. Some commenters requested specifically that the following USDA loan guarantee programs be added to the exclusion in the proposed rule: USDA Rural Development Business and Industry Guaranteed Loan Programs, USDA Rural Development Rural Energy for America Guaranteed Loan Program, USDA Rural Development Community Facilities Guaranteed Loan Program, USDA Rural Development Water and Wastewater Guaranteed Loans, and USDA Biorefinery Renewable Chemicals and Biobased Product Manufacturing Assistance Program. Another commenter stated that CEQ should clarify that, among other forms of financial assistance, re-financings for a loan guarantee should be treated the same way as an originating loan guarantee. Other commenters who opposed the exclusion of specific types of financial instruments stated that courts have long-recognized that Federal action triggering NEPA includes commitments of Federal financing to private parties that enables a private party to act. *See Save Barton Creek Ass'n*, 950 F.2d at 1134; *Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973) ("there is 'Federal action' within the meaning of the statute not only when an agency [acts], but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment"); *Named Individual Members of*

San Antonio Conservation Soc’y v. Texas Highway Dep’t, 446 F.2d 1013, 1027 (5th Cir. 1971) (Federal funding “triggered the advertisement for contract bids, the letting of contracts, and the commencement of construction,” thus implicating NEPA).

CEQ Response: Under the final rule, any form of financial assistance where the agency does not exercise sufficient control would not be a major Federal action. CEQ has expressly identified FSA and SBA guaranteed loans as examples to address past confusion by courts and agencies. Financial instruments similar to the FSA and SBA loan guarantee programs where the Federal agency does not exercise sufficient control and responsibility over the effects of the assistance will not trigger the need for a NEPA analysis. Agencies may identify types of financial instruments that should be considered a non-major Federal action in their respective implementing procedures.

Comment: Commenters requested clarification on whether Federal funding for the planning and design work for a transportation infrastructure project is excluded from the definition of “major Federal action.” Courts have found the planning and design phases of transportation projects have independent utility from the construction of the project, and have upheld the use of CEs for such Federal action.

CEQ Response: The final rule does not specifically exclude Federal funding for the planning and design phases of infrastructure projects from the definition of “major Federal action.” As discussed elsewhere, CEQ has favorably cited *Macht*, 916 F.2d 13, where the court found that funding for planning and studies not enough to federalize a DOT project. Consistent with §§ 1501.1 and 1507.3(d)-(e), an agency may determine in its NEPA procedures or on an individual basis types of Federal actions that do not trigger NEPA as a threshold matter, or may develop a CE.

Comment: One commenter opposed any revisions to the types of projects which qualify as major Federal actions asserting that the resource savings from the proposed 12 month environmental reviews makes it unnecessary to revise the definition of “major Federal action.”

CEQ Response: While more efficient reviews will result in resource savings for agencies, revisions to the definition of major Federal action are necessary to provide various clarifications as described elsewhere.

Comment: In response to CEQ’s invitation for comments on a suggested threshold for “minimal Federal funding,” commenters who opposed a monetary threshold stated that any determination of “minimal Federal funding” should be made in the context of a particular project. Commenters also stated that the absence of Federal funding is not conclusive of whether an action constitutes a major Federal action. Some commenters stated that establishing a quantified threshold for minimal Federal funding would be at odds with other statutory triggers such as the ESA. Some commenters stated that if a project could not otherwise be completed without the use of Federal funds (regardless of the amount), then NEPA applies. Commenters were concerned that a defined minimal amount would result in segmentation. Some commenters stated that CEs are the appropriate way to treat actions that do not have significant impacts. Other commenters expressed support for the proposal to conditionally exempt certain forms of financial assistance, but few provided information that would enable CEQ to specify a monetary threshold. Some commenters proposed a dollar threshold for Federal funding of less than \$1,000,000 or less than 20 percent or 25 percent of total project costs. Other commenters raised concerns about calculating Federal funding asserting that cost overruns could potentially turn a “minor” project into a “major” one.

CEQ Response: CEQ did not receive many suggestions regarding specific figures to establish a threshold amount. The final rule does not include a specific monetary threshold for minimal Federal funding. Agencies may identify a minimal financial threshold and other categories of actions that do not meet the threshold of “major Federal action” in their agency NEPA procedures. While calculating an overall project’s costs may be challenging, once an applicant submits an application for Federal funding, the agency should use its experience and expertise to evaluate whether there is sufficient information and documentation that allows it determine whether the proposed action is a major or non-major action.

Comment: Commenters stated concern that the number of Federal projects subjected to NEPA review will decrease if the proposed threshold analysis model is accepted, as Tribes coordinate their NEPA review and section 106 of the NHPA responsibilities concurrently. The threshold analysis standard will therefore result in fewer section 106 undertakings being completed as a by-product of this new threshold analysis. Commenters also stated the proposed amendments would allow Federal agencies to decide on a project-by-project basis whether NEPA compliance is required. Commenters stated if Federal funding or permitting is involved in a proposed action, even on a limited basis, some form of environmental review is needed in order to ensure that Federal resources are not used in connection with unnecessary and uninformed destruction of Tribal or cultural resources. An increase in the loss of non-renewable cultural and historical sites and information is unacceptable especially when it will be primarily based on arbitrary decisions such as the amount of Federal involvement or money.

CEQ Response: The obligations under NEPA and NHPA are separate. As noted elsewhere, nothing in the final rule affects the requirements under other statutes including NHPA.

Comment: Some commenters recommended that if the final rule makes the proposed changes, CEQ define “minimal” and “control” within the definition and context of “major Federal action” to reduce confusion. A commenter recommended that more oversight on the definition’s applicability to a project and the ability to dispute a threshold analysis determination be included.

CEQ Response: CEQ declines to make the requested revision. The particular facts and circumstances of each project or program are relevant to determining whether the project involves minimal Federal funding or involvement. The agency’s statutory authorities are also relevant to considering whether the agency exercises sufficient control and responsibility over the outcome of the project. Where an agency has questions concerning the interpretation of § 1501.1, agencies may consult with CEQ on a case-by-case basis.

Comment: In response to CEQ’s request for comment on whether the definition of “major Federal action” should be further revised to address scenarios where a Federal permit or other Federal action is a small portion of a larger non-Federal action, some commenters opposed such changes while others supported such changes. Commenters who opposed further revisions stated that there is no correlation between the magnitude of Federal involvement and the magnitude of potentially adverse impacts of a project. These commenters also noted that bypassing NEPA review for small Federal actions would deprive the public, including environmental justice communities, of transparency and the ability to comment. Some commenters were concerned that without NEPA analysis, in States that do not have comparable statutes, less informed decision-making would occur. Some commenters were particularly concerned with an exemption to NEPA analysis for major linear projects such as transmission lines, pipelines, and roads. Multiple commenters cited the example of a wetlands permit from

the Army Corps of Engineers that is required for only a small part of a larger project.

Commenters who supported further revisions asserted that federalizing an entire project over which an agency lacks legal authority or jurisdiction is contrary to the procedural nature of NEPA, and expands Federal jurisdiction over non-Federal actions. Commenters on both sides of the issue pointed CEQ to various cases including *Winnebago Tribe*, 621 F.2d at 273; *Save the Bay, Inc. v. U.S. Army Corps of Eng'rs*, 610 F.2d 322 (5th Cir. 1980); *White Tanks Concerned Citizens v. Strock*, 563 F.3d 1033, 1040-43 (9th Cir. 2009); *Ohio Valley Env'tl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196-97 (4th Cir. 2009); *Save Our Sonoran Inc., v. Flowers*, 403 F.3d 1113, 1122 (9th Cir. 2005); *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001); *Macht*, 916 F.2d at 18–20; and *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 33 (D.D.C. 2013). Some commenters stated that case law provided sufficient direction so further CEQ rulemaking is not needed on this issue. Some commenters encouraged CEQ to provide additional examples and clarification in the final rule that minimal Federal involvement or funding would not require review of the environmental impacts of the entire project. Some commenters stated that CEQ should clarify that “minimal Federal involvement” and “minimal Federal funding” should be assessed in relation to the scale and scope of the overall project. Commenters requested that CEQ clarify that where an agency has regulatory authority over a relatively small area or element of a project, even where that area or element has broader consequences for the project as a whole, the agency’s scope of review does not extend to the entire project. One commenter suggested that the proposed NEPA threshold applicability analysis in § 1501.1 and revisions to the definition of major Federal action in § 1508.1(q) limit much of CEQ’s oversight by not applying NEPA to the actions of private citizens or private industry that are obtaining permits.

CEQ Response: The final rule does not further revise the definition of “major Federal action” to address the small Federal handle problem. The final rule’s definition of “major Federal action” is adequate to address scenarios where a Federal permit or other Federal action is a small portion of a larger non-Federal project. The definition specifically excludes non-discretionary decisions and non-Federal projects covered under § 1508.1(q)(1)(ii) and (vi). Courts that have addressed the small Federal handle question have taken a fact-intensive approach to determine whether a Federal permit or other Federal action is sufficient to federalize the entirety of a proposed action. Courts have considered facts such as the relationship between the location of the areas that require a Federal permit and the remaining non-Federal portions of the proposed action, whether the proposed action could avoid the areas where a Federal permit would be required, and the degree of the Federal agency’s control and responsibility over the broader project.

Comment: In response to CEQ’s invitation for comment on whether “partly” should be changed to “predominantly” in § 1508.1(q)(1) for consistency with the revisions in the introductory paragraph regarding “minimal Federal funding,” few commenters expressed an opinion on the question. Some commenters opposed the suggested change from “partly” to “predominantly” because they believed it would result in less disclosure of impacts. Other commenters welcomed the proposed change because they believed it would increase clarity and certainty regarding when Federal financing should rise to a level necessitating a NEPA review.

CEQ Response: Predominantly means “for the most part” and would imply that projects and programs would be major Federal actions only if more than 50 percent were financed, assisted, conducted, regulated, or approved by Federal agencies. Such an interpretation would be inconsistent with language elsewhere in the definition that excludes non-Federal projects with

minimal Federal funding or involvement where the agency does not exercise sufficient control and responsibility over the effects of the assistance. For these reasons, the final rule does not change “partly” to “predominantly.” However, CEQ notes that the proportion of Federal funding versus non-Federal funding is certainly a relevant consideration for agencies.

ii. Extraterritoriality

Comment: Commenters supported revisions to clarify that NEPA does not apply extraterritorially. Some commenters requested that CEQ revise the regulations to state that NEPA should not apply extraterritorially to projects outside the jurisdiction of the United States. Other commenters stated that NEPA should not require assessment of extraterritorial effects of domestic actions.

CEQ Response: In the final rule, CEQ clarifies that section 102(2)(C) of NEPA does not apply to activities or decisions with effects located entirely outside the jurisdiction of the United States. § 1508.1(q)(1). This clarification is consistent with decisions of the Supreme Court addressing the application of the presumption against extraterritoriality to Federal statutes. In the final rule, CEQ has revised the definition of “Major Federal action” to provide that a major Federal action does not include agency activities or decisions with effects located entirely outside of the jurisdiction of the United States. § 1508.1(q)(1)(i). The Restatement of Foreign Relations Law provides that the areas within the territorial jurisdiction of the United States include “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.”⁹⁵ Under the final rule, for activities or decisions with effects in the United States, agencies should analyze the

⁹⁵ Restatement, *supra* note 93, sec. 404.

reasonably foreseeable effects of such activities or decisions where there is a reasonably close causal relationship to the proposed action. § 1508.1(g). This may include transboundary effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. § 1508.1(g).

