COMMENTS OF THE ATTORNEYS GENERAL OF THE STATES OF WASHINGTON, CALIFORNIA, NEW YORK, THE COMMONWEALTH OF MASSACHUSETTS, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, MAINE, MARYLAND, MINNESOTA, NEW MEXICO, OREGON, RHODE ISLAND, THE DISTRICT OF COLUMBIA, AND HARRIS COUNTY, TEXAS

July 31, 2025

VIA REGULATIONS.GOV

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U.S. Army Corps of Engineers

David Guldenzopf, Ph.D.
Director for Environmental Quality
Office of the Assistant Secretary of the Army for Installations, Energy and Environment

Jack Bush
Department of the Air Force

Amy Farak
Office of the Deputy Assistant Secretary of the Navy (Environment and Mission Readiness)

Re: Department of the Army, Corps of Engineers Provisions for Implementing NEPA; Removal, 90 Fed. Reg. 29,461 (July 3, 2025); [COE-2025-0007]

Department of the Army, Corps of Engineers Procedures for Implementing NEPA; Processing of Department of the Army Permits, 90 Fed. Reg. 29,465 (July 3, 2025); [COE-2025-0006]

Department of the Army Environmental Analysis of Army Actions (AR 200–2), 90 Fed. Reg. 29,450 (July 3, 2025); [USA-2025-HQ-0003]

Department of the Air Force Removal of Environmental Impact Analysis Process (EIAP) Regulations, 90 Fed. Reg. 28,021 (July 1, 2025); [USAF-2025-HQ-0003]

Department of the Navy Rescission of Procedures for Implementing the National Environmental Policy Act (NEPA), 90 Fed. Reg. 29,453 (July 3, 2025); [USN-2025-HQ-0004]

Department of Defense Notice of Implementation of the National Environmental Policy Act, 90 Fed. Reg. 27,857 (June 30, 2025)

Dear Mr. Boyd, Dr. Guldenzopf, Mr. Bush, and Ms. Farak:

The Attorneys General of the States of Washington, California, New York, the Commonwealth of Massachusetts, Arizona, Colorado, Connecticut, Delaware, Maine, Maryland, Minnesota, New Mexico, Oregon, Rhode Island, the District of Columbia, and Harris County, Texas (collectively, States) respectfully submit these comments in opposition to Interim Final Rules by the Army Corps of Engineers (Army Corps), Department of the Army (Army), Department of the Air Force (Air Force), and Department of the Navy (Navy) (collectively, Agencies), and a notice by the Department of Defense (DoD), rescinding the Agencies' regulations implementing the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347 and largely replacing these regulations with the "Department of Defense National Environmental Policy Act Implementing Procedures" (DoD NEPA Procedures), which have not undergone notice and comment. Specifically, the States oppose the following Interim Final Rules by the Agencies (collectively, Rescission Rules):

- The Army Corps' Interim Final Rule rescinding the regulations implementing NEPA for the Army Corps Civil Works Program and replacing them with the DoD NEPA Procedures;[1]
- The Army Corps' Interim Final Rule (the Army Corps Permitting Rescission Rule) rescinding the regulations implementing NEPA for the Army Corps' evaluation of permit applications and replacing them with new regulations;[2]
- The Army's Interim Final Rule rescinding the Army's NEPA implementing regulations and replacing them with the DoD NEPA Procedures;[3]
- The Air Force's Interim Final Rule rescinding the Air Force's NEPA implementing regulations and replacing them with the DoD NEPA Procedures;[4]
- The Navy's Interim Final Rule rescinding the Navy's NEPA implementing regulations and replacing them with the DoD NEPA Procedures;[5]

Additionally, the States oppose the DoD NEPA Procedures, and DoD's issuance of these procedures through a notice in the Federal Register, without providing notice before the procedures became effective, or an opportunity for public comment.[6]

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[1] Procedures for Implementing NEPA; Removal, 90 Fed. Reg. 29,461 (July 3, 2025), Docket ID No. COE-2025-0007 (hereinafter the Army Corps Civil Works Rescission Rule).

[2] Procedures for Implementing NEPA; Processing of the Department of the Army Permits, 90 Fed. Reg. 29,465 (July 3, 2025), Docket ID No. COE-2025-0006 (hereinafter the Army Corps Permitting Rescission Rule).

[3] Environmental Analysis of Army Actions (AR 200–2), 90 Fed. Reg. 29,450 (July 3, 2025), Docket ID No. USA-2025-HQ-0003 (hereinafter the Army Rescission Rule).

[4] Removal of Environmental Impact Analysis Process (EIAP) Regulation, 90 Fed. Reg. 28,021 (July 1, 2025), Docket ID No. USAF-2025-HQ-0003 (hereinafter the Air Force Rescission Rule).

[5] Rescission of Procedures for Implementing the National Environmental Policy Act (NEPA), 90 Fed. Reg. 29,453 (July 3, 2025), Docket ID No. USN-2025-HQ-0004 (hereinafter the Navy Rescission Rule).

[6] Public Notice, Department of Defense Implementation of the National Environmental Policy Act, 90 Fed. Reg. 27,857 (June 30, 2025).

NEPA has long supported informed and transparent agency decision-making and allowed for meaningful public participation in developing and reviewing proposed federal actions.[7] Congress enacted NEPA to advance a national policy of environmental protection by requiring federal agencies to conduct thorough and careful review of their actions' environmental impacts.[8] As the Supreme Court has explained, Congress intended NEPA's "action-forcing procedures" to help "[e]nsure that the policies [of NEPA] are implemented."[9] In order to implement NEPA within the work of DoD, the Agencies promulgated NEPA regulations.[10] The Agencies' abrupt action to repeal their longstanding NEPA regulations will disrupt and undermine the implementation of NEPA across the country.

The States have a strong interest in robust NEPA compliance and the significant opportunities for public participation formerly required under CEQ's NEPA regulations in order to protect their residents, property, and natural resources. The States and our residents are injured by the effects of environmental degradation, including effects exacerbated by climate change.[11] The States also have a quasi-sovereign interest in preventing harm to the health of our natural resources and ecosystem[12] and are entitled to "special solicitude" in seeking redress for environmental harms within our borders.[13] Moreover, the States have a strong interest in the Agencies' consultation process with state agencies that have jurisdiction or special expertise related to the federal permitting process. CEQ's regulations, by comparison, emphasized early participation, and participation throughout all stages of the process.

The Agencies' Rescission Rules and the DoD NEPA Procedures will undo this guiding framework for federal agencies' environmental review under NEPA to the detriment of the States. These comments describe how the Rescission Rules and the DoD NEPA Procedures (1) harm the States; (2) are arbitrary and capricious; (3) fail to conform to the requirements for notice-and-comment rulemaking under the Administrative Procedure Act (APA); and (4) are contrary to law. In sum, the Rescission Rules and the DoD NEPA Procedures are unlawful. For

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[7] U.S. Gov't Accountability Off., GAO-14-369, National Environmental Policy Act: Little Information Exists On NEPA Analyses, 16 (2014), https://www.gao.gov/products/gao-14-370 (last visited Mar. 20, 2025) ("[a]ccording to studies and agency officials, some of the qualitative benefits of NEPA include its role as a tool for encouraging transparency and public participation and in discovering and addressing the potential effects of a proposal in the early design stages to avoid problems that could end up taking more time and being more costly in the long run."); Implementation of Procedural Provisions: Final Regulations, 43 Fed. Reg. 55,978 (Nov. 29, 1978) (hereinafter the 1978 Regulations).

