

Comments on Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act Docket Number CEQ– 2019–0003

ENVIRONMENTAL AND ENERGY LAW SECTION

Environmental #2

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The New York State Bar Association (“NYSBA”) Environmental & Energy Law Section (“EELS”) submits these comments on the Council on Environmental Quality (“CEQ”) proposed rule, “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,” published in the January 10, 2020 Federal Register (Docket No. CEQ–2019–0003).¹ EELS members come from the private, public, and non-governmental sectors and represent a diverse array of clients.

EELS agrees that reviews under the National Environmental Policy Act (“NEPA”) should be effective and efficient. It supports updating CEQ’s implementing regulations to remove obsolete references, to explicitly provide for Tribal consultation and coordination, and to make other changes to modernize NEPA processes in ways that remain true to NEPA’s purposes.

However, EELS believes that many of the proposed changes to CEQ’s regulations are either contrary to NEPA’s fundamental purposes and intent, beyond CEQ’s statutory authority, or both. Such changes would not improve the quality of NEPA reviews. They would also likely generate significant regulatory uncertainty and lead to litigation that will lead to further project delays.

EELS’ comments focus on items of particular concern. However, given the extent of CEQ’s proposed changes and the limited time provided for comment, they are by no means exhaustive.

I. CEQ Has Proposed Changes to the Regulations that Are Inconsistent with NEPA’s Fundamental Principles

A. CEQ Cannot Change NEPA’s Applicability by Narrowing the Definition of “Human Environment” to Cover Only Effects on “Present and Future Generations of Americans”

CEQ proposes to amend 40 C.F.R. § 1508.1(l) to change the definition of “human environment” from “the natural and physical environment and the relationship of *people* with that environment” to “the natural and physical environment and the relationship of *present and future generations of Americans* with that environment.”

¹ 85 Fed. Reg. 1684 (Jan. 10, 2020).

This proposed change is contrary to law for at least two reasons. First, the proposed change rests on importing statutory text from a distinct, unrelated provision of NEPA, divorcing the phrase “present and future generations of Americans” from its context. Second, to the extent CEQ intends this definitional change to restrict NEPA’s application in cases involving transboundary environmental impacts, doing so would upend decades of administrative practice and run counter to long-settled precedent from federal courts across the country.

CEQ justifies this change by asserting that it conforms the definition of human environment to Section 101(a) of NEPA. But transplanting the phrase “present and future generations of Americans” into the definition of “human environment” divorces that phrase from its intended meaning. Section 101(a) of NEPA is simply a congressional statement of purpose. In relevant part, Section 101(a)

declares that it is the continuing policy of the Federal Government ... to use all practicable means and measures ... 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.²

Although statements of congressional purpose can guide courts in interpreting ambiguous provisions of a statute, it would be improper to import a phrase from Section 101 as a justification for narrowing NEPA’s broad remedial purpose.³ The reference to “present and future generations of Americans” in Section 101 has little to do with the term “human environment” in Section 102, especially since Section 102, in enumerating federal agencies’ responsibilities, specifically provides that agencies shall “recognize the worldwide and long-range character of environmental problems,”⁴ indicating that Congress intended “human environment” to have a more expansive definition.

Moreover, to the extent that CEQ intends this change to alter NEPA’s application to federal actions involving environmental effects that cross U.S. national boundaries, CEQ lacks the power to do so. Courts have long held that NEPA requires, at a minimum, consideration of “foreseeable transboundary effects resulting from a major federal action taken within the United States.”⁵ This interpretation is consistent with executive orders

² 42 U.S.C. § 4331(a).

³ *Cf.* *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 480 (7th Cir. 2016), *aff’d*, 138 S. Ct. 816 (2018) (noting that a “legislative statement of purpose” does not “provide[] statutory meaning independent of the operative statutory text”).

⁴ 42 U.S.C. § 4332(2)(E).