Comment: CEQ also received comments opposing application of the presumption against extraterritoriality to NEPA. Commenters stated that CEQ should not prohibit applying NEPA to all extraterritorial projects, and that doing so would be inconsistent with the plain text of the statute. Some commenters contended that NEPA applies extraterritorially on its face, and that applying the presumption would not be consistent with the text of the statute which references “human environment” without geographic limitation, and which commenters maintained is not limited to the domestic environment. Other commenters cited the text of section 102(2)(F) of the Act which directs that “all agencies of the [F]ederal [G]overnment shall . . . recognize the worldwide and long range character of environmental problems” and “lend support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of the mankind’s world environment.”

CEQ Response: The plain language of section 102(2)(C) of the Act does not indicate it was intended to be applied to actions occurring outside the United States. 42 U.S.C. 4332(2)(C). The provision directs Federal agencies to provide a detailed statement for major Federal actions significantly affecting the quality of the human environment, and requires the responsible official to consult with and obtain the comments of Federal agencies with jurisdiction or special expertise, as well as to make copies of the statement and comments and views of Federal, State and local agencies available to the President, CEQ and the public. 42 U.S.C. 4332(2)(C). Nothing in the text of the Act states that this section was intended to require the preparation of

detailed statements for actions located outside the United States. Nor does the definition of “human environment” make clear that the section was intended to be applied extraterritorially. The statute establishes a “national policy” of the “Federal Government, in cooperation with State and local governments, and other public and private organizations,” and directs the Federal Government to use practicable means and measures to “fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. 4331(a). Further, the statute directs the use of practicable means “consistent with other essential considerations of national policy” to “assure for all Americans safe . . . surroundings.” 42 U.S.C. 4331(b). The only reference in the Act to international considerations is in section 102(2)(F) which directs agencies to “where consistent with foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation” to protect the environment. 42 U.S.C. 4332(2)(F). This provision also does not clearly indicate that the requirements of section 102(2)(C) to prepare detailed statements applies outside U.S. territorial jurisdiction. Rather, it indicates agencies should seek to cooperate internationally on environmental issues, where consistent with U.S. foreign policy.

Comment: Commenters opposing application of the presumption against extraterritoriality to NEPA stated that it would not be consistent with the statute’s legislative history. Commenters reference the language “to the fullest extent possible” in section 102(2), and cite the Conference Report (H.R. Rep. No. 91-765, at 9-10 (1969)), as well as the Senate Report (S. Rep. No. 91-296, at 9 (1969) and the House Report (H.R. Rep. No. 91-378, at 121 (July 11, 1969)). Commenters also referenced post-enactment reports comments or statements before Congress.

CEQ Response: The legislative history of section 102(2)(C), which is very limited, does not discuss applying the requirements of section 102(2)(C) to extraterritorial actions. Consistent with this conclusion, the Court of Appeals for the District of Columbia has held that NEPA's legislative history did not support rebutting the presumption against extraterritorial application of the statutes. *Nat. Res. Def. Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1367 (D.C. Cir. 1981) ("NEPA's legislative history illuminates nothing in regard to extraterritorial application"). To the extent commenters cite post-enactment congressional comments or statements, CEQ notes that these are not part of the legislative history of the Act.

Comment: Commenters opposing clarification that NEPA does not apply extraterritorially contended that restricting NEPA's extraterritorial application would contravene case law. Some commenters specifically referenced *Envtl. Def. Fund v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993), or other cases. Other commenters stated that a rule barring consideration of transnational effects would undermine the long-standing practice of courts of considering the presumption against extraterritoriality on a case-by-case basis.

CEQ Response: Since NEPA was enacted a number of district and appellate courts have found that NEPA applied extraterritorially,⁹⁶ while other district and appellate courts have held

⁹⁶ See, e.g., *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978) (assuming NEPA to be applicable to South American highway funded by Department of Transportation); *People of Entewatak v. Laird*, 353 F. Supp. 811 (D. Haw. 1973) (concluding NEPA applicable to action in the Trust Territory of the Pacific Islands); *Ctr. for Biological Diversity v. Nat'l Science Found.*, 2002 U.S. Dist. LEXIS 22315 *1, *10–11 (N.D. Cal. 2002) (applying NEPA within the Mexican Exclusive Economic Zone and stating that imposing the requirements of NEPA would not impinge on the sovereignty of Mexico); *Nat. Res. Def. Council v. Navy*, 2002 U.S. Dist. LEXIS 26360 *1, *41–42 (C.D. Cal. 2002) (applying NEPA within the U.S. Exclusive Economic Zone and stating that applying NEPA would not implicate foreign policy interests). Commenters also cited *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889, 908 (N.D. Cal. 2007) (finding presumption against extraterritoriality did not apply to Overseas Private Investment Corporation or Export-Import Bank fossil fuel projects, which plaintiff asserted had domestic effects); *Hirt v. Richardson*, 127 F. Supp. 2d 833, 844 (W.D. Mich. 1999) (finding NEPA applied to decision related to shipments of plutonium from New Mexico to Canada and parallel shipment from Russia to Canada).

that the presumption against extraterritoriality precluded NEPA's application to activities abroad.⁹⁷ In 1993, in a case involving the National Science Foundation (NSF) and incineration of food waste in Antarctica, the Court of Appeals for the District of Columbia held that the presumption against extraterritoriality did not apply because NSF's decision making under the NEPA process occurred in the United States. *Massey*, 986 F.2d. at 533 (“[S]ince NEPA is designed to regulate conduct occurring within the territory of the United States and imposes no substantive requirements which could be interpreted to govern conduct abroad, the presumption . . . does not apply to this case”). In its decision, the court also stated that Antarctica was an area without a sovereign and an area over which the United States had “a great measure of legislative control.” *Id.* (stating that “where the U.S. has some real measure of legislative control over the region at issue, the presumption against extraterritoriality is much weaker”). The court further stated that “where there is no potential for conflict ‘between our laws and those of other nations,’ the purpose behind the presumption is eviscerated, and the presumption against extraterritoriality applies with significantly less force.” *Id.*

To the extent that the *Massey* court and other courts have found that NEPA applied extraterritorially to actions occurring outside the territorial jurisdiction of the United States, these

⁹⁷ See, e.g., *Nat. Res. Def. Council v. Nuclear Regulatory Comm’n*, 647 F.2d 1345 (D.C. Cir. 1981) (holding NEPA did not apply to nuclear export licensing decisions relating to the export of a nuclear reactor to the Philippines); *NEPA Coal. of Japan v. Aspin*, 837 F. Supp. 466, 467 (D.D.C. 1993) (applying presumption to preclude application of NEPA to Department of Defense actions on military installations in Japan); *Greenpeace USA v. Stone*, 748 F. Supp. 749, 760 (D. Haw. 1990) (applying presumption to actions in Germany). Courts have also applied the presumption of extraterritoriality to find that agencies were not required to analyze the impacts of activities occurring in the U.S. EEZ or the high seas. See *Basel Action Network v. Maritime Admin.*, 370 F. Supp. 2d 57, 71–75 (D.D.C. 2005) (upholding EA and FONSI that analyzed towing activities that encompassed the towing of ships in U.S. territorial waters but finding that the Maritime Administration (MARAD) was not required to consider the effects of the towing of ships across the high seas).

decisions are not consistent with more recent holdings of the Supreme Court. These Supreme Court decisions have reinforced that the presumption against extraterritoriality applies absent a clear showing that Congress intended extraterritorial application, and considering the focus of the concerns Congress seeks to address through the statute. *See, e.g., RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2100 (2016); *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). The Supreme Court has stated: “Rather than guess anew in each case, we apply the presumption [against extraterritorially] in all cases, preserving a stable background against which Congress can legislate with predictable effects.” *Morrison*, 561 U.S. at 261.

To the extent the *Massey* court maintained that the presumption against extraterritoriality did not apply because Federal decision making occurred in the United States, the Supreme Court has clarified that the occurrence of some activity in the United States is not determinative when applying the presumption. *Morrison*, 561 U.S. at 266. The Supreme Court has stated that it “is a rare case of prohibited extraterritorial application that lacks *all* contact with United States territory.” *Id.* Here, section 102(2)(C) applies to Federal agencies and requires that they consider the environmental impacts of major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. 4332(2)(C). The purpose of section 102(2)(C) is to ensure that a Federal agency, as part of its decision-making process considers the potential environmental impacts of proposed actions. The focus of congressional concern under this provision is not the location of the decision, but the proposed action at the location it will occur and its potential environmental effects. For this reason, CEQ has defined extraterritorial actions in terms of the location of the effects of an activity or decision, rather than the location of the decision making. § 1508.1(q).

Comment: One commenter stated that whether NEPA applies to agency actions occurring outside the United States is a red herring. The commenter asserted that the purpose of the presumption against extraterritoriality is to protect against clashes between U.S. laws and those of other nations that could result in international discord. The commenter stated that where courts have found that NEPA would have serious foreign policy implications they have excused agencies from compliance, citing *Nuclear Regulatory Comm'n*, 647 F.2d at 1366.

CEQ Response: As discussed above, the Supreme Court has issued a number of decisions over the past decade holding that the presumption applies absent clear congressional intent to apply statutory provisions extraterritorially. In its decision in *Massey*, the D.C. Circuit stated that “the primary purpose of th[e] presumption against extraterritoriality is ‘to protect against unintended clashes between our laws and those of other nations which could result in international discord.’” 986 F.2d. at 530 (quoting *Arabian Am. Oil Co.*, 499 U.S. at 248). The Supreme Court, however, has held that while this may be a reason for applying the presumption, the presumption is based on a broader foundation. For example, shortly after the *Massey* decision, later that same year, the Supreme Court in a case also involving Antarctica rejected the rationale of avoidance of conflict as the primary purpose, stating “the presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind.” *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993); see *RJR Nabisco, Inc.*, 136 S. Ct. at 2100 (“We therefore apply the presumption across the board, ‘regardless of whether there is a risk of conflict between the American statute and a foreign law.’”) (citing *Morrison*, 561 U.S. at 255); see also *Morrison*, 561 U.S. at 255 (“The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law”); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 174 (1993)

(“[T]he presumption has a foundation broader than the desire to avoid conflict with the laws of other nations.”); *Aspin*, 837 F. Supp. at 467 n.3 (stating that “two post-Massey Supreme Court cases hold that the choice of law dilemma is not the only justification for the presumption”).

Comment: Commenters contended that a finding the NEPA does not apply extraterritorially would be inconsistent with CEQ’s 1997 transboundary guidance.

CEQ Response: The guidance on transboundary impacts issued by CEQ in 1997 did not apply NEPA to extraterritorial actions. This guidance expressly stated that CEQ was not intending to “apply NEPA to so-called ‘extraterritorial actions’; that is, U.S. actions that take place in another country or otherwise outside the jurisdiction of the United States.”⁹⁸ As such, it is not inconsistent with the final rule clarifying that section 102(2)(C) does not apply to extraterritorial actions.