[8] 42 U.S.C. §§ 4331, 4332.

[9] *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979) (quoting S. Rep. No. 91-296, at 19 (1969)); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) ("Simply 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.").

[10] *See, e.g.*, 33 C.F.R. pt. 230 (implementing NEPA for the Army Corps Civil Works Program); 33 C.F.R. pt. 325, app. B (implementing NEPA for the Army Corps Permitting Program).

[11] *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Baez*, 458 U.S. 592, 607 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 737–38 (1981).

[12] *Massachusetts v. EPA*, 549 U.S. 497, 519–22 (2007).

[13] *Id*. at 520.

the reasons stated below, the States strongly oppose the Rescission Rules and the DoD NEPA Procedures and request that they be withdrawn in their entirety.[14]

I. BACKGROUND

Since 1969, NEPA has promoted informed, transparent, and coordinated agency decisionmaking and meaningful public participation in the development of major infrastructure projects. By requiring thorough environmental review ahead of significant federal actions, NEPA has helped regulatory agencies and the American people evaluate and understand how such projects impact the environment and public health.[15] NEPA's procedural safeguards have—among other things—protected drinking water from radioactive contamination, protected the public from exposure to harmful air pollutants and pathogens, and alerted agencies to wildfire risk so that damage from those fires could be mitigated.[16] Across the country, Americans have benefited from increased safety, preservation of natural resources, and long-term reductions in costs as a result of NEPA's review process.

A. CEQ adopted regulations to address inconsistent agency practices and interpretations.

From 1978 to 2025, CEQ's regulations implementing NEPA guided environmental review for agencies across the federal government. This single set of overarching regulations ensured consistency across federal agencies' environmental review of federal actions.[17]

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[14] By separate correspondence through Regulations.gov, on Mar. 14, 2025, California, Washington, New York, Colorado, Delaware, Illinois, Maine, Maryland, Minnesota, New Jersey, Oregon, Rhode Island, Wisconsin, the Commonwealth of Massachusetts, the District of Columbia, and Harris County, Texas, filed a letter requesting that CEQ extend the comment period for the Rescission Rule. Comment ID CEQ-2025-0002-17196.

[15] *See* Comments of Attorneys General of California, Illinois, Maryland, Massachusetts, New Jersey, New York, Oregon, Vermont, and Washington, and the Secretary of the Commonwealth of Pennsylvania Department of Environmental Protections on Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591, at 2–5 (Aug. 20, 2018) [hereinafter 2018 Multistate Comments], https://www.regulations.gov/comment/CEQ-2018-0001-11812; Comments of Attorneys General of Washington, California, New York, District of Columbia, Connecticut, Delaware, Guam, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, and Vermont on Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684, at 8–12 (Mar. 10, 2020) [hereinafter 2020 Multistate Comments], https://www.regulations.gov/comment/CEQ-2019-0003-172704.

[16] *See* Env't L. Inst., *NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government* (2010), https://ceq.doe.gov/docs/get-involved/NEPA_Success_Stories.pdf; Elly Pepper, Never Eliminate Public Advice: NEPA Success Stories, NRDC (Feb. 1, 2015), https://www.nrdc.org/resources/never-eliminate-public-advice-nepa-success-stories.

[17] 1978 Regulations, 43 Fed. Reg. 55,978.

CEQ began providing federal agencies with guidelines for consistent application of NEPA across agencies in 1970, soon after NEPA was enacted.[18] After seven years of attempting to implement NEPA across agencies with only guidelines, however, CEQ found that "inconsistent agency practices and interpretation of the law . . . impeded Federal coordination and made it more difficult for those outside government to understand and participate in the environmental review process."[19] To address those difficulties, President Carter issued Executive Order (E.O.) 11991 in May 1977, directing CEQ to "[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA] (42 U.S.C. § 4332(2))."[20] CEQ's regulations would serve to create a "uniform, government-wide" approach to NEPA review;[21] to "make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to . . . focus on real environmental issues."[22] CEQ issued final NEPA implementing regulations in 1978 (1978 Regulations).[23]

CEQ's 1978 Regulations were binding on all federal agencies.[24] Agencies conformed their NEPA procedures accordingly: The regulations of the Agencies, the Environmental Protection Agency (EPA), the United States Forest Service, the Federal Highway Administration, and other agencies referred to and in some cases explicitly incorporated CEQ's regulations.[25] The Agencies' Rescission Rules note that the Agencies' NEPA regulations were supplements to CEQ's NEPA regulations.[26] In addition to promoting uniformity across the federal government, CEQ's regulations aided development of state environmental regulations and facilitated public involvement in the environmental review process. And by providing a unified set of standards for environmental review across dozens of different agencies, CEQ's

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[18] CEQ issued interim guidelines for implementing NEPA to agencies in May 1970, Statements on Proposed Federal Actions Affecting the Environment: Interim Guidelines, 35 Fed. Reg. 7390, 7391 (May 12, 1970), pursuant to President Nixon's Executive Order directing CEQ to issue such guidelines, Exec. Order 11,514, 35 Fed. Reg. 4247, 4248 (Mar. 7, 1970). CEQ finalized the guidelines in 1971 and revised them in 1973. Statements on Proposed Federal Actions Affecting the Environment: Guidelines, 36 Fed. Reg. 7724 (Apr. 23, 1971); Preparation of Environmental Impact Statements: Proposed Guidelines, 38 Fed. Reg. 10,856 (May 2, 1973).

[19] 1978 Regulations, 43 Fed. Reg. at 55,978.

[20] Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977).

[21] 1978 Regulations, 43 Fed. Reg. at 55,978.

[22] Exec. Order No. 11,991, 42 Fed. Reg. at 26,967.

[23] 1978 Regulations, 43 Fed. Reg. at 55,978.

[24] 1978 Regulations at 55, 978.

[25] *See, e.g.*, 33 C.F.R. § 230.13(b) ("A supplement to the draft or final EIS should be prepared whenever required as discussed in 40 C.F.R. § 1502.09(c)") (Army Corps); 40 C.F.R. § 6.100(b) (". . . adopts the CEQ Regulations (40 CFR Parts 1500 through 1508) implementing NEPA . . . Subparts A through C supplement, and are to be used in conjunction with, the CEQ Regulations") (EPA); 36 C.F.R. § 220.4(e)(2) ("Scoping shall be carried out in accordance with the requirements of 40 C.F.R. § 1501.7.") (Forest Service); 23 C.F.R. § 771.107 ("The definitions contained in the CEQ regulations . . . are applicable.") (Federal Highway Administration).

[26] *See e.g.,* 90 Fed. Reg. 29465 (Army Corps Civil Works Rescission Rule).

regulations helped the public to understand the NEPA process and made participation in the process more accessible.