⁵ *Gov’t of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 51 (D.D.C. 2010); *Swinomish Tribal Cmty. v. Fed. Energy Regulatory Comm’n (“FERC”)*, 627 F.2d 499, 511–13 (D.C. Cir. 1980) (permitting Canadian intervenors to challenge the adequacy of an environmental impact statement (“EIS”) prepared by FERC and finding the agency took the requisite “hard look” at environmental impacts in Canada); *Wilderness Soc’y v. Morton*, 463 F.2d 1261, 1261 (D.C. Cir. 1972) (permitting Canadian citizen and environmental group to intervene to challenge trans-Alaska pipeline EIS and finding petitioners

dating back to the Carter Administration⁶ and longstanding guidance from CEQ.⁷ CEQ lacks the authority to promulgate regulations that overturn decisions of the federal courts that rest on the plain text of NEPA.⁸

To be sure, there is some disagreement among federal courts about whether NEPA requires consideration of transboundary environmental impacts where both the federal *action* takes place and its *effects* are felt entirely outside the territorial United States.⁹ But the definitional change proposed by CEQ appears to go much further by seeking to overturn the longstanding rule that agencies must consider transnational impacts of federal actions taken inside the United States in instances where there may be no effect on “present or future generations of Americans.” Moreover, a blanket rule barring consideration of transnational effects would also undermine courts’ longstanding practice of considering the presumption against extraterritoriality on a case-by-case basis.¹⁰

To the extent the phrase “present and future generations of Americans” attempts to limit NEPA’s application to non-citizens, this too would be unlawful.¹¹

B. Proposed Revisions to the Definition of “Effects” and Related Changes to the Concept of “Significance” Conflict with the Purpose and Intent of NEPA

CEQ proposes to revise the definition of “effects,” including by adding a sentence that provides that “[e]ffects should not be considered significant if they are remote in time” or “geographically remote.”¹² The proposed definition also would state that

raised issues involving environmental impacts in Canada that were not adequately presented by other parties in the case); *Backcountry Against Dumps v. Chu*, 215 F. Supp. 3d 966, 980 (S.D. Cal. 2015) (“[A]gencies must take into account the effects of actions within the United States, even when those effects are felt across sovereign borders.”); *Tourgeman v. Collins Fin. Servs., Inc.*, No. 08-CV-01392-JLS-NLS, 2009 WL 6527757, at *2 (S.D. Cal. Aug. 6, 2009) (“Even if the effect or harm of the conduct occurred outside the U.S., if the harm-causing conduct at issue occurred largely in the U.S., enforcement of the statute is not extraterritorial.”).

⁶ Exec. Order No. 12,114, 44 Fed. Reg. 18,722 (Mar. 21, 1979).

⁷ Council on Environmental Quality Guidance on NEPA Analysis for Transboundary Impacts (July 1, 1997).

⁸ See, e.g., *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

⁹ Compare *Env’tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993) (finding presumption against extraterritoriality did not apply where decision-making process occurred entirely within the United States, effects occurred in Antarctica, and no foreign affairs concerns were implicated), with *Basel Action Network v. Mar. Admin.*, 370 F. Supp. 2d 57, 71–72 (D.D.C. 2005) (distinguishing *Massey* in case involving tandem towing of dead ships on the high seas).

¹⁰ See, e.g., *Massey*, 986 F.2d 528; *NEPA Coal. of Japan v. Aspin*, 837 F. Supp. 466, 467 (D.D.C. 1993) (finding NEPA did not require the Department of Defense to prepare an EIS for military installations in Japan based in part on conflict with longstanding treaty agreements).

¹¹ See *Soskin v. Reinertson*, 353 F.3d 1242, 1250 (10th Cir. 2004) (noting strict scrutiny applies to classifications based on citizenship or alienage).

¹² The definition of “effects” is currently codified at 40 C.F.R. § 1508.8 and would be relocated to § 1508.1(g) under the proposal.

“[a]nalysis of cumulative effects is not required.” In addition, the proposed definition eliminates the terms “direct effects” and “indirect effects,” and CEQ invites comment on whether the regulations should affirmatively state that consideration of indirect effects is not required. CEQ also proposes to delete the definition of “cumulative impact” in 40 C.F.R. § 1508.7 and to eliminate other references to cumulative effects.¹³ The proposed rule also would make substantial changes to the concept of “significance,” including by removing an express prohibition on segmentation in the current definition of “significantly” in 40 C.F.R. § 1508.27.