Comment: Commenters stated that agency practice has demonstrated that NEPA is successfully applied to extraterritorial activities, and that agencies regularly prepare EISs or other NEPA documents for certain overseas activities. Some commenters stated that it was well established that NEPA applies to transboundary impacts as well as the global commons and impacts that affect the U.S. environment, and requested that revisions reflect the provisions of E.O. 12114. Some commenters stated that this Executive order has strong extraterritoriality implications. One commenter also noted that courts have found NEPA to apply where the proposed action has effects in the United States.

⁹⁸ 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 Response: As noted above, the 1978 regulations did not address the issue of application of NEPA to environmental effects occurring outside the United States. In 1979, President Carter issued E.O. 12114, Environmental Effects Abroad of Major Federal Actions,⁹⁹ which serves as a guide to agencies. This Executive order provided that, “[w]hile based on independent authority, this Order furthers the purpose of the National Environmental Policy Act and the Marine Protection Research and Sanctuaries Act and the Deepwater Port Act consistent with the foreign policy and national security policy of the United States, and represents the United States government’s exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.” E.O. 12114, § 1.

Under section 2 of the Executive order, agencies were required to develop procedures, in consultation with the Department of State and CEQ, for developing documents relating to major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation, the environment of a foreign nation not participating with the U.S. and not otherwise involved in the action, affecting the environment of a foreign nation, or affecting natural or ecological resources of global importance designated for protection under this subsection by the President or Secretary of State. The Executive order also exempted various actions from the order. Because E.O. 12114 is based on independent authority, the final rule does not alter the requirements of that Executive order. Critically, however, section 3 of this Executive Order provides that it “is solely for the purpose of establishing internal procedures for

⁹⁹ 44 FR 1957 (Jan. 4, 1979).

Federal agencies to consider the significant effects of their actions on the environment outside the United States, its territories and possessions, and nothing in this Order shall be construed to create a cause of action.” NEPA, by contrast, is a statute enforceable pursuant to the APA in appropriate circumstances. Hence, E.O. 12114 does not extend the reach of NEPA and CEQ is free to align NEPA with the presumption against extraterritoriality.

Under the final rule, a “Major Federal action” does not include activities or decisions for which the effects are entirely outside the territorial jurisdiction of the United States. § 1508.1(q). For actions with effects occurring in the United States, under the regulations as revised agencies should consider all effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. § 1508.1(g). This may include reasonably foreseeable transboundary effects where they have a reasonably close causal relationship to the proposed action taken in the United States.

Comment: Commenters stated that long-standing practice demonstrates that NEPA is successfully applied extraterritorially, including NEPA documents for overseas activities such as Navy training exercises. They contended eliminating the extraterritorial application of NEPA would disrupt agency practice.

CEQ Response: The final rule does not alter E.O. 12114 which directs agencies to prepare environmental analyses of certain actions occurring outside the United States territories or possessions under specified circumstances. For actions located outside U.S. territorial jurisdiction, agencies should consider any applicable statutes, international agreements, or Executive orders, including E.O. 12114. The purpose of this regulatory reform is to clarify that NEPA does not require analysis of extraterritorial action.

Comment: Commenters raised concerns that it was not clear whether transboundary impacts would be considered if the presumption against extraterritoriality applies to NEPA.

CEQ Response: As CEQ discussed above, the case law applying NEPA extraterritorially is limited and predates more recent holdings of the Supreme Court reinforcing that application of the presumption against extraterritoriality absent express congressional intent to apply Federal statutes extraterritorially. Under the final rule, where an activity or decision has effects that are located within the United States, agencies should consider reasonably foreseeable effects for which there is a reasonably close causal relation to the proposed action. § 1508.1(g). This would include cross-border or transboundary effects to the extent they are reasonably foreseeable and have a reasonably close relationship to the proposed action.

Comment: Commenters stated that NEPA governs Federal decision making and not conduct of individuals or corporations, that Federal decision making occurs in the United States, and that extraterritorial application of NEPA does not present a conflict between U.S. and foreign law, and for this reason the presumption against territoriality should not apply.

CEQ Response: Section 102(2)(C) applies to Federal agencies and requires that they consider the environmental impacts of major Federal actions significantly affecting the quality of the human environment. The purpose of section 102(2)(C) is to ensure that a Federal agency, as part of its decision-making process, considers the potential environmental impacts of the proposed action. The focus of congressional concern under this provision is not the location of the decision, but the proposed action and potential environmental effects. For this reason, CEQ has defined extraterritorial actions in terms of the location of the effects of an activity or decision, rather than the location of the decision making.

To the extent commenters have stated that Federal decision making occurs in the United States, and the presumption against extraterritoriality does not apply to NEPA, the Supreme Court has clarified that the occurrence of some activity in the United States is not determinative when applying the presumption. *Morrison*, 561 U.S. at 266. The Supreme Court has stated that “it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States.” *Id.* In the *Morrison* case, the Supreme Court, considering the application of § 10(b) of the Securities and Exchange Act, found that only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, were the focus of the statute. *Id.* at 267.

Comment: Commenters asked whether an extraterritorial action would be characterized differently if effects were felt within the United States.

CEQ Response: In the final rule, CEQ clarifies that a major Federal action does not include extraterritorial actions that are defined to be activities or decisions with effects located entirely outside U.S. territorial jurisdiction. To the extent actions have effects located within the United States, they would not be excluded from the definition of “Major Federal action” under the regulations as revised.

Comment: Some commenters asked whether NEPA requires consideration of transboundary environmental impacts across borders. Other commenters stated that NEPA should not apply to the extraterritorial effects of domestic projects.

CEQ Response: Under the final rule, a “Major Federal action” does not include activities or decisions for which the effects fall entirely outside the jurisdiction of the United States. § 1508.1(q). For actions with effects occurring in the United States, under the regulations as revised agencies should consider all effects that are reasonably foreseeable and have a

reasonably close causal relationship to the proposed action. *See* § 1508.1(g). This may include reasonably foreseeable transboundary effects where they have a reasonably close causal relationship to the proposed action taken in the United States. *Id.*

Comment: One commenter asked whether implementation of treaties includes extraterritorial actions.

CEQ Response: In the final rule, CEQ states that major Federal actions may include the implementation of treaties. *See* § 1508(q). Consistent with the final rule, this would include activities or decisions with effects that occur within the territorial jurisdiction of the United States. *Id.*

Comment: Commenters recommended that the regulations be revised to provide that NEPA applies in the Exclusive Economic Zone (EEZ).

CEQ Response: President Reagan established the U.S. EEZ on March 10, 1983 with the issuance of Proclamation 5030—Exclusive Economic Zone of the United States of America.¹⁰⁰ As discussed above, the Supreme Court has reinforced that the presumption against extraterritoriality applies absent a clear showing that Congress intended extraterritorial application, considering the focus of the concerns Congress seeks to address through the statute, and regardless of whether or not there is a potential for conflicts of law. The Supreme Court has also stated that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States” *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932)); *see Arg. Repub. v.*

¹⁰⁰ 48 FR 10605 (Mar. 14, 1983). *See* Proclamation 5030—Exclusive Economic Zone of the United States of America, <https://www.archives.gov/federal-register/codification/proclamations/05030.html>.

Armerada Hess Shipping Corp., 488 U.S. 428, 440 (1989) (stating that “[w]hen it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.”)

Under customary international law, the territorial jurisdiction of the United States does not include the U.S. EEZ which falls outside U.S. territorial waters. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 at Art. 55 (defining EEZ as “beyond and adjacent to the territorial sea”). The Supreme Court, however, has stated that Federal statutes apply to areas where the U.S. has sovereignty or “some measure of legislative control.” *See Arabian Am. Oil Co.*, 499 U.S. at 248 (citing *Foley Bros., Inc.*, 336 U.S. at 285. The Restatement of Foreign Relations Law provides that the areas within the territorial jurisdiction of the United States include “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.”¹⁰¹

With respect to the U.S. EEZ, the Proclamation establishing it states that “[w]ithin the Exclusive Economic Zone, the United States has, to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.” Over the past two

¹⁰¹ Restatement, *supra* note 93, sec. 404.

decades, courts have both applied and declined to apply the presumption against extraterritoriality to the U.S. EEZ.¹⁰²

Whether NEPA may apply to a proposed action with effects exclusively in the U.S. EEZ will depend upon the nature of the action, the relevant statutes, and other factors specific to the proposed action. Regardless of whether NEPA applies, E.O. 12114, Environmental Effects Abroad of Major Federal Actions,¹⁰³ which is based on independent authority, serves as a guide to agencies.¹⁰⁴ Under section 2 of the Executive order, agencies have developed procedures, in consultation with the Department of State and CEQ, for developing documents relating, *inter alia*, to “major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica).” E.O. 12114, sec. 2.

11. Definition of Mitigation (§ 1508.1(s))

Comment: Some commenters expressed concerns that the requirement that mitigation measures have a nexus to the effects of the proposed action would discourage compensatory mitigation. Other commenters supported the requirement, stating it would make the NEPA

¹⁰² In 2002, a Federal District Court applied NEPA to the U.S. EEZ. *See Nat. Res. Def. Council v. Navy*, 2002 U.S. Dist. LEXIS at *1, *41–42 (applying NEPA within the U.S. EEZ, and stating that applying NEPA would not implicate foreign policy interests). The district court held that “[b]ecause the United States exercises substantial legislative control of the EEZ in the area of the environment stemming from its ‘sovereign rights’ for the purpose of conserving and managing natural resources, the Court finds that NEPA applies to [F]ederal actions which may affect the environment in the EEZ.”). *Id.* at 41. In 2005, a Federal District Court reached a contrary result, applying the presumption against extraterritoriality to find that agencies were not required to analyze the impacts of activities occurring in the U.S. EEZ or the high seas. *Basel Action Network*, 370 F. Supp. 2d at 72 (upholding EA and FONSI that analyzed towing activities that encompassed the towing of ships in U.S. territorial waters but finding that MARAD was not required to consider the effects of the towing of ships across the high seas).

¹⁰³ 44 FR 1957 (Jan 4, 1979).

¹⁰⁴ This Executive Order provided that, “[w]hile based on independent authority, this Order furthers the purpose of the National Environmental Policy Act and the Marine Protection Research and Sanctuaries Act and the Deepwater Port Act consistent with the foreign policy and national security policy of the United States, and represents the United States government’s exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.” E.O. 12114, sec. 1.

process more effective by clarifying that mitigation measures must be designed to mitigate the effects of the proposed action.

CEQ Response: CEQ supports agencies using compensatory mitigation where appropriate and consistent with their respective legal authorities. The requirement that mitigation have a nexus to the proposed action means that compensatory mitigation must bear a relation to the nature of the impact from the proposed action. This will not discourage the appropriate use of compensatory mitigation.

Comment: Commenters expressed concern that the definition for “mitigation” is inconsistent because it is limited to “measures that avoid, minimize, or compensate” in its first sentence, but then includes “avoiding...minimizing... rectifying...reducing... [and] compensating” in the numbered paragraphs. They recommended that all five terms are included in the first sentence. Other commenters recommended simplifying the definition of mitigation because Federal agencies, including CEQ, or State agencies do not use the terms “rectify” or “reduce” in practice.