B. CEQ rescinded its NEPA regulations in 2025.

CEQ's 1978 Regulations were remarkably durable, with only a few minor revisions made over the following four decades.[27] However, in 2017, after nearly 40 years of stable NEPA implementation, President Trump issued E.O. 13807 directing CEQ to revise its regulations.[28] In July 2020, CEQ finalized a rule that improperly narrowed environmental review under NEPA, threatened meaningful public participation, and impermissibly restricted judicial review of agency actions (2020 Rule).[29] The States and numerous public interest organizations filed lawsuits challenging the unlawful 2020 Rule.[30]

The lawsuits challenging the 2020 Rule were dismissed[31] after CEQ, under the Biden Administration, issued revised NEPA regulations in 2022 and 2024 (2022 Rule and 2024 Rule, respectively) which reversed many provisions of the 2020 Rule and restored key provisions of the 1978 Regulations.[32] Among these, the 2022 Rule required analysis of all reasonably foreseeable effects of a major federal action.[33] The 2024 Rule restored most of the remaining provisions of the 1978 Regulations, strengthened participation, strengthened analysis of climate change and human health impacts including environmental justice concerns, and implemented amendments to the NEPA statute enacted in the 2023 Fiscal Responsibility Act (FRA).[34]

In 2024, a group of states led by Iowa filed a lawsuit—*Iowa v. Council on Environmental Quality*—in federal district court, seeking to vacate the 2024 Rule and reinstate the 2020 Rule.[35]

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[27] U.S. Dep't of Energy, History of CEQ NEPA Regulations and Guidance, https://www.energy.gov/nepa/history-ceq-nepa-regulations-and-guidance (last visited July 11, 2025).

[28] Exec. Order No. 13807, 82 Fed. Reg. 40,463 (Aug. 24, 2017).

[29] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020).

[30] *E.g.*, *California v. Council on Env't Quality*, No. 3:20-cv-06057 (N.D. Cal. Aug. 28, 2020).

[31] *State of Iowa v. CEQ*, D.N.D. Case No. 1:24-cv-00089-DMT-CRH, at Dkt. 145, 146.

[32] Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, 86 Fed. Reg. 7,037 (Jan. 25, 2021); *see also* Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34,154 (June 29, 2021).

[33] *See* National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022) (2022 Rule).

[34] *See* National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35,442 (May 1, 2024) (2024 Rule); Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat.10.

[35] Complaint, *Iowa v. Council on Env't Quality*, No. 1:24-cv-00089-DMT-CRH (D.N.D. May 21, 2024), ECF No. 1.

In February 2025, the *Iowa* court vacated the 2024 Rule.[36] However, the Eighth Circuit subsequently vacated the Iowa court's decision on July 29, 2025.[37]

In January 2025, President Trump signed E.O. 14154, entitled "Unleashing American Energy."[38] E.O. 14154 revoked President Carter's E.O. 11991 directing CEQ to issue regulations and directed CEQ to "expedite and simplify the permitting process" for energy infrastructure projects by proposing to rescind CEQ's NEPA regulations and providing new guidance for NEPA implementation.[39] In addition to directing CEQ to reconsider its NEPA regulations, E.O. 14154 called for the coordinated "revision of agency-level implementing regulations," requiring any resulting regulations to "expedite permitting approvals and meet deadlines established in the [FRA]."[40] E.O. 14154 further directed that "[c]onsistent with applicable law, all agencies must prioritize efficiency and certainty over any other objectives, including those of activist groups, that do not align with the policy goals set forth in section 2 of this order or that could otherwise add delays and ambiguity to the permitting process."[41]

In February 2025, CEQ issued an interim final rule rescinding its NEPA implementing regulations (CEQ Repeal Rule).[42] In place of the regulations, CEQ issued a guidance memorandum to heads of federal agencies recommending that agencies "revise . . . their NEPA implementing procedures (or establish such procedures if they do not yet have any) to expedite permitting approvals" (CEQ Guidance).[43] The CEQ Guidance further directed agencies to "prioritize efficiency and certainty over any other policy objectives,"[44] which is in conflict with NEPA's focus on environmental protection.[45] The CEQ Guidance "encourage[d]" agencies to use the unlawful 2020 Rule "as an initial framework for the development of revisions to their NEPA implementing procedures."[46] Like the 2020 Rule, the CEQ Guidance improperly limited environmental review. Among other things, it directed agencies to omit environmental justice

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[36] *See* Order Regarding All Mots. for Summ. J. & Partial Summ. J. 23, *Iowa v. CEQ*, No. 1:24-cv-00089-DMT-CRH (D.N.D. Feb. 3, 2025), ECF No. 145. The *Iowa* court also reviewed plaintiffs' claims that the Phase 2 Rule was arbitrary and capricious, granting some and rejecting others. *Id.* at 32–36.

[37] *Iowa v. Council on Env't Quality*, Case No. 25-1641, Entry ID 5542514 (July 29, 2025).

[38] Exec. Order No. 14154, 90 Fed. Reg. 8353 (Jan. 20, 2025).

[39] Exec. Order No. 14154, 90 Fed. Reg. at 8355.

[40] *Id*.

[41] *Id.*

[42] Removal of National Environmental Policy Act Implementing Regulations, 90 Fed Reg. 10,610 (Feb. 25, 2025), *as corrected by* Removal of National Environmental Policy Act Implementing Regulations, 90 Fed Reg. 11,221 (Mar. 5, 2025).

[43] Council on Env't Quality, Memorandum for Heads of Federal Departments and Agencies (Feb. 19, 2025) [hereinafter CEQ Guidance], *available at* https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf.

[44] CEQ Guidance at 1.

[45] 42 U.S.C. § 4321(a).

[46] CEQ Guidance at 1.

analysis from NEPA documents[47] and to avoid providing the opportunity for public comment on proposed NEPA regulations[48] unless either is required by law. The Guidance also suggested that the scope of effects that agencies are required to analyze should be narrowed.[49]

On May 21, 2025, DoD circulated an internal memorandum directing all its Agencies to repeal their respective NEPA implementing regulations by June 30, 2025.[50] On June 30, DoD issued the DoD NEPA Procedures, which are applicable to all its Agencies except the Army Corps Permitting Program.[51] In early July 2025, several agencies, including the Agencies, the Department of Energy (DOE), Department of Agriculture, Department of the Interior, and Department of Transportation (DOT), issued interim final rules modifying and rescinding their NEPA implementing regulations.[52] The Agencies issued their Rescission Rules on July 1, 2025 and July 3, 2025. To support these changes, the Agencies' Rescission Rules cited E.O. 14154, the CEQ Repeal Rule, the CEQ Guidance, and other developments such as the Supreme Court's decision in *Seven County Infrastructure Coalition v. Eagle County* (*Seven County*),[53] claiming that the NEPA regulations had caused delay and uncertainty in permitting.[54]

C. The Agencies' Rescission Rules and DoD NEPA Procedures

As a result of the CEQ Repeal Rule, CEQ's uniform and binding NEPA regulations were eliminated. With CEQ's regulations now gone, individual agencies face increased pressure to develop individual agency regulations to provide stability, transparency, and guide consistent environmental review in compliance with NEPA. Otherwise, environmental review under NEPA will return to the era of "inconsistent agency practices and interpretation" that the Carter Administration had sought to correct. Although DoD issued new procedures and the Army Corps issued new regulations for its Permitting Program, the DoD NEPA Procedures and Rescission Rules are problematic and unlawful in several ways.

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[47] *Id.* at 5.

[48] *Id.* at 7.

[49] *Id.* at 5.

[50] *See, e.g.,* Navy Rescission Rule, 90 Fed. Reg. at 29,454.