As discussed below, these proposed changes conflict with NEPA’s express purpose and intent, as would the addition of an affirmative statement that consideration of indirect effects is not required.

1. “Remote in Time” and “Geographically Remote” Provisions

The proposed requirement that “remote in time” or “geographically remote” effects should not be considered significant appears to apply to what are currently defined as “indirect effects.”¹⁴

The preamble does not explain why effects that are “remote in time” or “geographically remote” should not be considered significant. This language is not derived from the Supreme Court decisions referenced in the preamble.¹⁵ Moreover, other case law that employs the “remote in time” language does not support CEQ’s assertion that a *proposed action’s* impacts that are remote in time or geographically remote should not be considered. Rather, the analysis in these cases relates only to whether a *separate project* is one of the “past, present, and reasonably foreseeable future actions”¹⁶ that should be considered in a cumulative impact analysis.¹⁷

¹³ For instance, CEQ would remove from the evaluation of the significance of a proposed action’s impacts a consideration of “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts” and a statement that “[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” 40 C.F.R. § 1508.27(b)(7).

¹⁴ See 40 C.F.R. § 1508.8(b) (defining indirect effects as effects “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable”).

¹⁵ See 85 Fed. Reg. 1684, 1708 (Jan. 10, 2020) (citing *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752 (U.S. 2004), and *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983)).

¹⁶ 40 C.F.R. § 1508.7 (definition of cumulative impact).

¹⁷ See, e.g., *Lands Council v. Powell*, 379 F.3d 738, 746 (9th Cir. 2004) (“For any project that is not yet proposed, and is more remote in time, however, a cumulative effects analysis would be both speculative and premature.”), *opinion amended & superseded by* 395 F.3d 1019 (9th Cir. 2005) (deleting quoted language and other portions of 2004 opinion because parties agreed that issue did not need to be addressed); *River Road Alliance, Inc. v. Corps of Eng’rs of U.S. Army*, 764 F.2d 445 (7th Cir. 1985) (in response to plaintiffs’ argument that Corps failed to consider cumulative effects of having many facilities in same general area as proposed action, finding that other applications pending at time the Corps approved the application at issue were either “geographically remote,” had been withdrawn, or both). The Ninth Circuit has continued to cite the “remote in time” language. See, e.g., *Jones v. Nat’l Marine Fisheries Serv.*, 741 F.3d 989, 1000 (9th Cir. 2013).

Considering impacts that are “remote in time” as less significant also does not comport with the “strong precatory language”¹⁸ of Section 101 of NEPA, which establishes a “continuing policy” of the federal government “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” and makes it the responsibility of the federal government to act so that “the Nation may ... *fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.*”¹⁹ In addition, the provision that effects that are “remote in time” should not be considered significant is inconsistent with provisions in both the current and proposed regulations that “[b]oth short- and long-term effects are relevant to the evaluation of whether a proposed action’s effects are significant.”²⁰

Furthermore, the proposed “remote in time” provision, as well as the “geographically remote” language, does not comport with NEPA’s statutory requirements that federal agencies “recognize the worldwide and long-range character of environmental problems.”²¹

The new language concerning effects that are “remote in time” and “geographically remote” would also render climate change-related impacts insignificant—a result that cannot be aligned with NEPA’s directives that environmental impact statements (“EISs”) cover the environmental impacts of proposed actions and consider “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity.”²²

The “remote in time” and “geographically remote” provisions therefore should be stricken from any final rule. In addition, CEQ should refrain from affirmatively stating that consideration of indirect effects is not required. CEQ should continue to include “indirect effects” in the definition of effects to avoid any implication that such effects are not a type of effect that agencies must evaluate.

2. Cumulative Impacts

The Supreme Court has said that NEPA requires that an EIS disclose the cumulative effects of a proposed action and that cumulative environmental impacts can require an EIS.²³ The Court concluded that cumulative effects fall within the reach of

¹⁸ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

¹⁹ 42 U.S.C. § 4331(a), (b)(1) (emphasis added).

²⁰ *See* 40 C.F.R. § 1508.27(a) (current regulations); § 1501.3(b)(1) (proposed regulations).

²¹ 42 U.S.C. § 4332(2)(F) (“[A]ll agencies of 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.”)