CEQ Response: CEQ finds that “avoidance,” “minimization,” and “compensation” are the primary components of mitigation, and agrees that the terms “rectifying” and “reducing” are not as widely used. However, CEQ has retained both rectifying and reducing in the definition to minimize any uncertainty all of the aspects of mitigation in the 1978 regulations continue to be available to agencies.

Comment: Commenters requested that CEQ establish a mitigation hierarchy in its regulations, prioritizing avoidance and minimization over compensatory mitigation and remediation. Some commenters requested CEQ to require that the mitigation of a project’s adverse impacts improve the baseline environmental conditions.

CEQ Response: Certain statutes may require that agencies follow a hierarchy where project proponents must avoid and minimize environmental impacts before offsetting remaining impacts through compensatory mitigation; however, NEPA does not provide similar authorities. Furthermore, there may be circumstances where compensatory mitigation achieves more practicable and favorable environmental outcomes than actions to avoid and minimize impacts. Section 1508.1(s) of the final rule states that while NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation. Therefore, CEQ declines to require that mitigation improve the baseline environmental conditions.

Comment: Commenters stated that, by narrowing the scope of effects at § 1508.1(g), the rule also limits the assessment of mitigation measures.

CEQ Response: The final rule would continue to require analysis of all effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, consistent with Supreme Court case law. By extension, the assessment of mitigation measures would be similarly consistent with applicable Supreme Court case law. The implementation of NEPA is bounded by a rule of reason, and it is inefficient for agencies to evaluate the mitigation of impacts that are remote or otherwise inconsistent with the revised definition.

Comment: Commenters requested that CEQ further revise the definition of mitigation § 1508.1(s) to include the language concerning mitigation from *Robertson v. Methow Valley*, 490 U.S. 332, 352 (1989), requiring that “mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated,” but does not establish “a substantive requirement that a complete mitigation plan be actually formulated and adopted” before the agency can make its decision.

CEQ Response: CEQ declines to make the requested change as the final rule already adopts the Supreme Court opinion and its language.

Comment: Commenters stated that the proposed changes to the definition of “mitigation” are too broad and that CEQ should define “human environment” in this context. For example, it is unclear whether human environment includes an individual’s experience, such as the use of noise-cancelling windows or other construction noise mitigation measures.

CEQ Response: CEQ declines to make further changes to the definition of mitigation in the final rule. Mitigation may include a broad range of potential activities to offset the adverse impacts of a proposed action. Agencies should consider the particular facts and circumstances of a proposed action when considering effective mitigation strategies.

Comment: Commenters requested that CEQ clarify whether the definition of mitigation in § 1508.1(s) precludes consideration of out-of-kind or offsite mitigation.

CEQ Response: The final rule is sufficiently broad to allow for offsite mitigation provided that the mitigation measures have a nexus to the effects of the proposed action. CEQ notes that it may be difficult to demonstrate a nexus for out-of-kind mitigation or off-site mitigation, and that any determination by the agency would depend on the specific circumstances of the proposed action.

Comment: Commenters expressed concern that applicants may not be able to receive credit for certain types of mitigation measures that are not directly tied to the “on the ground impacts” of the proposed project, such as educational programs, that nevertheless provide significant environmental benefits.

CEQ Response: The final rule does not preclude any particular form of mitigation; however, it does require that the agency demonstrate a nexus any proposed mitigation and an

impact from the proposed action. Any proposed mitigation would also need to either avoid, minimize or compensate for impacts caused by the proposed action that satisfy the definition of “effects” set forth in § 1508.1(g).

Comment: Commenters requested that CEQ remove the term “nexus” from the definition and replace it with “reasonable proximity.”

CEQ Response: CEQ declines to make the requested change to the final rule. The word “nexus” is analogous to “tie” or “link,” which makes clear that the proposed mitigation must have an adequate relationship to the effects of the proposed action. “Proximity” is not the right word as it is typically and primarily applied to concepts of relative distance. The concept of “nexus” is about a degree of conceptual relationship.

Comment: Proposed § 1508.1(s) should clarify that mitigation would be required for a mitigated FONSI.

CEQ Response: The final rule establishes the requirements for a mitigated FONSI in § 1501.6(c).

Comment: Commenters requested adding another provision to the definition of mitigation (1508.1(s)), whereby an agency could “monitor the impact and take appropriate corrective measures, including adaptive management.”

CEQ Response: The obligations to monitor mitigation are addressed in §§ 1501.6(c) and 1505.2(a)(3). CEQ declines to make the requested change.

Comment: A commenter stated that the definition of “mitigation” incorrectly restricts the meaning to apply only to the proposed action, and not the alternatives.

CEQ Response: In response to comments, CEQ has added “or alternatives” to § 1508.1(s).

12. Definition of Page (§ 1508.1(v))

Comment: Some commenters expressed opposition to the new definition of “page” stating that it will cause confusion to agencies that follow CEQ’s guidance to use a large number of charts, graphs, and figures that will occupy more pages but use fewer words. One commenter suggested adding “list of commenters and summary of comments” to the definition, while another commenter suggested adding “as it applies to § 1502.7.” Another commenter suggested requiring a uniform font size rather than word count for readability purposes.

CEQ Response: CEQ finds that the recommended changes are necessary to achieve the stated goals of the 1978 regulations: reduce paperwork, to reduce delays, and to produce better decisions. The definition facilitates uniformity in document length while allowing unrestricted use of graphs, tables, photos, and other geographic information that can provide a much more effective means of conveying information. The changes also update NEPA for modern electronic publishing and internet formatting, in which the number of words per page can vary widely depending on format.

13. Definition of Participating Agency (§ 1508.1(w))

Comment: Commenters supported adding a definition of “participating agency” and replacing the term “commenting” with “participating” agencies throughout the regulations. One commenter asked whether the term applied to CEs and EAs.

CEQ Response: CEQ has updated the regulations to reflect agency practice and the statutes enacted since 1978 that establish a definition of “participating agency.” CEQ has defined “participating agency” consistent with the definition in FAST-41 and 23 U.S.C. 139. Under the statutes referenced above, the term applies where agencies are preparing an EIS or an EA.

Comment: One commenter opposed the addition of a new category of agency and raised concerns that having “cooperating agencies” and “participating agencies” causes confusion for the lead agency and misconceptions about the role of the involved agencies.

CEQ Response: It is useful to update the regulation to add this definition because of the enactment of the statutes referenced above and because the term “participating agency” is used in agency practice and in legislation. CEQ acknowledges that this definition is different from and in addition to the definition of “cooperating agency,” and refers to an agency that is participating in the NEPA process rather than in the role of a “cooperating agency.”

14. Definition of Proposal (§ 1508.1(x))

Comment: One commenter opposed striking the second sentence with operative text. The commenter maintained that the reason for striking the text was not provided in the preamble for the proposed rule, except to indicate that it was already addressed in § 1502.5. The commenter stated that the change at best was confusing, as the required time of preparation is well established through Supreme Court precedent, or at worst was an attempt to overturn practice and precedent, and was arbitrary and capricious.

CEQ Response: CEQ’s revisions to the definition are designed to clarify the definition by revising the text from passive to active voice and by striking operative language that is already referenced in § 1502.5 which states the agency should schedule the preparation of an EIS so it can be completed in time for the final statement to be included in any recommendation or report on the proposal. Elimination of the second sentence is consistent with CEQ’s revisions elsewhere to move operative text from the definitions to relevant regulatory sections and to assist agencies in understanding and implementing those sections of the regulations.

Comment: One commenter suggested adding to the definition of proposal that “proposal” and “proposed action” are the same, that the proposed action is one alternative, and that the “proposal” is not a restatement of the purpose and need.

CEQ Response: In the definition of “proposal” in the final rule, CEQ has simplified the definition to state that “proposal” means “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.” It is not necessary to state that the proposed action is one alternative because that is addressed elsewhere in the regulations. *See* § 1502.14. Nor is it necessary to state that it is different from the “purpose and need” because that phrase is defined as the purpose and need for the proposed action. *See* § 1502.13.

15. Definition of Publish and Publication (§ 1508.1(y))

Comment: Commenters supported the replacement of the words “circulate” or “circulation” with “publish” or “publication” and defining the term to provide agencies with the flexibility to make environmental documents and information available to the public by electronic means. Commenters cautioned that agencies should not rely exclusively on electronic means to publish documents and requested that CEQ require publication of physical copies located in local libraries to facilitate access for those with limited or no internet access.

CEQ Response: CEQ declines to include the suggested requirement. The 1978 regulations did not require agencies to provide physical copies of documents at local libraries and the continued rapid evolution of digital communication and media may render such a requirement obsolete. As explained in the Public Involvement section, CEQ has revised § 1506.6 in the final rule to clarify that agencies should consider the public’s access to electronic media when selecting appropriate methods for providing public notice and involvement. The

final rule expands on the range of methods agencies may use when providing notice and publishing documents, including a requirement to publish information on an agency website.

See § 1507.4.

16. Reasonable Alternative (§ 1508.1(z))

Comment: Commenters objected to the phrase “technically and economically feasible” in the definition of reasonable alternative (§ 1508.1(z)) because it is contrary to the purpose of NEPA.

CEQ Response: Establishing standards for reasonable alternatives based on feasibility is appropriate and meets the purposes of NEPA. One of the stated purposes in E.O. 11991 when directing CEQ to issue regulations to Federal agencies for the implementation of NEPA was to “emphasize the need to focus on real environmental issues and alternatives.”¹⁰⁵ Consideration of alternatives that are neither technically nor economically feasible is not an effective use of agency time and resources, nor do such alternatives pose a logical choice for agency decision makers. In considering a proposed action, the agency decision maker must decide whether to approve, disapprove, or approve it with conditions or modifications pursuant to its specific authorities. Analyzing alternatives that have no means of implementations informs none of these choices before the decision maker. If after reviewing the record and determining an action’s effects to be unacceptable, the decision maker may choose the no action alternative. Similarly, alternatives that are impossible to implement because of a lack of funding, or that is not technically feasible, are nothing more than strawman alternatives and resources devoted to their analysis are wasted, as they do not present a reasonable choice to the decision maker.

¹⁰⁵ *Supra* note 16.

Comment: Commenters stated that CEQ provides no information as to how agencies should decide on the range of alternatives that are technically or economically feasible. Commenters requested that CEQ address this issue, noting that project sponsors may claim that only the proposed action is economically feasible, yet still make their projects economically viable even if the agency requires the implementation of an alternative to the sponsor's preferred action.

CEQ Response: For an alternative to be technically feasible, its implementation must be possible based on existing technology, knowledge, or science at the time the proposal is submitted. Alternatively, if a project sponsor is developing new technologies in conjunction with a proposal, these technologies must be reasonably certain to be developed within the time frame the proposal is to be implemented. Agencies should not engage in speculation to predict the future of technological advances as they relate to the proposals before them.

Similarly, for an alternative to be economically feasible, the agency must consider a variety of factors. For example where an agency is sponsoring a proposal, it must consider whether funding or grants have been appropriated or are reasonably certain to be available at the time the proposal is to move forward, and whether they are sufficient to support the alternative in question. Where a project is developed by a private sponsor, alternatives that result in changes to project design, technology, or location must not render the project economically non-viable. In these cases, agencies should work closely with sponsors, particularly during scoping, and the early coordination stages, to develop and understand the project sponsor's objective and to carefully consider alternatives with respect to economic feasibility.