[51] DoD NEPA Procedures, Part 0.1.

[52] Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. 29,676 (Jul 3, 2025) (DOE); National Environmental Policy Act, 90 Fed. Reg. 29,632 (Jul. 3, 2025) (USDA); National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 29,498 (Jul. 3, 2025) (DOI); Army Corps Civil Works Rescission Rule, 90 Fed. Reg. 29,461; Army Corps Permitting Rescission Rule, 90 Fed. Reg. 29,465.

[53] *Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colorado*, 145 S. Ct. 1497 (2025).

[54] *See, e.g.*, Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,462-63; Army Corps Permitting Rescission Rule, 90 Fed. Reg. at 29,465–66.

1. The Agencies' Rescission Rules

The Agencies' NEPA implementing regulations had previously supplemented CEQ's NEPA regulations.[55] Now that CEQ's NEPA regulations have been repealed, the Agencies will follow the new DoD NEPA Procedures, which apply to all DoD components except for the Army Corps Permitting Program.[56] As described below, the Rescission Rules and the DoD NEPA Procedures have the potential to allow the Agencies to evade NEPA review for activities that may harm the environment.

a. The Army Corps Civil Works Rescission Rule

The Army Corps Civil Works Rescission Rule rescinds most of the Army Corps' NEPA implementing regulations at 33 C.F.R. pt. 230, which applied to all Army Corps' activities in support of the Civil Works functions, except for the processing of permit applications.[57] The rescinded Army Corps' regulations had been promulgated nearly four decades ago in 1988,[58] and supplemented CEQ's NEPA regulations.[59] The rescission does not extend to 33 C.F.R. §§ 230.2 or 230.9—which set forth the Army Corps' NEPA categorical exclusions and related requirements—to "avoid any uncertainty about the continuation of [the Army Corps'] already-established [categorical exclusions] or the procedural mechanism through which the Corps established them."[60]

b. Army Rescission Rule

The Army Rescission Rule rescinds the Army Corps' NEPA implementing regulations at 32 C.F.R. pt. 651, which supplemented CEQ's NEPA regulations, and applied to the Department of the Army, including the Active Army, the Army Reserve, Joint Bases for which the Army is the lead component, the Army's acquisition process, functions of the Army National Guard involving Federal funding, and functions for which the Army is the DoD executive agent.[61] The Army will continue to rely on categorical exclusions previously published in 32 C.F.R. pt. 651, app. B, which have been incorporated into the Appendix to the DoD NEPA Procedures.[62]

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[55] *See, e.g.,* Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,462-63.

[56] Department of Defense National Environmental Policy Act Implementing Procedures (DoD Procedures) at p. 23 (June 30, 2025), available at: https://www.denix.osd.mil/nepa/denix-files/sites/55/2025/06/DoD-NEPA-Procedures-FINAL.pdf.

[57] Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,462.

[58] Environmental Quality; Procedures for Implementing the National Environmental Policy Act (NEPA) (Final Rule) (hereinafter, Army Corps 1988 NEPA Regulations), 53 Fed. Reg. 3120 (Feb. 3, 1988).

[59] Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,462.

[60] *Id*. at 29,462-63.

[61] Army Rescission Rule, 90 Fed. Reg. at 29,450-51.

[62] *Id*. at 29,451.

c. Air Force Rescission Rule

The Air Force Rescission Rule rescinds the Air Force's NEPA implementing regulations at 32 C.F.R. pt. 989, which supplemented CEQ's NEPA regulations.[63] The Air Force will continue to rely on categorical exclusions previously published in 32 C.F.R. pt. 989, app. B, which have been incorporated into the Appendix to the DoD NEPA Procedures.[64]

d. Navy Rescission Rule

The Navy Rescission Rule rescinds the Navy's NEPA implementing regulations at 32 C.F.R. pt. 775, which supplemented CEQ's NEPA regulations and applied to the Department of the Navy, including the Office of the Secretary of the Navy, and Navy and Marine Corps commands, operating forces, shore establishments, and reserve components.[65] The Navy will continue to rely on the categorical exclusions listed in 32 C.F.R. § 775.6(f), which are included in the DoD NEPA Procedures.[66]

2. DoD NEPA Procedures

On June 30, 2025, DoD promulgated the DoD NEPA Procedures, which apply to "all entities of the [DoD] and its executing agents for actions where DoD is serving as the action proponent,"[67] including the Army, Army Corps Civil Works Program, Air Force, and Navy, without providing an opportunity for public comment under the APA.[68]

The DoD NEPA Procedures inappropriately constrict environmental review and public participation. For example, the DoD NEPA Procedures do not require that the Agencies analyze all of the indirect and cumulative effects of a major federal action, such as climate change, although the requirement to consider these impacts is supported by case law. Instead, DoD repeatedly states that DoD will consider only the "action or project at hand and *its* effects."[69] The DoD NEPA Procedures also discourages the DoD components from considering indirect and cumulative effects by requiring documentation of "where and how it drew a reasonable and manageable line relating to its consideration of any environmental effect from the action or project at hand that extend outside the geographical territory of the project or might materialize later in time."[70]

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[63] Air Force Rescission Rule, 90 Fed. Reg. at 28,021.

[64] *Id*. at 28,022.

[65] Navy Rescission Rule, 90 Fed. Reg. at 29,454.

[66] *Id*.

[67] DoD NEPA Procedures, Part 0.2.

[68] 90 Fed. Reg. at 27,857.

[69] DoD NEPA Procedures, Part 1.2(a) [emphasis in original]; *see also* Parts 1.1(b), 1.5(c)(1), 1.6(a), 2.3(b)(1).

[70] DoD NEPA Procedures, Parts 1.5(c)(2) & (3), 2.3(b)(2) & (3).

In contrast, the Agencies' prior NEPA regulations supplemented CEQ's NEPA regulations, which required that agencies consider the direct, indirect, and cumulative impacts of a major federal action.[71] CEQ's NEPA regulations also defined environmental "effects" to include "disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative, and effects on Tribal resources and climate change-related effects."[72] The DoD NEPA Procedures do not mention consideration of environmental justice, Tribal resources, or climate change.

Moreover, the DoD NEPA Procedures limit opportunities for public participation in the NEPA process. For example, the DoD NEPA Procedures do not expressly direct the DoD to seek public comment on the establishment or adoption of categorical exclusions.[73] CEQ's NEPA regulations, in contrast, required agencies to publish proposed new or revised categorical exclusions in the Federal Register for public comment.[74] Furthermore, the DoD NEPA Procedures limit opportunities for public comment on the preparation and analysis of DoD environmental impact statements (EIS) by omitting any express requirement that the public be able to review draft EISs before they are finalized. Specifically, while the DoD NEPA Procedures provide that DoD will obtain public comments "[d]uring the process of preparing an EIS," DoD may request and obtain comments "at any time" during that process.[75] In contrast, the CEQ regulations required agencies to "affirmatively solicit[] comments" from the public after preparing a draft EIS and before preparing a final EIS.[76] The DoD NEPA Procedures also limit opportunities for state agencies to act as cooperating agencies, both by narrowing the scope of agencies to be consulted, and by weakening the process for participation. CEQ's regulations, by comparison, emphasized early participation, and participation throughout all stages of the process.