²² 42 U.S.C. § 4332(2)(C)(iv).

²³ *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.* (“NRDC”), 462 U.S. 87, 106–07 (1983) (“[W]e agree with the Court of Appeals that NEPA requires an EIS to disclose the significant health, socioeconomic and cumulative consequences of the environmental impact of a proposed

NEPA reviews even before the CEQ regulations requiring cumulative impact analysis were in place.²⁴

Given the judicial recognition that cumulative effects fall within NEPA's scope, CEQ's desire to "reduce confusion and unnecessary litigation" is an insufficient basis for eliminating consideration of cumulative effects. Similarly, the concern that there has been "excessive documentation about speculative effects" is not an adequate basis for proposing that entire categories of effects should not be considered "effects" of a proposed action. CEQ argues that the definition of "effects" is intended "to provide clarity on the bounds of effects" consistent with *Department of Transportation v. Public Citizen* and *Metropolitan Edison Co. v. People Against Nuclear Energy*.²⁵ However, placing cumulative impacts categorically outside those bounds goes well beyond the principles set forth in those decisions.

3. Segmentation

The proposed regulations remove the language of 40 C.F.R. § 1508.27(b)(7) that specifically prohibits "segmentation" of environmental review by "breaking [an action] down into small component parts." Analogous language in 40 C.F.R. § 1508.28(a)(1), requiring that the proper scope of an environmental impact statement shall include an analysis of connected actions, would also be repealed.

The proposed elimination of these requirements (as well as the corollary requirement that the scope of review include cumulative impacts, as discussed above) are contrary to the purpose and intent of NEPA. Moreover, the elimination of these provisions directly contravenes NEPA's mandates.

The seminal NEPA case proscribing segmentation is *Kleppe v. Sierra Club*.²⁶ In discussing whether the Department of the Interior improperly segmented its review of proposed coal leases to federal land in the Northwest, the Supreme Court squarely enunciated that segmentation was inconsistent with the statute, stating: "Thus, when general proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are concurrently before an agency, their *environmental consequences must be considered together*. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action."²⁷

More recently, the D.C. Circuit Court of Appeals reiterated the rule against segmentation, stating, "An agency impermissibly 'segments' NEPA review when it divides connected cumulative, or similar federal actions into separate projects and

action."); *Kleppe v. Sierra Club*, 427 U.S. 390, 413 (1976) ("Cumulative environmental impacts are, indeed, what require a comprehensive impact statement.").

²⁴ See *Kleppe*, 427 U.S. 390.

²⁵ 85 Fed. Reg. 1684, 1708 (Jan. 10, 2020) (citing *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (U.S. 2004), and *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983)).

²⁶ 427 U.S. 390 (1976).

²⁷ *Id.* at 410 (emphasis added)

thereby fails to address the true scope and impact of activities that should be under consideration.”²⁸

Significantly, in *Kleppe*, the judicial basis for the no-segmentation rule preceded the promulgation of the CEQ regulations, demonstrating that the rule is not based on those regulations. Rather, it is based on the Supreme Court’s interpretation of the statute itself and thus not subject to repeal by regulation.

II. CEQ Has Proposed Changes that Are *Ultra Vires*

A. Agencies Cannot Unilaterally Decide Whether NEPA Applies Based on “Conflict” with Other Statutes

CEQ proposes to amend 40 C.F.R. § 1501.1(a) in several critical respects, raising significant separation of powers concerns. Agencies do not have unilateral authority to conclude that NEPA does not apply where its requirements “would be inconsistent with Congressional intent due to the requirements of another statute.” CEQ lacks the authority to promulgate regulations giving it the unilateral power to make such determinations when Congress has not seen fit to do so.