Comment: One commenter stated that the definition of reasonable alternatives should not include the requirement to “meet the goals of the applicant,” because this requirement would allow agencies to inappropriately narrow the range of alternatives to only the proposed action.

CEQ Response: Ensuring that reasonable alternatives meet the goals of an applicant is consistent with the changes made to § 1502.13 regarding purpose and need. Requiring alternatives to meet the goals of an applicant will allow agencies to appropriately focus analysis on reasonable and logical alternatives that fall within their jurisdiction. In situations where a private project sponsor is proposing an action, there would be no environmental review but for the proposal in the first place. It is therefore appropriate for agencies responding to requests for permits or authorizations to ensure that the alternatives under consideration reasonably meet the objective of the applicant instead of some other objective designed by the agency. Agencies should coordinate with applicants in the earliest stages of a proposal to ensure that a project objective is defined by an appropriate rule of reason, and should not be unduly narrow such that it would bias conclusions toward the no-action alternative. In short, agencies should conduct an objective inquiry.

Comment: Commenters questioned how agencies would weigh economic feasibility and environmental protection, expressing concern that there would be fewer environmental safeguards for alternatives with greater economic feasibility.

CEQ Response: An agency need not categorize alternatives in terms of technical or economic feasibility or rank the alternatives by degrees of feasibility. In considering the economics of alternatives, the agency must only determine whether an alternative is economically feasible. If an alternative is not economically feasible, it may be discounted from further analysis. For those alternatives that are economically feasible, and meet other criteria the

agency has deemed pertinent, an agency may use its discretion and technical expertise in analyzing the environmental effects of such alternatives consistent with § 1502.14.

Comment: Commenters argued that requiring alternatives to be technically and economically feasible will preclude an EIS from considering technical solutions as they become available. Commenters also noted that, the economics of a project may change within the time period of the EIS.

CEQ Response: CEQ recognizes that technical and economic feasibility may change during the up to two-year process of preparing an EIS. However, the goal of including such information must be balanced against the need to improve regulatory certainty in the NEPA process. The public comment period on the draft EIS is an important step in the process for new information, including information on technical and economic feasibility, to be incorporated into the analysis of proposed alternatives. The best approach in balancing the goals of using existing data and a predictable process is to consider technical and economic feasibility in developing alternatives based on information submitted in response to the NOI, with the flexibility to incorporate new information submitted through public comments on the draft EIS. Agencies should not engage in speculation on the future of technological advancements in a given field.

Comment: Commenters stated that there should be a less environmentally significant impact alternative, the no action alternative, an environmentally superior alternative, and a change of location alternative.

CEQ Response: Proposals may have numerous alternatives and such characterization may not be possible. Further, not every proposal may lend itself to alternative locations (*i.e.*, such as renovating a historic, Federal building), or a clearly environmentally superior option (e.g., without triggering trade-offs among impacted natural resources). Agencies must only

identify their preferred alternative, and otherwise may use their discretion to categorize other alternatives as appears prudent in light of the facts.

Comment: Commenters recommended that the definition of “reasonable alternatives” § 1508.1(z) more explicitly exclude consideration of alternatives outside the jurisdiction of an agency.

CEQ Response: CEQ declines to make the requested edit because the NPRM proposed to eliminate the requirement for agencies to evaluate alternatives outside of their jurisdiction. *See* 40 CFR 1502.14(c). The definition of reasonable alternatives in the final rule does not include alternatives outside of an agency’s jurisdiction.

17. Reasonably Foreseeable (§ 1508.1(aa))

Comment: Commenters supported the new definition of reasonably foreseeable, stating that the term previously lacked a definition, and that this reform would help to focus the analysis by eliminating consideration of strictly speculative effects.

CEQ Response: CEQ acknowledges the support for the new definition, which is included in the final rule as proposed.

Comment: Commenters objected to the definition of reasonably foreseeable, stating that it is inconsistent with NEPA’s statutory requirements. Commenters stated that tort law is a system of determining liability for harm that has already occurred. By contrast, the fundamental purpose of NEPA and the NEPA process is to predict and prevent harm. Given those differences, NEPA requires a broader analysis of potential impacts than tort law’s post-event analysis of causation. Imposing tort concepts into NEPA law narrows the agencies’ responsibilities and ultimately is likely to lead to the harm to the environment.

CEQ Response: Applying tort law concepts to NEPA is not novel. The Supreme Court applied tort law concepts in its holdings in *Metropolitan Edison Co.*, 460 U.S. 766 and *Public Citizen*, 541 U.S. 752.

Comment: Commenters stated that the proposed rule sows confusion and fails to discuss what qualifies as a “reasonably foreseeable” effect. Other commenters supported using the term as applied but requested that it be further clarified because it may produce determinations that are inconsistent or have the appearance of being too subjective. Some commenters recommended specific changes or clarifications, including defining “prudence.”

CEQ Response: CEQ declines to make further changes to the definition of reasonably foreseeable. 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.

The concept of a person of ordinary prudence is well-established in law and, with respect to NEPA, applied based on the particular facts and circumstances of a proposed action. *See United States v. Boyle*, 469 U.S. 241, 243 n.1 (1985) (“A cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly negatives willful neglect will be accepted as reasonable.”) (referring to Internal Revenue Manual) (citation omitted); *Watt. v. W. Nuclear, Inc.*, 462 U.S. 36, 58 n.18 (1983) (“a [mineral] deposit is locatable if it is ‘of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.’ *Castle v. Womble*, 19 Pub. Lands Dec. 455, 457 (1894).”). 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 are required to forecast to the extent they can do so either quantitatively or qualitatively within a reasonable range.

Comment: Commenters stated that in the context of tort law the appropriate definition for reasonably foreseeable would specifically reference a “reasonably prudent decision maker” and not an “ordinary person.” In the context of NEPA compliance, the decision maker is an actor with a high level of skills, which would be taken into account when determining whether the duty to discuss impacts is present. Other commenters stated that utilizing an “ordinary person standard” may be too vague for highly specialized industries and would likely lead to increased litigation risk and requested more deference to agency expertise. Some commenters felt that, where knowledge is specialized (e.g., Tribal and traditional knowledge), the definition allowed Federal agencies to dismiss it from consideration.

CEQ Response: CEQ acknowledges that prior courts have described the duty of the agency as it pertains to NEPA as determined from the perspective of “a person of ordinary prudence in the position of the decision maker at the time the decision is made.” *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985). However, implicit in the application of this final rule is that agencies would apply their expertise and that decisions would be made in this context. For that reason, it is not necessary to create a specialized person standard. CEQ notes as well that in the modern administrative state, agency decision makers have the ability to consult with experts within their agencies. Further, the final rule directs lead agencies to consult or seek comment from other agencies with special expertise. *See* §§ 1501.8(a) and 1503.1(a)(1).

Comment: A commenter requested that CEQ incorporate the concept of the precautionary principle into the definition of reasonably foreseeable as a means of handling reasonably foreseeable but uncertain effects.

CEQ Response: CEQ declines to make the requested change to the final rule. There is no legal basis for ascribing a precautionary principle to a person of ordinary prudence. Further, NEPA is a procedural statute bound by the “rule of reason”; the weighing of the risk of adverse environmental impacts is governed by the applicable legal requirements of a particular proposed action.

Comment: Some commenters requested that CEQ set a limit for what is reasonably foreseeable based on the quality of the data, while others suggested setting a specific time period (e.g., 40 years) for determining what is reasonably foreseeable.

CEQ Response: CEQ declines to make the requested change. As discussed elsewhere, the application of reasonably foreseeable is influenced by the context of the proposed action. Certain actions may have reasonably foreseeable impacts that are more distant in time (e.g., disposal of radioactive waste), and therefore would exceed the time limit recommended by the commenter.

Comment: Commenters requested that CEQ incorporate the concept of “reasonable forecasting” and “speculation” into the proposed definition of reasonably foreseeable. Specifically, commenters requested that CEQ add, “Unreasonable forecasting and speculation is not required.” Other commenters recommended adding “scientifically proven or documented causal relationships.”

CEQ Response: CEQ declines to make the requested revisions because they are confusing and potentially inconsistent with the proposed definition. In stating that “unreasonable forecasting and speculation is not required,” the definition could be interpreted to imply that there may be circumstances where unreasonable forecasting and speculation is appropriate. As

noted above, agencies' specialized expertise should inform their determination as to what is "reasonably foreseeable."

Comment: A commenter recommended adding a definition of "reasonably foreseeable action" as an action that: (i) an entity proposes to take within 1 year of the proposed action's completion date; (ii) has been developed to a level that would enable a reviewing agency to meaningfully describe the action's environmental effects; and (iii) would likely affect the same environmental resources the proposed action would affect. The commenter further recommended that the definition state that typically, a reasonably foreseeable action is the subject of a NEPA document, or a Federal, State, local or Tribal government permit application.

CEQ Response: CEQ declines to make the recommended changes, in part because actions that are reasonably foreseeable may extend beyond one year into the future. Under the final rule, agencies have the flexibility to determine actions that are reasonably foreseeable based on the specific circumstances of the proposed action at issue.

18. Referring Agency (§ 1508.1(bb))

Comment: Some commenters recommended that CEQ expand the definition of "referring agency" to include State, Tribal, and local governments. Some commenters stated that agencies other than the EPA should not be allowed to refer matters to CEQ.

CEQ Response: The final rule does not allow State, Tribal, or local governments to submit pre-decisional referrals to CEQ because there is no statutory basis for doing so. The pre-decisional referral authority is rooted in section 309 of the Clean Air Act, 42 U.S.C. 7609, which is directed to the EPA. Other Federal agencies may also submit pre-decisional referrals to CEQ consistent with section 102(2) of NEPA, 42 U.S.C. 4332, which requires the responsible Federal official to consult with and obtain comments from any Federal agency which has jurisdiction by

law or special expertise with respect to any environmental impact involved. States, Tribes, and local governments may continue to submit their views to CEQ as interested agencies or persons for consideration outside of the pre-decisional referral process.

Comment: Some commenters recommended that CEQ clarify the definition of “referring agency” to also include “or quality of the human environment.”

CEQ Response: CEQ declines to adopt this recommendation in the final rule because the phrase is superfluous. The language “public health or welfare or environmental quality” mirrors the language in section 309 of the Clean Air Act, 42 U.S.C. 7609, and sufficiently covers the bases for a pre-decisional referral to CEQ.

19. Special Expertise (§ 1508.1(ee))

Comment: Some commenters objected to the definition for the term “special expertise.” Other commenters recommended adding “local government” and “economic and social” statutory responsibility.

CEQ Response: CEQ declines to make the requested changes because the definition of “special expertise” in 40 CFR 1508.26 has not been a source of confusion for Federal agencies. Further, the changes recommended by the commenters are not necessary to encompass the expertise of local governments and matters pertaining to economic and social issues.

L. Comments Regarding CEQ Guidance Documents

Comment: Commenters expressed support for provisions to supersede and withdraw previous CEQ NEPA guidance, stating that the “layer cake” of guidance has grown larger than the statute itself to become confusing, unworkable, and inconsistent between Federal agencies.