3. The Army Corps Permitting Rescission Rule

The Army Corps Permitting Rule rescinds the Army Corps' NEPA implementing regulations at 33 C.F.R. pt .325, app. B, which were promulgated in 1988.[77] The rescinded regulations applied to the Army Corps Permitting Program, which carries out the Army Corps' authority to issue permits for certain activities in jurisdictional waters and wetlands, and to the Army Corps' permitting process under 33 U.S.C. § 408.[78]

The Army Corps' previous NEPA regulations for the Permitting Program supplemented the now-repealed CEQ NEPA regulations. The Army Corps Permitting Program also relied on the Army Corps' now-repealed Civil Works NEPA regulations at 33 C.F.R. pt. 230 for additional

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[71] 2024 CEQ Regulations, 40 C.F.R. § 1508.1(i).

[72] 2024 CEQ Regulations, 40 C.F.R. § 1508.1(i)(4).

[73] DoD NEPA Procedures, Part 1.4(b), (c).

[74] 40 C.F.R. § 1507.3(b), (c)(8)(ii).

[75] DoD NEPA Procedures, Part 2.1(c).

[76] 40 C.F.R. § 1503.1(a).

[77] Army Corps 1988 NEPA Regulations, 53 Fed. Reg. 3120.

[78] Army Corps Permitting Rescission Rule, 90 Fed. Reg. at 29,465.

guidance.[79] The Army Corps Permitting Rescission Rule replaces the Army Corps' Permitting Program NEPA regulations with new regulations at 33 C.F.R. pt. 333—Procedures for Complying with the National Environmental Policy Act.[80]

The Army Corps Permitting Rescission Rule will allow the Army Corps to evade NEPA review for activities that may harm the environment. For example, the Army Corps Permitting Rescission Rule does not require the consideration of indirect and cumulative effects. Instead, the Permitting Rescission Rule limits the definition of environmental "effects" to "changes to the human environment…that are reasonably foreseeable and have a reasonably close and causal relationship to the proposed action or alternatives," and generally excludes effects that are "remote in time, geographically remote, or the product of a lengthy causal chain."[81] The Permitting Rescission Rule also discourages the consideration of indirect and cumulative effects by requiring the Army Corps to document "where and how it drew a reasonable and manageable line relating to its consideration" of environmental effects that "extend outside the geographical territory of the project or might materialize later in time."[82] And, the Army Corps Permitting Rescission Rule states that where the Army Corps is regulating a link in a transportation or utility transmission project, the scope of analysis should address the specific activity requiring an Army Corps permit or 33 U.S.C. § 408 permission and any portion of the project that is within the control, responsibility, and legal authority of federal agencies.[83] This may also impermissibly limit the analysis of indirect and cumulative effects.

Moreover, the Army Corps Permitting Rescission Rule substantially limits public participation in the NEPA process. The Rule renders the solicitation of public comment during preparation of an EIS optional, thus allowing the Army Corps to completely evade public comment during this crucial process.[84] Under the Rule, the Army Corps is not even expressly required to publish a draft EIS.[85] Additionally, unlike CEQ's prior NEPA regulations, the Permitting Rescission Rule does not expressly instruct the Army Corps to take public comment on the establishment, revision, or adoption of categorical exclusions.[86]

Furthermore, the Army Corps Permitting Rescission Rule unlawfully sets forth a presumption that a "non-exhaustive" list of Army Corps activities do not meet the definition of a major Federal action and are not subject to NEPA.[87] This list includes preliminary jurisdictional determinations, approved jurisdictional determinations, determinations of whether an activity requires an Army Corps permit or permission, aquatic resource delineation concurrence or non-

[79] *Id.* at 29,465.

[80] *Id*. at 29,466.

[81] *Id.* at 29,484 (33 C.F.R. § 333.61(d)(1)).

[82] *Id.* at 29,479 (33 C.F.R. § 333.18(c)(5)(i)).

[83] *Id.* at 29,479.

[84] *Id.* at 29,480 (33 C.F.R. § 333.21(a)(3)).

[85] *Id.* at 29,482 (stating "the District Engineer *may* publish a draft statement" and that "the District Engineer can, but need not, make a draft of the [EIS] available to the public" [emphasis added]).

[86] *Id.* at 29,474.

[87] *Id*. at 29,473.

concurrence determinations, or determinations that the modification of unimproved real estate of a project would not affect the function and usefulness of the project.[88] The Army Corps has not provided any reasoned explanation why these activities should evade NEPA's "hard look" requirement.

II. THE RESCISSION RULES WILL ADVERSELY IMPACT THE UNIQUE INTERESTS OF STATES, TERRITORIES, AND TRIBAL AND LOCAL GOVERNMENTS IN ROBUST NEPA REGULATIONS

NEPA is an example of cooperative federalism, envisioning a strong role for states, territories, and tribal and local governments in environmental reviews. Indeed, when enacting NEPA, Congress declared that the federal government must act, "in cooperation with States and local governments" to evaluate potential environmental impacts in fulfillment of NEPA's purposes.[89] NEPA's success has led to the enactment of similar statutes in many states. The Agency's rescission of their NEPA regulations threatens the interests of the States in protecting our residents and environmental resources through public participation and robust, informed decision-making processes for major federal actions.

A. The Rescission Rules will Harm State Sovereign and Proprietary Interests

NEPA regulations protect state sovereign and proprietary interests in at least two fundamental ways: (1) by enabling States to participate meaningfully to assess the impacts of agency actions on state natural resources and public health; and (2) by lessening the strain on state resources of shouldering the regulatory burden of those reviews. The Rescission Rules will adversely impact both of those types of interests.

1. States have an Important Role in the NEPA Process

NEPA contains provisions directly incorporating states, territories, and local governments into federal decision making.[90] The States rely on participation in the NEPA process to protect their proprietary, sovereign, and quasi-sovereign interests in their natural resources, and residents by, *inter alia*, identifying harms from federal actions to their resources, including to air, water, public lands, cultural resources, wildlife, and the public health and welfare of their residents that agencies might otherwise ignore. Participation also allows the States to thoroughly weigh in on the environmental impacts of an action, such as the long-term effects of climate change and the reduction of scarce water resources. And for certain federal projects where state environmental review may be limited or even preempted, a robust NEPA process is critical to protecting state interests, resources and residents from harmful environmental effects, which may otherwise evade review. State agencies thus regularly engage in the federal NEPA process as cooperating

[88] *Id*.

[89] 42 U.S.C. § 4331(a).