The plain text of the statute requires a “responsible official” to prepare an environmental impact statement for “every ... major Federal action[] significantly affecting the quality of the human environment.”²⁹ This provision contains no exemptions. Where a statute is plain and unambiguous, an agency has no authority to interpret it in a manner inconsistent with the statutory language.³⁰ Alternatively stated, an agency may not use regulations to tailor legislation to its bureaucratic policy goals by rewriting unambiguous statutory terms.³¹ Rather, “[a]gencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always give effect to the unambiguously expressed intent of Congress.”³²

When Congress has seen fit to grant statutory exemptions to NEPA, it has done so explicitly. For example, Section 316 of the Stafford Act creates an exemption from NEPA for certain federal actions taken by the Federal Emergency Management Agency

²⁸ Del. Riverkeeper Network v. FERC, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (citing *Kleppe*); see also Coal. on Sensible Transp., Inc. v. Dole, 826 F.2d 60 (D.C. Cir. 1987); NRDC v. Hodel, 865 F.2d 288, 297 (D.C. Cir. 1988) (the rule against segmentation “prevent[s] agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.”).

²⁹ 42 U.S.C. § 4332(2)(C) (emphasis added).

³⁰ City of Arlington v. Fed. Comm’n Comm’n, 569 U.S. 290, 296 (2013) (“Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.”).

³¹ Util. Air Regulatory Grp. v. Evtl. Prot. Agency (“EPA”), 573 U.S. 302, 325 (2014).

³² *Id.* at 326 (internal quotation marks omitted); cf. Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 842–43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

in a Presidentially declared emergency or disaster area.³³ Congress has created numerous other such exceptions.³⁴ In each instance, Congress has expressly exempted certain federal actions from NEPA. CEQ, as an arm of the Executive branch, has no authority to grant other federal agencies the power to exempt actions from NEPA's broad coverage where Congress has not seen fit to do so.³⁵

The Supreme Court has recognized a limited exception to this rule where compliance with NEPA would create "an irreconcilable and fundamental conflict" with another statutory requirement,³⁶ but courts have generally read this exception narrowly.³⁷ The proposed regulations' exception for circumstances in which applying NEPA would "clearly and fundamentally conflict with the requirements of another statute" arguably fits within the exception in *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*.³⁸ But allowing agencies to avoid NEPA's mandates when compliance would merely "be *inconsistent* with Congressional intent" goes well beyond codifying existing case law.

The plain text of NEPA requires compliance with its mandates "to the fullest extent possible."³⁹ CEQ lacks the statutory authority to create such a broad-based exemption to such mandates.⁴⁰

B. CEQ Cannot Broaden the Use of NEPA's "Functional Equivalent" Exemption

In three sections of the draft regulations, CEQ proposes to revise the regulations to allow agency analyses prepared pursuant to other statutory or executive order requirements to serve as the "functional equivalent" of a NEPA EIS. These proposed revisions contravene the statutory requirements of NEPA as interpreted through nearly fifty years of federal court decisions.

³³ 42 U.S.C. § 5159 (providing that actions taken under various statutory previous "shall not be deemed a major Federal action significant affecting the quality of the human environment within the meaning of the National Environmental Policy Act").

³⁴ *See, e.g.*, 42 U.S.C. § 10165(d) (requiring preparation of an environmental assessment, but not an environmental impact statement, for selecting a high-level radioactive waste disposal site); 43 U.S.C. § 1638 (exempting certain actions taken pursuant to the Alaska Native Claims Settlement Act); 45 U.S.C. § 917 (exempting transactions carried out under the Milwaukee Railroad Restructuring Act).

³⁵ *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1144 (2018) ("Where Congress explicitly enumerates certain exceptions additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (internal quotation marks and alterations omitted)).

³⁶ *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 788 (1976).

³⁷ *See, e.g.*, *Jamul Action Comm. v. Chaudhuri*, 837 F.3d 958, 964 (9th Cir. 2016) ("Our court has been reticent to find a statutory conflict between NEPA and other provisions of the U.S. Code lest *Flint Ridge's* exception undermine Congress's intent that NEPA apply broadly.").

³⁸ 426 U.S. 776, 788 (1976).

³⁹ 42 U.S.C. § 4332.

⁴⁰ *See Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 325 (2014).