CEQ Response: In the proposed rule, CEQ stated that if adopted as a final rule, it would supersede any previous CEQ NEPA guidance. As discussed in sections II.H.7 and II.K of the

final rule, the final rule supersedes previous CEQ guidance and CEQ intends to publish a separate notice in the *Federal Register* listing guidance it is withdrawing. CEQ will issue new guidance, as needed, consistent with the final rule and presidential directives. The final rule also provides that, “[t]o the extent that Council guidance issued prior to [the effective date of the final rule] is in conflict with the [final rule], the provisions of [the final rule] apply.” § 1506.7(b).

Comment: Commenters objected to the withdrawal of CEQ’s guidance documents. Specifically, commenters stated that eliminating all the guidance in one fell swoop, as proposed, would create uncertainty through inefficient implementation across agencies and extensive, costly, and time-consuming litigation. Some commenters recommended that CEQ issue any revised guidance documents or new guidance before agencies revise their NEPA procedures. Other commenters expressed concern with how long it would take to issue new guidance and whether or not CEQ has the staff and capability to do so in a timely manner.

CEQ Response: Since issuing its regulations in 1978, CEQ has issued over 30 separate guidance documents to assist agencies in complying with NEPA. While CEQ has sought to provide clarity and direction related to implementation of the regulations and the Act through the issuance of guidance, agencies continue to face implementation challenges. Further, the documentation and timelines for completing environmental reviews can be very lengthy, and the process can be complex and costly.

In the proposed rule, CEQ stated that if adopted as a final rule, it would supersede any previous CEQ NEPA guidance. As discussed in sections II.H.7 and II.K of the final rule, the final rule supersedes previous CEQ guidance and CEQ intends to publish a separate notice in the *Federal Register* listing guidance it is withdrawing. CEQ will issue new guidance, as needed, consistent with the final rule and presidential directives. The final rule also provides that, “[t]o

the extent that Council guidance issued prior to [the effective date of the final rule] is in conflict with the [final rule], the provisions of [the final rule] apply.” § 1506.7(b). Section 1507.3(a) of the final rule requires agencies to develop or revise proposed agency NEPA procedures to implement the rule no later than one year after the publication of the final rule or nine months after the establishment of an agency.

Comment: Commenters recommended that if CEQ promulgated a final rule, CEQ retain some or all of its existing guidance for reference until it can issue updated guidance. Commenters proposed that CEQ retain its Mitigation Guidance and Cumulative Effects Guidance until CEQ establishes new guidance.

CEQ Response: It would be confusing and inefficient for agencies to continue to follow guidance that is inconsistent with the final rule based on a different and superseded version of the NEPA regulations. As discussed in sections II.H.7 and II.K of the final rule, the final rule supersedes previous CEQ guidance and CEQ intends to publish a separate notice in the *Federal Register* listing guidance it is withdrawing. CEQ will issue new guidance, as needed, consistent with the final rule and presidential directives. The final rule also provides that, “[t]o the extent that Council guidance issued prior to [the effective date of the final rule] is in conflict with the [final rule], the provisions of [the final rule] apply.” § 1506.7(b).

Comment: Commenters questioned whether CEQ would revise its Forty Questions, *supra* note 47, noting that scores of NEPA professionals and practitioners rely on it. Other commenters asked what would become of the Forty Questions document generally.

CEQ Response: As discussed in sections II.H.7 and II.K of the final rule, the final rule supersedes previous CEQ guidance and CEQ intends to publish a separate notice in the *Federal Register* listing guidance it is withdrawing. CEQ will issue new guidance, as needed, consistent

with the final rule and presidential directives. The final rule also provides that, “[t]o the extent that Council guidance issued prior to [the effective date of the final rule] is in conflict with the [final rule], the provisions of the [final rule] apply.” § 1506.7(b).

Comment: Commenters recommended that existing guidance and agency procedures remain in effect for a reasonable length of time to provide agencies time to conform their own guidance and procedures to the new rule.

CEQ Response: CEQ has addressed the withdrawal of existing guidance in previous responses to comments. The final rule does not have the effect of withdrawing agency procedures. Rather, to facilitate needed projects and improvements, agencies must expeditiously review and revise their procedures to conform to the changes made in the final rule.

Section 1507.3(a) provides agencies the later of one year after publication of the final rule or nine months after the establishment of an agency to develop or revise proposed agency NEPA procedures to implement the final rule. This is similar to the amount of time provided under the 1978 regulations. Additionally, because agency NEPA procedures cannot impose additional procedures or requirements beyond those set forth in the CEQ regulations, it may facilitate a timely revision.

Comment: Commenters expressed their concern with CEQ withdrawing its Environmental Justice (EJ) Guidance and believe that the lack of guidance will create confusion within agencies about whether or how to disclose environmental justice impacts. Commenters stated that the proposed revisions do not propose to enact any directives concerning environmental justice issues and will likely result in worse environmental justice outcomes should CEQ rescind any guidance assisting agencies with understanding how to disclose

environmental justice impacts. A commenter stated that, instead of undermining NEPA's analysis of environmental justice, CEQ should codify its environmental justice guidance.

CEQ Response: As discussed in sections II.H.7 and II.K of the final rule, the final rule supersedes previous CEQ guidance and CEQ intends to publish a separate notice in the *Federal Register* listing guidance it is withdrawing. CEQ will issue new guidance, as needed, consistent with the final rule and presidential directives. If the EJ Guidance is withdrawn, however, it will not create confusion within the agencies or reduce the quality of analysis under NEPA. Rather, the final rule continues to ensure review of the major Federal actions that significantly affect the human environment and includes several improvements to facilitate public involvement. *See, e.g.,* §§ 1501.9, 1503.1, 1503.3, and 1506.6. Further, the final rule continues to require analysis of significant ecological, aesthetic, historic, cultural, economic, social, and health effects.

Comment: Commenters stated that the elimination of CEQ's Cumulative Effects Guidance is not justified and contrary to years of practice that have been upheld by Federal courts.

CEQ Response: As discussed in sections II.H.7 and II.K of the final rule, the final rule supersedes previous CEQ guidance and CEQ intends to publish a separate notice in the *Federal Register* listing guidance it is withdrawing. CEQ will issue new guidance, as needed, consistent with the final rule and presidential directives. It is necessary to withdraw guidance documents that are superseded by the final rule to reduce confusion that could be generated by having guidance documents in effect that conflict with the provisions of the final rule. As discussed elsewhere, the final rule eliminates the definition of cumulative impact. Agencies are instead required to analyze all effects that are reasonably foreseeable and that have a reasonably close causal relationship to the proposed action, as per § 1508.1(g). The final rule also provides that,

“[t]o the extent that Council guidance issued prior to [the effective date of the final rule] is in conflict with the [final rule], the provisions of [the final rule] apply.” § 1506.7(b).

Comment: A commenter expressed concern that withdrawing CEQ’s guidance on biodiversity will have an adverse impact on species and habitats.

CEQ Response: CEQ will be withdrawing guidance documents that are no longer necessary, and are superseded by the final rule. It is necessary to withdraw the majority of CEQ’s guidance documents to reduce confusion that could be generated by having guidance documents in effect that conflict with the provisions of the final rule. As described elsewhere, the final rule continues to fully consider ecological impacts including impacts to species and their habitats, provided they satisfy the definition of “effects.” *See* §§ 1501.3(b)(1) and 1508.1(g). Furthermore, nothing in the final rule alters substantive environmental protections afforded species and their habitats by such laws as the ESA.

Comment: Commenters expressed their support for withdrawing all current CEQ guidance and requested that the public be consulted on what guidance should be reissued or revised. Some commenters also recommended that any new guidance CEQ issues should be subject to public review and comment. Some commenters urged that, after final adoption of these revised regulations, CEQ prepare a handbook providing clear guidance to all agencies regarding appropriate implementation.

CEQ Response: CEQ may issue new guidance, as needed, consistent with presidential directives, including E.O. 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents” which requires a 30–day period of notice and comment for “significant

guidance documents.”¹⁰⁶ The final rule also provides that “[t]o the extent that Council guidance issued prior to [the effective date of the final rule] is in conflict with the [final rule], the provisions of [the final rule] apply.” § 1506.7(b).

Comment: A commenter expressed concern with the withdrawal of CEQ’s CE Guidance.

CEQ Response: As discussed in sections II.H.7 and II.K of the final rule, the final rule supersedes previous CEQ guidance and CEQ intends to publish a separate notice in the *Federal Register* listing guidance it is withdrawing. CEQ will issue new guidance, as needed, consistent with the final rule and presidential directives. The final rule also provides that, “[t]o the extent that Council guidance issued prior to [the effective date of the final rule] is in conflict with the [final rule], the provisions of [the final rule] apply.” § 1506.7(b).

Comment: One commenter expressed concern with withdrawing all of the guidance and agencies having to train their staff on the new rules. This commenter also asked what resources the government would provide to offset this unanticipated budgetary cost.

CEQ Response: CEQ acknowledges that agencies and NEPA practitioners will experience near-term administrative costs to train staff on the final rule. CEQ believes that these near-term costs will be fully offset by an overall lowering of administrative costs as a result of the changes made in the final rule. Administration budget priorities and congressional budget decision making are beyond the scope of this final rule.

Comment: One commenter expressed their concern that the withdrawal of CEQ’s Citizen’s Guide would deliberately obstruct the public from providing input.

¹⁰⁶ 84 FR 55235, 55237 (Oct. 9, 2019).

CEQ Response: CEQ' Citizen's Guide is not an official guidance document. CEQ plans to revise the document to conform to the final rule. CEQ notes that the final rule enhances public involvement in several ways, and these improvements would be incorporated into the revised guide. *See, e.g.,* §§ 1501.9, 1503.1, 1503.3, and 1506.6.

M. Comments Outside the Scope of the Rulemaking

Comment: Some commenters raised questions about how previously completed NEPA analyses for specific actions would be conducted differently under the updated CEQ NEPA regulations.

CEQ Response: CEQ will not speculate on what, if any, different outcomes would have resulted from agencies applying these updated regulations to the facts of previously completed NEPA analyses. Such analyses were conducted by agencies using their experience and expertise and involve particular facts and circumstances. In the final rule and this response to comments, CEQ has provided a detailed discussion of the changes to the prior regulations.

Comment: Commenters requested that CEQ work with Federal agencies and Congress to modernize several environmental laws including the ESA, Clean Water Act, and Clean Air Act, suggesting that these laws are the source of delays during NEPA reviews. A commenter provided recommendations to reform the Marine Mammal Protection Act to reduce burdens.

CEQ Response: CEQ acknowledges the comments, which are outside the scope of this rulemaking. NEPA is a procedural statute and is not an authority through which implementation of other environmental laws can be modified.

Comment: Commenters referenced several provisions under the 1978 regulations that CEQ should modify to increase the analysis of immigration activities. Specifically, commenters requested that CEQ modify § 1502.4 to specify that Federal actions that result in entry and

settlement of foreign nationals in the United States are per se “major Federal actions” subject to programmatic review; amend the definition of “effects” in § 1508.1(g) to include entry and settlement of foreign nationals into the United States; amend the definition of “significantly” in 40 CFR 1508.27 to include actions that result in entry and settlement of foreign nationals in the United States; and amend the tiering requirement in 40 CFR 1508.28 to include entry and settlement of foreign nationals in the United States as requiring a programmatic EIS.