[90] 42 U.S.C. §§ 4331(a), 4332(G).

and commenting agencies or as agencies with special expertise highlighting potential effects to each State's natural resources and public health.[91, 92]

The Rescission Rules unlawfully evade notice and public comment under the APA. Indeed, the Agencies not only rescinded their regulations without a full notice-and-comment process, but also issued new NEPA implementing regulations for the Army Corps Permitting Program without public input. Additionally, DoD issued its NEPA Procedures without providing any opportunity for public comment on NEPA procedures that will apply to the Agencies. In doing so, DoD and the Agencies lose out on valuable public input into the Agencies' NEPA procedures, including information about the interaction between the State environmental review and DoD's NEPA review process. By rescinding the Agencies' NEPA regulations, the Army Corps issuing new regulations, and DoD issuing NEPA Procedures to be applied in environmental reviews, DoD and the Agencies are attempting to circumvent the APA notice and comment process, contrary to the transparency and public participation built into the text of NEPA itself.[93]

Furthermore, the Rescission Rules both impair meaningful participation in the NEPA process and preclude the benefits of public participation in subsequent NEPA processes. The Agencies' NEPA regulations served a critical function in guiding the Agencies' actions and in providing certainty regarding the standards and analysis required during the NEPA process. These regulations supplemented CEQ's NEPA regulations, which required agencies to provide for robust public comment during the scoping and EIS process, including public comment on draft EISs. These NEPA regulations provided needed certainty to States, the regulated community, and the public because the regulations could not be changed without notice and comment. In contrast, the Rescission Rules and the DoD NEPA Procedures constrain opportunities for public comment. The DoD NEPA Procedures do not expressly require public comment on draft EISs.[94] Even worse, the Army Corps Permitting Rescission Rule, which establishes regulations for the Army Corps Permitting Program, does not require public comment during the EIS process at all.[95]

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[91] For example, many of the States have commented on CEQ's NEPA rulemakings since 2018. *See* Comments of Attorneys General of Washington, *et al* on the Proposed Phase 2 Rule, 88 Fed. Reg. 49,924 (July 31, 2023); Comments of Attorneys General of Washington, et al., on the Interim Final Rule, 86 Fed. Reg. 34,154 (July 29, 2021); Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking 86 Fed. Reg. 55,757 (Nov. 22, 2021); Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking, 85 Fed. Reg. 1684 (Mar. 10, 2020); Comments of Attorneys General of California, et al., on Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 28,591 (Aug. 20, 2018).

[92] Many of the States also challenged the unlawful 2020 Rule and defended the 2024 Rule in the *Iowa* litigation. First Amended Complaint, *California v. CEQ*; Proposed Intervenor-Defendant States' Cross Mot. for Partial Summ. J., *Iowa v. CEQ*, No 1:24-cv-00089-DMT-CRH (D.N.D. Aug. 30, 2024), ECF No. 83.

[93] NEPA cites

[94] DoD NEPA Procedures, at 13-14.

[95] Army Corps Permitting Rescission Rule, 90 Fed. Reg. at 29,480.

Moreover, the Agencies' actions rescinding regulations that were promulgated via an APA rulemaking,[96] and replacing them with the DoD NEPA Procedures and the Army Corps' new Permitting Program regulations without proper notice and comment under the APA, opens the door to more frequent and less public revisions to these NEPA procedures. By not following an APA rulemaking process for their NEPA procedures, the Agencies will avoid the rigors and scrutiny of the APA's requirements for public notice and comment. This could encourage frequent flip-flopping in DoD's and the Agencies' NEPA procedures and create inconsistency regarding the public participation provided during environmental review. This approach leaves the States with less certainty as to the NEPA process that will apply to any one project. This could lead to time consuming and costly revisions to State specific environmental review procedures to account for current federal guidelines, which can be altered more frequently and without notice and comment.

2. The Rescission Rule Would Place an Increased Burden on States to Evaluate the Impacts of Federal Actions

Many States have their own state environmental policy statutes and regulations modeled on NEPA—the so-called "little NEPAs." These include the California Environmental Quality Act,[97] Washington's State Environmental Policy Act,[98] New York's State Environmental Quality Review Act, [99] Connecticut's Environmental Policy Act,[100] New Jersey's Executive Order 215,[101] the Massachusetts Environmental Policy Act,[102] Wisconsin's Environmental Policy Act,[103] and the District of Columbia's Environmental Policy Act.[104] Where an action subject to state environmental review also requires NEPA review, state and local agencies can often comply with their own environmental review requirements by adopting or incorporating by reference certain environmental documents prepared under NEPA, but only if those NEPA documents exist and meet state statutory requirements.[105] This collaboration allows state, local, and federal agencies to share documents, reduce paperwork, and efficiently allocate limited time and resources.

The Rescission Rules would increase the burden on the States to rely more heavily on and prepare more documents under the States' little NEPAs. The States' laws are often administered in conjunction with the NEPA regulations, either through coordinated state and

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[96] *See, e.g.*, Army Corps 1988 NEPA Regulations, 53 Fed. Reg. 3120.

[97] Cal. Pub. Res. Code § 21000–21189.57.

[98] Wash. Rev. Code. ch. 43.21C.

[99] N.Y. Envtl. Conserv. Law art. 8; N.Y. Comp. Codes R. & Regs. tit. 6, pt. 617.

[100] Conn. Gen. Stat. § 22a-1 *et seq.*

[101] Exec. Order No. 215 (Sept. 11, 1989).

[102] Mass. Gen. Laws, ch. 30, §§ 61-62I.

[103] Wis. Stat. § 1.11.

[104] D.C. Code § 8-109.01–109.12; D.C. Mun. Regs. tit. 20, § 7200–7299.

[105] *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 6, § 617.15; Mass. Gen. Laws, ch. 30, § 62G.

federal review or by relying on NEPA review to satisfy state environmental review requirements. For instance, in situations where a federal agency's limited analysis of indirect and cumulative impacts would be less stringent than a state's little NEPA standards, a state agency would be unable to rely on the EIS to make its own environmental findings. Thus, the burden would fall on the States to conduct additional analysis, such as preparing a separate state EIS. The DoD NEPA Procedures and the Agencies' Rescission Rules curtail the scope of impacts analysis required under NEPA, shifting the burdens of environmental review to state and local jurisdictions. As a result, the States will need to expend additional time and resources on environmental review of proposed federal actions. The Agencies' findings that the Rescission Rules would have no federalism implications under Executive Order 13132 are therefore wrong and unsupported.[106] The Agencies should have engaged in the state consultation process and other procedures mandated by that executive order prior to issuing the Rescission Rules.

Moreover, where additional environmental review would previously have been required under the Agencies' or CEQ's NEPA regulations, but is not required under a State's little NEPA, the Rescission Rules would diminish the amount of information available to state and local agencies and the public with regard to environmental impacts of proposed projects. In such a case, neither the federal nor the State agency responsible for a project would be required to analyze or disclose the same level of information that would have been required under the Agencies' previous regulations. This deprives the States and the public of the ability to participate in the NEPA process and to ensure that the Agencies' environmental decision-making is well-informed.

B. The Rescission Rules Will Undermine the Full Evaluation of Major Federal Actions at a Time When Climate Change Threats Make Comprehensive Analysis Even More Critical to the States

A robust NEPA process—resulting in full evaluation of reasonably foreseeable environmental impacts of major federal actions—has become even more critical in the face of the increasing severity and frequency of compounding climate change impacts on States' sovereign lands and coastal areas, natural resources, infrastructure, and the health and safety of residents.

Climate change is causing significant environmental and economic losses for States and our residents, including, but not limited to, damage to infrastructure and natural resources,[107]

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[106] *See, e.g.*, Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,464.