NEPA requires that all agencies incorporate environmental review under NEPA “to the fullest extent possible” in their decision-making processes.⁴¹ Since the 1970s, federal courts have consistently applied a narrow interpretation of whether non-NEPA analyses can serve as the “functional equivalent” of compliance with NEPA. The courts have found that the United States Environmental Protection Agency (“EPA”) is exempt from NEPA review for regulatory actions in furtherance of various environmental statutes. The exemption is applicable in situations “where an agency is engaged primarily in an examination of environmental questions,” and where another statutory process provides “substantive and procedural standards that ensure full and adequate consideration of environmental issues.”⁴² Notably, no federal court has extended the “functional equivalent” exemption to an agency other than EPA, even when another agency is applying an environmental statute such as the Endangered Species Act.⁴³

The mere fact an agency has been given the role of implementing an environmental statute is insufficient to invoke the ‘functional equivalent’ exception. To extend the doctrine to all cases in which a federal agency administers a statute which was designed to preserve the environment would considerably weaken NEPA, rendering it inapplicable in many situations.⁴⁴

CEQ proposes to revise three sections of the NEPA regulations (40 C.F.R. §§ 1501.1, 1506.9, and 1507.3) in order to broaden the universe of situations in which non-NEPA analyses can substitute for NEPA review. The proposed revisions to Section 1506.9 are specific to NEPA review when an agency is promulgating rules or regulations. CEQ cites the regulatory impact analysis (“RIA”) that agencies undertake pursuant to Executive Order 12866, “Regulatory Planning and Review,” as one example of the analysis that would be functional equivalent to NEPA review, because the cost-benefit analysis in an RIA “may naturally overlap with aspects of the EIS.”⁴⁵ Executive Order 12866 has been in effect since 1993. There is no case law holding that an RIA could serve as the functional equivalent of an EIS. To the contrary, under existing case law, an

⁴¹ 42 U.S.C. § 4332.

⁴² *Envtl. Def. Fund, Inc. v. EPA*, 489 F.2d 1247, 1257 (D.C.Cir.1973); *see also* *Tex. Comm. on Natural Res. v. Bergland*, 573 F.2d 201, 208 (5th Cir. 1978); *Alabama ex rel. Siegelman v. EPA.*, 911 F.2d 499, 503–04 (11th Cir. 1990).

⁴³ *See* *Fund for Animals v. Hall*, 448 F. Supp. 2d 127, 134 (D.D.C. 2006) (U.S. Fish & Wildlife Service review under the Migratory Bird Hunting Frameworks and Endangered Species Act Section 7 consultation process are not functional equivalents of NEPA review); *Tex. Comm. on Natural Res.*, 573 F.2d at 208 (exemption does not apply to Forest Service review under National Forest Management Act); *United States v. S. Fla. Water Mgmt. Dist.*, 847 F. Supp. 1567, 1581 (S.D. Fla. 1992), *aff’d in part, rev’d in part*, 28 F.3d 1563 (11th Cir. 1994) (exemption not available to Department of Justice because it “is not an environmental agency and is not operating under any enabling legislation which would provide the functional equivalent of an EIS”); *Found. on Econ. Trends v. Heckler*, 587 F. Supp. 753, 765–66 (D.D.C. 1984), *order aff’d in part, vacated in part*, 756 F.2d 143 (D.C. Cir. 1985) (exemption does not apply to National Institutes of Health).

⁴⁴ *Jones v. Gordon*, 621 F. Supp. 7, 13 (D. Alaska 1985), *aff’d in part, rev’d in part*, 792 F.2d 821 (9th Cir. 1986).

⁴⁵ 85 Fed. Reg. 1684, 1705 (Jan. 10, 2020).

RIA would not qualify as a functional equivalent of NEPA review because it is not undertaken primarily for an environmental purpose.⁴⁶

The proposed revisions to Section 1507.3(b)(6) are broader than those proposed for Section 1501.1 and would allow agencies to designate analyses or processes that serve as the functional equivalent of agency compliance with NEPA in all contexts, not just the promulgation of rules and regulations. Similarly, the proposed revisions to Section 1501.1(a)(5) would allow agencies to make a threshold determination about functional equivalency on a case-by-case basis. CEQ does not cite any provision of NEPA or any court decision that would support the broadening of the “functional equivalent” exemption beyond its current limited applicability. CEQ correctly notes that courts have determined that EPA need not conduct NEPA analyses under certain environmental statutes. However, CEQ fails to identify or address the many court decisions declining to extend the functional equivalency doctrine beyond EPA.

Like the proposed exemption for “inconsistent statutes,” CEQ does not have the statutory power unilaterally to extend this exemption.