Additionally, other commenters recommended that CEQ use NEPA to pressure government agencies to set a sustainable numbers for immigration as well as denying all Federal funds to any State that becomes a “sanctuary” State.

CEQ Response: NEPA is a procedural statute and does not prescribe a specialized process or outcome based on the specific activity that is implicated. For this reason, CEQ declines to make further changes to address the commenters’ concerns.

Comment: Commenters stated that Congress should undertake an initiative to amend NEPA, which would allow for fuller consideration of several issues including changing the definition of environmental “effects” that agencies need to consider and would exclude effects that are remote in time, geographically remote, or the product of a lengthy causal chain. Commenters further stated that such a revision should be considered further in light of the compelling evidence of climate change. Commenters also stated that while remote effects should probably not be considered in most small or local projects, perhaps they should be considered for major ones. Another commenter expressed support for the enactment of legislation to reduce the statute of limitations for NEPA actions from six years to two years.

CEQ Response: Recommendations to amend NEPA are outside of the scope of this rulemaking. The final rule provides that “[e]ffects should generally not be considered if they are

remote in time, geographically remote, or the product of a lengthy causal chain.” § 1508.1(g)(2). The remoteness analysis does not change based on the size of the project and whether it is only local in scope.

Comment: In reference to § 1506.1 commenters stated that, before a NEPA document in Baker County is produced, the agency should read the Baker County Natural Resources Plan. If it is a mining project, the section on mining is quite complete.

CEQ Response: CEQ acknowledges the comment, which is outside of the scope of this rulemaking.

Comment: Commenters expressed concerns about various Federal agencies and their management of certain activities under NEPA. Some commenters stated that Federal agencies have allowed projects to proceed without performing adequate environmental review or while environmental reviews are pending. Examples cited include the wall being constructed along sections of the United States and Mexico border, exemptions for gathering lines for energy-related projects, and the Piñon Canyon Maneuver Site.

CEQ Response: These comments pertain to past and ongoing reviews of specific Federal actions and therefore are outside the scope of this rulemaking. Elsewhere in this Final Rule Response to Comments document, CEQ has discussed certain statutory exemptions from NEPA, however, and incorporates those responses here by reference.

Comment: Commenters expressed support for making conforming changes to agency procedures by BLM and USFS within 12 months of adoption of the final rulemaking, and requested to participate in the development of agency procedures.

CEQ Response: CEQ notes that updates to agency NEPA procedures are subject to public review and comment under § 1507.3(b). When BLM and USFS revise their NEPA procedures, that process will entail notice and comment rulemaking pursuant to the APA.

Comment: Commenters stated that CEQ should compile research databases and develop procedures to guide analysis of the most pervasive environmental effects such as climate change and loss of biodiversity.

CEQ Response: CEQ acknowledges the comment. CEQ may consider compiling additional research relevant to the implementation of NEPA separate from this rulemaking.

Comment: Commenters requested that CEQ provide a detailed discussion of the proposed changes to CEQ's regulations on hunting, trapping, and fishing on Federal lands.

CEQ Response: The final rule, including this Final Rule Response to Comments, explains in considerable detail the changes to the NEPA process and implications for the analysis of environmental impacts. Further detail will be provided in the NEPA procedures for those agencies with regulatory authority over hunting, trapping, and fishing.

Comment: A commenter expressed support for integrating into the final rule the changes made to the treatment of Federal lands by the John D. Dingell, Jr. Conservation, Management and Recreation Act, Public Law 116-9 (Dingell Act).

CEQ Response: CEQ acknowledges the commenter's support but NEPA is a procedural statute and does not mandate substantive outcomes such as those authorized pursuant to the Dingell Act.

Comment: Commenters recommended that CEQ re-evaluate the changes in the proposed rule after five years to determine if the changes have helped or hindered the NEPA process. Commenters recommended that CEQ establish metrics that can be used to measure

improvement. Commenters stated the data should be comparable across time and agencies and made publicly available. Recommended metrics included the number and types of NEPA reviews, cost, completion times and document length. Further, commenters suggested CEQ should work with the EPA to expand the EIS database to include EAs. Expanding the database could aid long-term analysis of trends.

CEQ Response: CEQ acknowledges that a retrospective review of the final rule would be beneficial. In § 1502.11(g), the final rule directs agencies to publish the estimated total cost of preparing an EIS, and includes time and page limits that could also be used in future evaluations of the NEPA process. In the final rule, CEQ also includes a new section (§ 1507.4) directing agencies to make available through agency websites, or by other means, environmental documents, relevant notices, and other relevant information for use by agencies, applicants and interested persons.

Comment: A commenter recommended that CEQ conduct a study to evaluate the interaction between NEPA and other environmental laws and how to eliminate or minimize this duplication. The commenter also recommended that CEQ take steps to become a clearinghouse for monitoring court decisions that affect procedural aspects of preparing NEPA documents. Another recommendation was for CEQ to study the interaction between NEPA and similar State laws. CEQ should take additional steps to reduce costs and clarify its regulations based on the results of the studies.

CEQ Response: CEQ acknowledges the interest in studying and further coordinating authorities across Federal and State environmental laws. The final rule includes numerous changes to improve coordination and reduce duplication among Federal, State, Tribal, and local laws.

Comment: A commenter noted that adaptive management may be well suited for decisions that occur at a large enough scale that flexible future management is possible. The commenter recommended that CEQ allow for an adaptive management protocol, noting the potential for streamlining the up-front assessment process in exchange for the agency's commitment to establish and monitor for specific metrics sufficient to allow the agency to learn from the implementation of the action and adapt the decision to reflect what is learned.

CEQ Response: CEQ acknowledges the comment and observes that certain proposed actions may be well-suited for adaptive management. The long-standing practice of tiering enables agencies to streamline the review of certain types of similar actions, and would enable some degree of adaptive management across the similar actions. Other aspects of adaptive management are more difficult to implement because of the need for regulatory certainty and a predictable process.

Comment: Commenters appreciated the use of a document with tracked changes, which makes reviewing and understanding the proposed changes much easier than prior rulemakings. Commenters recommended the continued use of the track change approach for all documents amended at the Federal level.

CEQ Response: CEQ acknowledges the comments.

Comment: A commenter recommended that CEQ encourage contemporaneous and efficient preparation and maintenance of administrative records during the NEPA process and associated decision-making for covered actions. The commenter stated that Federal agencies scramble to compile an administrative record only at the very end of the process or in direct response to oversight or litigation, rather than maintaining a "decision file" throughout the NEPA process. This reactive approach can result in delayed final decisions, inefficient deployment of

agency resources, errors or omissions in the administrative record, and longer litigation. While some agencies have issued guidance on maintaining a decision file and preparing an administrative record, such guidance is limited, dated, non-uniform, non-binding, and most salient once litigation already exists. If CEQ is disinclined to prescribe uniform procedures for all Federal agencies, CEQ should consider including, at a minimum, express direction for Federal agencies to: (1) actively maintain a project file during the NEPA process, rather than only afterward; (2) memorialize key steps and decision points (e.g., in meeting minutes or a memorandum to file); and (3) work with project proponents and cooperating agencies to ensure the completeness of the record.

CEQ Response: CEQ supports the practices recommended by the commenter. Most agencies have procedures for maintaining administrative records under separate authorities. CEQ declines to establish additional procedures in the final rule.

Comment: A commenter recommended that the regulations recognize advances in information technology and the potential to address workflows in the NEPA process using tools such as sentiment analysis, text analytics, location intelligence, and cognitive search. These tools allow agencies to perform tasks they were unable to do efficiently beforehand, such as comment analysis from a wide variety of stakeholders, formulation of alternatives, and monitoring of results.

CEQ Response: CEQ strongly supports the use of information technology, where practicable, to advance the purposes of NEPA. The final rule in § 1506.6 enhances public involvement by explicitly allowing agencies to use electronic communication to satisfy certain requirements. In § 1502.23, it also allows agencies to make use of any reliable data sources, such as remotely gathered information or statistical models.

Comment: A commenter stated that delays in the NEPA process are often related to data and that improvements in this area would have multiple benefits. The proposed rule failed to grasp the significance of “data democratization,” as exemplified by citizen science. The commenter stated that agencies should create more efficient methods to import and leverage all external information, including during the NEPA process.

CEQ Response: The final rule includes changes to §§ 1502.21 and 1502.23 concerning the use of information and research, and encourages the use of any reliable data sources in addition to continuing the long-standing requirement to ensure the scientific integrity of environmental documents.

Comment: A commenter recommended that CEQ direct agencies to evaluate the full costs of a proposed action including the diminution of ecosystem services and costs saved as the result of the NEPA process.

CEQ Response: This recommended change is outside the scope of the rulemaking.

Comment: Commenters recommended that CEQ require all baseline assessments of the affected environment to consider the success and status of compensatory mitigation commitments and projects. One commenter expressed interest in the automated tracking of environmental impacts that incorporates modern geospatial technologies, with information that is discoverable and accessible to all stakeholders.

CEQ Response: Tracking the effectiveness of past mitigation projects and a greater use of technology can assist agencies in understanding environmental impacts. However, the proposed revision is beyond the scope of this rulemaking. Where there is available information on the effectiveness of mitigation projects relevant to the proposed action, the agency may consider such information in the analysis of reasonable alternatives.

N. Comments Regarding the Rulemaking Process

Comment: A commenter described the process for drafting the 1978 regulations and the praise received by CEQ at that time from participating organizations. For CEQ's proposed changes, however, the commenter stated that CEQ only went through the motions and had no aim, let alone determination, to secure the buy-in of all affected elements of American society. The commenter stated there was universal opposition of the environmental community and other citizen groups to the proposed rule. The commenter stated that CEQ only went through pro forma steps of listening and did not hear and act on what has been heard. The commenter stated that CEQ has contaminated the entire process.

CEQ Response: The process in developing the final rule was not pro forma and involved many more people than the 1978 rulemaking. For the 1978 rulemaking, CEQ sought the views of 12,000 private organizations, individuals, State and local agencies, and Federal agencies. In June 1977, CEQ held 3 days of public hearings and heard from 50 witnesses.¹⁰⁷ Following the hearings, CEQ received 300 completed questionnaires from participating Federal agencies, State governments, and hearing participants. The proposed rule was published in June 1978 with an approximately 60-day comment period, and CEQ received almost 500 written comments.¹⁰⁸

For this rulemaking, CEQ conducted a similar but modernized process that reached a far larger number of interested parties and organizations. In June 2018, CEQ issued an ANPRM requesting comments on potential updates to its NEPA regulations. CEQ received over 12,500 comments in response to the ANPRM, and those comments informed the development of CEQ's

¹⁰⁷ NEPA, EIS Reform, Notice of Request for Views, 42 FR 40756 (Aug. 11, 1977).