[107] JEC Democratic Majority, *Climate-Exacerbated Wildfires Cost the U.S. Between $394 to $893 Billion Each Year in Economic Costs and Damages* 1 (Oct. 2023), https://www.jec.senate.gov/public/_cache/files/9220abde-7b60-4d05-ba0a-8cc20df44c7d/jec-report-on-total-costs-of-wildfires.pdf; NOAA National Centers for Environmental Information (NCEI), *Billion-Dollar Weather and Climate Disasters* (2025), https://www.ncei.noaa.gov/access/billions/.

housing[108] and job instability,[109] and the cost of health care and lives lost from environmental pollutants,[110] extreme storms, heatwaves, and wildfires.[111] For instance, New Mexico already faces serious environmental challenges, with the entire state currently suffering from drought conditions and average temperatures increasing fifty percent faster than the global average over the past century. The escalating heatwaves, flooding, sea-level rise, extreme storms, and infectious diseases brought on by climate change have greater impacts on "[r]acially and socioeconomically marginalized communities," including communities of color, low-income communities, and Indigenous Peoples and Tribal Nations, as well as people with disabilities and unhoused people.[112] Such climate-related impacts disproportionately affect vulnerable populations facing existing environmental burdens,[113] exacerbating both environmental risk[114] and economic inequality.[115]

The States are already committing significant resources to meet policy goals and comply with statutory mandates to reduce in-state greenhouse gas emissions, as well as co-pollutants, while also investing in infrastructure to protect communities and state resources from the effects of climate change. A fully informed decision-making process requires that federal agencies work closely with states, territories, and tribal and local governments, as well as the public, to ensure that decisions account for the climate change impacts on communities already overburdened with pollution and associated public health harms.

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[108] Mariya Bezgrebelna et al., *Climate Change, Weather, Housing Precarity, and Homelessness: A Systematic Review of Reviews*, 18 Int J Environ Res Public Health 5812 (May 28, 2021); Taylor Gauthier & Financial Security Program, *The Devastating Effects of Climate Change on US Housing Security*, The Aspen Institute (April 21, 2021), https://www.aspeninstitute.org/blog-posts/the-devastating-effects-of-climate-change-on-us-housing-security/.

[109] A. R. Crimmins et al., Fifth National Climate Assessment, at Ch. 19 (2023), https://nca2023.globalchange.gov/chapter/19/ (Climate change is anticipated to "impact employment by changing demand for workers, reducing worker safety, altering the location of available jobs, and changing workplace conditions in heat-exposed jobs.") (citations omitted).

[110] American Lung Association, *Asthma Trends and Burden* (last updated July 15, 2024), https://www.lung.org/research/trends-in-lung-disease/asthma-trends-brief/trends-and-burden.

[111] Kim Knowlton et al., *Six Climate Change-Related Events in the United States Accounted for About $14 Billion in Lost Lives and Health Costs*, 30 Health Affairs 2167, 2170 (Nov. 2011); Vijay S. Limaye et al., *Estimating the Health-Related Costs of 10 Climate-Sensitive U.S. Events During 2012*, 3 GeoHealth 245, 245 (Sep. 2019), https://doi.org/10.1029/2019GH000202; Steven Woolf et al., *The Health Care Costs of Extreme Heat*, Center for American Progress (Jun. 27, 2023), https://www.americanprogress.org/article/the-health-care-costs-of-extreme-heat/.

[112] Alique Berberian et al., Racial Disparities in Climate Change-Related Health Effects in the United States, 9 Current Environmental Health Rep. 451, 454 (May 28, 2022); *see also* A. R. Crimmins et al., Fifth National Climate Assessment, at ch. 15 (2023), https://nca2023.globalchange.gov/chapter/15/.

[113] Alique Berberian et al., *supra* at 451-52 (May 28, 2022), https://doi.org/10.1007/s40572-022-00360-w.

[114] H. Orru et al., *The Interplay of Climate Change and Air Pollution on Health*, 4 Current Envtl. Health Report 504, 504 (2017).

[115] Avery Ellfeldt & E&E News, *Climate Disasters Threaten to Widen U.S. Wealth Gap,* Scientific American (Oct. 2, 2023), https://www.scientificamerican.com/article/climate-disasters-threaten-to-widen-u-s-wealth-gap/.

The Rescission Rules and the DoD NEPA Procedures undermine efforts by the States to study and abate climate-driven harms associated with major federal actions. As described above, the DoD and the Agencies may take the position that neither the DoD NEPA Procedures nor the new Army Corps Permitting Program regulations compel them to consider potential climate change impacts from an agency action. This position will make it more challenging for the States to assess greenhouse gas emissions and co-pollutants from projects subject to NEPA review, particularly where some of the emissions generated by the project will occur in a different state. For example, there could be projects sited outside of New York that have emissions associated with electricity generation or fossil fuel transportation in New York. Under New York's Climate Leadership and Community Protection Act, which requires significant statewide emission reductions by set dates,[116] such out-of-state emissions contribute to statewide greenhouse gas emissions. If the Rescission Rules and the DOD NEPA Procedures are not withdrawn, New York may need to implement additional and potentially costly regulatory, policy, or other actions to ensure the achievement of the requirements of its state climate law. The Rescission Rules thus threaten the States' significant interests in evaluating and addressing the effects of climate change.

C. The Rescission Rules will Make it More Difficult for States to Protect Overburdened Communities

The States have significant interests in robust and consistent evaluation of the full range of direct, indirect, and cumulative effects of the Agencies' actions to prevent public health disparities flowing from uninformed federal decisions that adversely impact vulnerable communities. The Rescission Rules and the DOD NEPA Procedures threaten these important interests.

The Rescission Rules threaten the ability of the States to understand the full range of effects from the Agencies' actions. Without a full understanding of direct, indirect, and cumulative effects, States will be limited in their ability to protect already overburdened communities. The Rescission Rules, read in conjunction with the DoD NEPA Procedures, threaten to eliminate consideration of cumulative effects of a federal project on communities that face a historic and disproportionate pattern of exposure to environmental hazards. These communities are more likely to suffer future health disparities if cumulative impact review is eliminated from the NEPA process. The DoD NEPA Procedures and Army Corps' new Permitting regulations, which lack any discussion of, or explicit direction to consider, environmental justice, will exacerbate that risk. Increased public health and community harms from weakened NEPA reviews will require greater expenditures of state, territorial, tribal, and local funds to evaluate and remedy increased public health disparities flowing from uninformed federal agency action.

Studying cumulative impacts is essential to preventing further harm to disadvantaged communities and vulnerable populations, including communities of color, low-income communities, and Indigenous Peoples and Tribal Nations, already burdened with the effects of

[116] Chapter 106 of the Laws of 2019; N.Y. Envtl. Conserv. L. § 75-0107(1).

disproportionately high levels of pollution. Consideration of cumulative effects is also vital in understanding population vulnerability and assisting decision-makers to mitigate and prevent disproportionate environmental and climate harms.[117] Agencies simply cannot know the full impact of a project on a community without considering its existing levels of pollution and the cumulative impacts of adding another pollution source. Similarly, without considering existing burdens, agencies cannot identify meaningful alternatives or mitigation measures to reduce or avoid harms to impacted communities.

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In summary, CEQ's and the Agencies' longstanding regulations implementing NEPA are an important tool for the States to protect their interests in informed federal decision-making and avoiding numerous types of potential harms to their resources and the public health of their residents. The States have strong interests in the continued implementation of NEPA regulations that provide for a robust, deliberative, and complete federal environmental review process that the States have relied on for decades. The Agencies' move to rescind their NEPA regulations and rely on the DoD NEPA Procedures and the Army Corps' new Permitting Program regulations, contributes to the fragmentation of NEPA review into individual, potentially inconsistent or conflicting procedures across dozens of federal agencies and threatens to undermine the quality and efficiency of NEPA reviews and impair the States' interests.