C. The Proposed Regulations’ Provision for “Conclusive Presumptions” of NEPA Compliance Improperly Attempts to Alter the Provisions of the Administrative Procedure Act

CEQ proposes to add a new Section 1502.17 to require that an agency final environmental impact statement (“FEIS”) contain a summary of all alternatives, information, and analyses submitted in comment on the draft EIS.⁴⁷ Proposed Section 1502.18 provides that where an agency certifies in its record of decision (“ROD”) that it has considered that summary, the FEIS is “entitled to a *conclusive presumption* that the agency has considered the information included in the submitted alternatives, information, and analyses section.”⁴⁸

By purporting to create a conclusive presumption, the proposed rule impermissibly attempts administratively to limit or eliminate judicial review under the Administrative Procedure Act of 1946 (“APA”)⁴⁹ concerning whether agencies have performed an adequate environmental review. The provision for a “conclusive presumption” that an agency considered submitted alternatives, information, and analyses based solely on that agency’s certification to that effect attempts to deny the courts the ability to review the record underlying that certification and determine the adequacy of the agency’s evaluation.

The right of judicial review of final agency action is firmly enshrined in the APA. As creatures of statute, no agency—including CEQ—has the power to undo an act of

⁴⁶ *Environmental Defense Fund, Inc.*, 489 F.2d at 1257.

⁴⁷ 85 Fed. Reg. at 1720 (proposed section 1502.17).

⁴⁸ *Id.* at 1720 (proposed section 1502.18) (emphasis added).

⁴⁹ 5 U.S.C. §§ 500 *et seq.*

Congress through the rulemaking process. The proposed provisions of Section 1502.18 are *ultra vires*.

The APA provides for judicial review of final agency action, except where judicial review is precluded by statute or where the agency action is committed to agency discretion by law.⁵⁰ Although NEPA does not provide a private right of action, final agency action under NEPA is nevertheless reviewable by the courts.⁵¹ A ROD approving a FEIS is final agency action, judicially reviewable pursuant to the APA.⁵² As such, the federal courts' jurisdiction over challenges to an agency ROD is enshrined in the APA.

It is also a well-settled matter of law that agencies are creatures of statute, and that their power derives entirely from that granted by Congress.⁵³ Absent express authority to do so, agencies may not promulgate regulations that alter or are contrary to statute.⁵⁴ That is precisely what CEQ attempts with proposed Section 1502.18. By purporting to create a “conclusive presumption” that an agency considered information it was required to consider, CEQ attempts to usurp the role of the courts under the APA. That it simply cannot do.

To the extent that CEQ has the authority to promulgate regulations implementing Congress's policy goals as set forth in NEPA, that authority is provided in NEPA itself. The exercise of that authority is subject to NEPA's purposes and limitations and is at all times constrained by the procedural requirements of the APA. No regulatory proposal may undo Congress's requirement for judicial review of final agency action under the APA—particularly here, where Congress has made no such exemption. Any attempt by CEQ to abrogate the reviewability of any agency action by creating conclusive presumptions is *ultra vires*.

D. The Exemption of “Legislation Recommended by the President” from EIS Requirements Is Improper

CEQ proposes to revise the definition of “legislation” found in Section 1508(p) of the proposed regulations. Under the proposed definition, where the President recommends legislation, the bill or legislative proposal would not require an EIS. Defining legislation in a manner that creates a classification of law-making that does not require a legislative EIS is *ultra vires*, unless that exemption is specifically provided for under the statute.

⁵⁰ *Id.* §§ 701, 702, 704.

⁵¹ *See, e.g.,* Sierra Club v. Slater, 120 F.3d 623 (6th Cir. 1997) (“We have long recognized that federal courts have jurisdiction over NEPA challenges pursuant to the APA, and so have many other courts.”).

⁵² *See id.*; *see also* Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497 (D.C. Cir. 2010) (reviewing and finding sufficient ROD approving FEIS).

⁵³ *See* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302 (2014) (finding that EPA exceeded its statutorily granted powers by attempting to “rewrite” statutory thresholds for greenhouse emissions).