¹⁰⁸ 43 FR at 55980.

proposed rule. Through the benefit of modern technologies, CEQ was able to reach many more people than in 1978. The NPRM was informed by the input received on the ANPRM, and CEQ's experience overseeing implementation of NEPA and working with agencies for more than 40 years on implementing the regulations. CEQ published its proposed rule in the *Federal Register* on January 10, 2020 and provided for a 60-day public comment period. CEQ circulated the proposed rule and invitations to comment to all federally recognized Tribes, and over 400 interested parties and groups, including States, localities, environmental organizations, trade associations, NEPA practitioners, and other members of the public representing a broad range of diverse views. CEQ held two public hearings, one in Denver, Colorado, and one in Washington, DC, each complete with morning, afternoon, and evening sessions. Approximately 230 individuals representing a wide range of views spoke at the hearings and additional participants submitted written comments. In addition to the two public hearings, CEQ also conducted additional public outreach including meetings with Tribal representatives in Denver, Colorado, Anchorage, Alaska, and Washington, DC and a meeting with the environmental justice community as part of a National Environmental Justice Advisory Council meeting in Jacksonville, Florida.

In addition, CEQ made information to aid the public's review available on its websites at www.whitehouse.gov/ceq and www.nepa.gov, including a redline version of the proposed changes, a presentation on the proposed rule, and other background information. CEQ received over 1.1 million comments on the proposed rule. These comments have been analyzed and CEQ has responded to all substantive issues raised in the public comments. In contrast, the 1978 regulations had 11 pages of justification in the final rule. Further, CEQ has coordinated with all Federal agencies on both the proposed and final rule under E.O. 12866. The mere fact

commenters disagree with the changes in the final rule is not indicative that CEQ's process was not inclusive.

Comment: Commenters stated that the public process was undermined because CEQ has failed to respond to requests for information pursuant to FOIA. Commenters stated they were unable to submit fully informed comments.

CEQ Response: The APA requires CEQ to provide sufficient information in the NPRM to enable interested or affected parties to meaningfully comment on the proposed rule, and it has done so. *See, e.g., Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 921 F.3d 1102, 1115 (D.C. Cir. 2019) ("To meet the rulemaking requirements of section 553 of the APA, an agency must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."). CEQ provided sufficient factual detail and rationale in the proposed rule, and, in response to comments on the proposed rule, CEQ has provided additional clarifications and made changes to the final rule.

Comment: Commenters requested that CEQ work with environmental justice communities to host additional public hearings.

CEQ Response: CEQ circulated the proposal and invitations to comment to over 400 interested groups, including States, localities, environmental organizations, trade associations, NEPA practitioners, and other members of the public representing a broad range of diverse views. Additionally, CEQ staff briefed and received feedback from environmental justice groups at EPA's National Environmental Justice Advisory Council meeting in Jacksonville, Florida on February 27, 2020.

Comment: Commenters stated that CEQ did not explain how the comments received as part of the advance notice of proposed rulemaking were considered, and how and what

comments informed the rulemaking process and came to be part of the NPRM. Some commenters stated that CEQ should have conducted a more thorough review process and meaningfully engaged with the States, other stakeholders, and the public before issuing the NPRM for public comment.

CEQ Response: In response to the ANPRM, CEQ received over 12,500 comments, which are available for public review. Those comments helped inform CEQ's proposal and were discussed in more detail in section II of the final rule and in section II of the NPRM's preamble. While some commenters opposed any updates to the current regulations, other commenters urged CEQ to consider potential revisions. While the approaches to the update of the NEPA regulations varied, most of the substantive comments supported some degree of updating of the current regulations. Many noted that overly lengthy documents and the time required for the NEPA process remain real and legitimate concerns despite the NEPA regulations' explicit direction with respect to reducing paperwork and delays. In general, numerous commenters requested that CEQ consider revisions to modernize its regulations, reduce unnecessary burdens and costs, and make the NEPA process more efficient, effective, and timely. CEQ did not refer to the comments in general terms to favor any given perspective on NEPA reform.

Comment: Commenters were concerned with CEQ asserting that the rulemaking was responding to "commenter requests," yet did not reveal the name(s) of the commenters. They feel their comments were being ignored while project proponents and corporate comments were pursued.

CEQ Response: While some commenters opposed any updates to the current regulations, other commenters urged CEQ to consider potential revisions. While the approaches to the update of the NEPA regulations varied, most of the substantive comments supported some

degree of updating of the current regulations. Many noted that overly lengthy documents and the time required for the NEPA process remain real and legitimate concerns, despite the NEPA regulations' explicit direction with respect to reducing paperwork and delays. In general, numerous commenters requested that CEQ consider revisions to modernize its regulations, reduce unnecessary burdens and costs, and make the NEPA process more efficient, effective, and timely. CEQ referred to various commenters without more detail for the purpose of assembling similar comments together and responding to them as a group for efficiency reasons.

Comment: A commenter recommended that CEQ disregard identical comments that are the result of highly coordinated internet campaigns.

CEQ Response: CEQ has included all of the comments it has received in response to the NPRM in the docket on www.regulations.gov. CEQ has reviewed and responded to all substantive issues raised in the public comments. All substantive points made in public comments have either been responded to individually or, where substantive points were similar in theme, summarized and responded to as a group of comments.

Comment: Some commenters stated that, if CEQ makes further changes before the final rule, CEQ should provide a supplemental notice of proposed rulemaking and supplemental opportunity to comment.

CEQ Response: The changes in the final rule are a logical outgrowth of the proposed changes in the NPRM. The 60-day comment period on the NPRM has fully satisfied CEQ's obligations with respect to the APA.

Comment: Some commenters stated that CEQ should first mail printed letters to all U.S. citizens, not just to a few national or local media outlets, before announcing the changes in the final rule.

CEQ Response: CEQ declines to mail printed letters to all U.S. citizens, as it is not required by law. CEQ is publishing the final rule in the *Federal Register* and, with this response to comments, provides a comprehensive explanation of all changes to the 1978 regulations.

Comment: Some commenters stated that the proposed NEPA regulations should meet the requirements of the United Nations Declaration on the Rights of Indigenous Peoples Article 19 which requires States to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

CEQ Response: CEQ solicited and received extensive input in response to both the ANPRM and NPRM from Tribal governments and organizations and, as explained throughout the final rule, made numerous changes to expand coordination between Federal agencies and Tribes on major Federal actions.

Comment: Commenters stated that Tribes operate as sovereign nations outside of the United States and requested explicit consent or agreement from all federally recognized Tribes. Commenters stated that although the proposed changes have elevated Tribes to the status of cooperating agencies along with State and local governments, their unique status as sovereign nations requiring direct government-to-government consultation is not addressed and the proposed rule fails to reference Tribal sovereignty, self-determination, and Federal agency trust responsibility.

Commenters stated the changes should not be finalized until Tribes have been fully consulted on how the rule will impact Tribal sovereignty and until CEQ considers the full impact the changes will have on Tribal participation and the fiduciary duty to Tribes. Commenters

further stated concern that the proposed changes concerning Tribes may be in violation of existing treaty law and could have significant impacts to sovereign authority and treaty resources, and that CEQ is obligated by its general trust duty to refrain from any rulemaking that would harm or diminish the Tribe's treaty rights, interests, or resources.

CEQ Response: CEQ has expanded consideration of Tribal laws relative to the 1978 regulations by making explicit references throughout the final rule. The final rule recognizes the existing sovereign rights, interests, and expertise of Tribes in the provisions for Tribal participation in the NEPA process.

Further, the final rule continues to require consideration of the impacts to Tribal resources and trust assets, where applicable. *See* the response to comments on §§ 1501.3, 1501.8, 1502.16, and 1508.1(g). As explained elsewhere, CEQ has received meaningful and timely input from Tribal officials and is in full compliance with E.O. 13175.

O. Requests for Extension of the Comment Period

Comment: Commenters suggested that, given the scope and complexity of the regulatory changes, CEQ did not provide a robust opportunity for public comment and involvement, and the public input process did not match the scope of the rule. Commenters requested an extension of the comment period of varying lengths (e.g., 180 days) in order to more fully evaluate the impacts of the NPRM. Some commenters requested that CEQ cease all work on the proposal and instead engage with States and Tribes, including through government-to-government consultation, on processes to improve and streamline NEPA in a manner that does not put environmental protections or species at risk. A commenter requested that CEQ conduct meetings and hearings in each of the 10 EPA regions, while another commenter requested that CEQ hold a

series of listening sessions or workshops in 8 to 12 geographically distinct locations across the country.

CEQ Response: While not required, in June 2018, CEQ issued an ANPRM requesting comment on potential updates to its NEPA regulations. CEQ received 12,500 comments as part of the ANPRM, and those comments informed the development of CEQ’s proposed rule. Additionally, CEQ published its proposal in the *Federal Register* on January 10, 2020 and provided for a 60–day public comment period, which is consistent with the length of time provided by CEQ when developing the 1978 regulations. CEQ also held two public hearings, in Denver, Colorado and Washington, DC, each complete with morning, afternoon, and evening sessions. CEQ also circulated the proposal and invitations to comment to all federally recognized Tribes, and over 400 interested groups, including States, localities, environmental organizations, trade associations, NEPA practitioners, and other members of the public representing a broad range of diverse views. CEQ made information to aid the public’s review available on its websites at www.whitehouse.gov/ceq and www.nepa.gov, including a redline version of the proposed changes, a presentation on the proposed rule, and other background information.

Comment: Commenters stated that CEQ should extend the comment period by 60 days because it created an “alternative comment portal” that was not available to all members of the public.

CEQ Response: CEQ did not offer a private email address or alternative comment portal. The NPRM provided three methods for members of the public to provide comments on the proposed rule—online via www.regulations.gov, by fax, and by mail. The NPRM also included an email address as a contact for further information. While the NPRM did not list this email

address among the methods for the public to provide comments, CEQ received comments through the email address. CEQ has posted all comments received through the email address to the docket on www.regulations.gov.

Comment: Some commenters expressed their support for the 60–day comment period on the NPRM.

CEQ Response: CEQ acknowledges the support for CEQ’s process in developing the final rule.

Comment: To comply with the APA’s notice and comment requirements, commenters requested that CEQ extend the comment period by at least 90 days and provide additional public hearings.

CEQ Response: The APA does not specify a minimum time period for public comment on proposed rulemakings. Section 6(a) of E.O. 12866 provides that most rulemakings “should include a comment period of not less than 60 days.” The 60–day comment period on the NPRM has fully satisfied CEQ’s obligations with respect to the APA and E.O. 12866. *See also, Southern Environmental Law Center v. Council on Environmental Quality*, No. 3:18cv113 (W.D. Va. Mar. 19, 2020) (declining to extend the comment period).

Comment: Commenters stated that two public hearings were not sufficient and the speaking opportunities were severely limited at both public hearings and a 60–day comment period on highly technical changes was inadequate.

CEQ Response: To facilitate a professional, structured, and efficient hearing, CEQ made a number of tickets available for both speaking and listening for each of the morning, afternoon, and evening sessions at both public hearings. CEQ also worked with those wishing to speak and attend on a first-come, first serve basis the day of its hearings. CEQ also provided comment

cards, which were included as part of the docket, at each of the hearings for participants whom did not have an opportunity to speak. Additionally, CEQ encouraged interested organizations, individuals, State, Tribal, and local governments to comment via www.regulations.gov, by mail, or by fax. In comparison, in the development of the 1978 regulations, CEQ held three days of hearings during which it received testimony from 50 witnesses. CEQ received over 1.1 million public comments on the proposed rule, suggesting that CEQ's process was more than adequate.