⁵⁴ *See id.*

NEPA requires that proposed “legislation” be accompanied by an EIS and provides no exception to that requirement. CEQ cannot, by rulemaking, countermand NEPA’s explicit requirement for an EIS to be prepared under such circumstances.

By clear language in NEPA, Congress expressly mandated that all legislative proposals be accompanied by an EIS:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) 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—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which 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 which would be involved in the proposed action should it be implemented.⁵⁵

Accordingly, NEPA’s current regulations appropriately require that all proposed legislation “significantly affecting the quality of the human environment,” aside from requests for appropriations, include a legislative EIS.⁵⁶

NEPA itself does not define “legislation” for purposes of a legislative EIS. Accordingly, it must be presumed that Congress intended that phrase to bear its “ordinary” meaning.⁵⁷ The ordinary usage of “legislation,”⁵⁸ which is the operative definition under NEPA in the absence of a clear congressional mandate to the contrary,

⁵⁵ 42 U.S.C. § 4332(2)(C) (emphasis added).

⁵⁶ 40 C.F.R. § 1506.8(a).

⁵⁷ See *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. ___, 139 S. Ct. 2356 (2019); *Perin v. United States*, 444 U.S. 37 (1979); *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979).

⁵⁸ Black’s Law Dictionary defines legislation as “[t]he *whole body* of enacted laws.” *Legislation*, BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis added).

provides no carve-out for bills proposed or recommended by the Executive.⁵⁹ Thus, current rules appropriately define “legislation” as any “bill or legislative proposal to Congress developed by or with the significant cooperation^[60] and support of a Federal agency,” excluding requests for appropriations.⁶¹ That definition should be retained.

In *Andrus v. Sierra Club*,⁶² the United States Supreme Court was faced with a challenge to CEQ’s interpretation of “proposals for legislation,” which exempted requests for appropriations from the legislative EIS requirement. In affirming CEQ’s interpretation, the Court reasoned in part that legislation and appropriations are traditionally distinct processes under congressional rules and practices. The key distinction is that legislation deals with policy and planning, while appropriations deal with the implementation of policies and plans already enacted by legislation. In expanding upon that key distinction, the Court explained that “the ‘action-forcing’ provisions of NEPA are directed precisely at the process of ‘planning and ... decision[-]making,’ which are associated with underlying legislation.” Thus, the Supreme Court held that precisely because appropriations *do not* deal with planning and decision-making, excluding them from “proposals for legislation” was an appropriate interpretation. Under that holding of the Court, it is therefore clear that, to the extent a bill recommended by the President falls within the process of planning and decision-making, it is a “proposal for legislation” under the clear terms of NEPA. It is outside of CEQ’s power to carve such proposed legislation out of the statute by rulemaking.

Furthermore, Congress’s use of “every” to modify “recommendation” in its provision requiring the legislative EIS demonstrates its intention to subject *all* legislative proposals to the NEPA process. CEQ is required to interpret the word “every” with its ordinary meaning. “It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.”⁶³ In attempting to carve out legislation recommended by the President, CEQ attempts to nullify the effect of the word “every,” writing that word out of the statute through the rulemaking process. That is clearly an *ultra vires* act.

Regulatory bodies such as CEQ have no authority to use the rulemaking process to ignore the clear language of the statutes that they are charged to implement, and any attempts to do so are invalid.⁶⁴ Accordingly, CEQ should strike the proposed carve-out from the final rule.

⁵⁹ See *Andrus*, 442 U.S. at 356 (noting in case interpreting NEPA’s “proposals for legislation” phrasing that “[w]hen Congress has thus spoken in ‘the plainest of words,’ we will ordinarily decline to fracture the clear language of a statute, even for the purpose of fashioning from the resulting fragments a rule that ‘accords with ‘common sense and the public weal’” (internal citations omitted)).

⁶⁰ The current rule also lays out a test for what is considered “significant cooperation.”

⁶¹ 40 C.F.R. § 1508.17.

⁶² *Id.* at 347.

⁶³ 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:6 (7th ed.) (quoting *United States v. Menasche*, 348 U.S. 528 (1955)).

⁶⁴ See *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014) (finding that EPA exceeded its statutorily granted powers by attempting to ‘rewrite’ statutory thresholds for greenhouse emissions).