III. THE RESCISSION RULES AND DOD NEPA PROCEDURES VIOLATE THE APA

The Rescission Rules and DoD NEPA Procedures violate the procedures and standards established by the APA and fail to comply with NEPA's text and purpose. Under the APA, an agency action is unlawful if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or "without observance of procedure required by law."[118] The Rescission Rules and the DoD NEPA Procedures are arbitrary and capricious because the agency (1) fails to provide a reasoned explanation for its position; (2) fails to provide a rational connection between the facts found and the choice made; (3) entirely fails to consider the unifying purpose of the regulations and the confusion that will occur following their repeal; and (4) ignores serious reliance interests engendered by the regulations. Additionally, the Agencies promulgated the Rescission Rules without observance of procedure required under the APA by (1) asserting "good cause" exists to circumvent the APA rulemaking process when none exists; (2) denying that the regulations are legislative rules; (3) improperly asserting that the Rescission Rules are rules of agency organization, an interpretive rule, or a general statement of policy; and (4) curtailing public participation in the rulemaking process.

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[117] *See* Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking, 85 Fed. Reg. 1684 (Mar. 10, 2020); Comments of the Attorneys General of Massachusetts et al. on the U.S. Environmental Protection Agency Interim Framework for Advancing Consideration of Cumulative Impacts, 89 Fed. Reg. 92,125 (Nov. 21, 2024).

[118] 5 U.S.C. § 706(2)(A), (D).

A. The Replacement of NEPA Regulations with Guidance is Unlawful

As a preliminary matter, the Agencies' switch to DoD NEPA Procedures rather than formal regulations is unlawful. The Agencies should have undertaken the notice-and-comment process under the APA before rescinding their NEPA regulations. The Army Corps should have provided APA notice and comment in issuing new Permitting Program regulations and DoD should have done so in promulgating the DoD NEPA Procedures, because these new regulations and procedures do not fall under the exception for "interpretive rules, general statements of policy, or rules of agency organization, procedures, or practice."[119] But to the extent that the Agencies and DoD view their NEPA procedures as subject to this exception, the use of procedures rather than regulations will inevitably increase the rate of change and create uncertainty. Indeed, the DoD claims that using non-codified procedures will provide it the "flexibility" to change course quickly, presumably without a notice-and-comment process under the APA.[120] By doing away with notice-and-comment rulemaking, it stands to reason that more rapid changes will ensue, introducing uncertainty for regulated parties which may face frequent and unpredictable changes in agency practices.

The actions by the Agencies and DoD reduce opportunities for public participation. The APA's notice-and-comment requirements are designed to ensure public involvement in the rulemaking process, allowing stakeholders to provide input and agencies to educate themselves on the potential impacts of their rules. The purpose of notice-and-comment rulemaking is to reintroduce public participation and fairness to affected parties.[121] An agency's reliance on exemptions to notice-and-comment requirements under 5 U.S.C. § 553(b)(A) limits the ability of the public to influence agency decisions and deprives the public of a meaningful opportunity to comment on interrelated procedural changes.

The Agencies' rescission of NEPA regulations and reliance on internal procedures also will also make it harder to determine the level of analysis or standards that apply to specific projects. Legislative rules, which are subject to notice-and-comment rulemaking, create legally binding requirements and provide clarity for regulated parties. In contrast, interpretive rules and policy statements may lack the specificity needed to guide compliance.

B. The Rescission Rule is Arbitrary and Capricious

Under the APA, a "reviewing court shall … hold unlawful and set aside" federal agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[122] The agency must make a "rational connection between the facts found and the choice made."[123] An agency action is "arbitrary and capricious" under the APA where "the

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[119] 5 U.S.C. § 553(b)(A).

[120] Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,462.

[121] *See Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) ("The essential purpose of according [section] 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies").

[122] 5 U.S.C. § 706(2).

[123] *Burlington Truck Lines, Inc. v. United States,* 371 U. S. 156, 371 U. S. 168 (1962).

agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[124] "Agencies are free to change their existing policies," but they must "provide a reasoned explanation for the change."[125] In this rulemaking, the Agencies and DoD fail to provide any reasoned explanation for the Rescission Rules and the DoD NEPA Procedures in violation of the APA, fail to assert a rational connection between the facts found and the choice it has made, make a decision that runs counter to the evidence before the agency, and fail to consider important aspects of the problem.

1. The Agencies and DoD Failed to Provide a Reasoned Explanation for their Abrupt Change in Position

As the basis for their Rescission Rules and DoD NEPA Procedures, DoD and the Agencies make several arguments for their change in position from utilizing codified regulations to utilizing internal procedures, all of which are unavailing.

a. The repeal of CEQ's implementing regulations is no justification for rescinding the Agencies' NEPA regulations

First, the Agencies explain that they previously relied on CEQ's NEPA implementing regulations, but that CEQ repealed its regulations. The Agencies argue that, even where it had additional regulations supplementing the CEQ regulations, the CEQ regulations are now repealed and the Agencies' regulations "thus stand in obvious need of fundamental revision."[126] The Agencies argue that the rescission of its regulations is consistent with a directive from E.O. 14154 that agencies revise procedures to prioritize efficiency and certainty.[127]

This argument fails because it makes the CEQ Repeal Rule the predicate for the Agencies' Rescission Rules. As several of our States explained in a comment letter in opposition to the CEQ Repeal Rule, that rule was unlawful for multiple reasons, including that CEQ did not adequately explain its complete reversal in its position as to whether it had authority to adopt regulations.[128]

The Agencies' argument also misrepresents the degree to which the Agencies' rescission of its regulations is demanded by E.O. 14154. The executive order *did not* direct agencies to rescind their own regulations in favor of procedures that were not subject to public notice and comment. Instead, the order refers to agency-level implementing regulations multiple times. E.O. 14154 states that CEQ shall convene a working group to "coordinate the revision of agency-level *implementing regulations* for consistency."[129] It further notes that "resulting *implementing*

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[124] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*State Farm*).

[125] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Nat'l Cable & Telecommunications. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

[126] Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,462.

[127] *Id.* at 29,463.

[128] The comment letter is attached and incorporated by reference.

[129] E.O. 14154, 90 Fed. Reg. 8353 (Jan. 29, 2025).

regulations" must meet certain additional requirements, like meeting deadlines established in the FRA.[130]

Moreover, the reasoning that CEQ utilized to rescind its NEPA implementing regulations does not apply to the Agencies' NEPA regulations. CEQ argued that it may not have authority to administer its own regulations following the revocation of E.O. 11991 and with passing references to the *Marin Audubon* and *Iowa v. CEQ* decisions.[131] E.O. 11991 addressed regulations by CEQ, not other agencies, so its revocation is irrelevant. As noted above, the *Iowa v. CEQ* decision has been vacated.[132] And though *Marin Audubon* called into question CEQ's ability to issue binding regulations, the court *never* questioned the ability or propriety of other agencies promulgating regulations to implement NEPA. In a part of *Marin Audubon Society v. Federal Aviation Admin*istration, 121 F.4th 902, 914 (D.C. Cir. 2024) not joined by the full panel, the court reserves the question of whether other agencies (i.e., not CEQ) have the authority to adopt CEQ's regulations or incorporate them by reference into their own NEPA regulations.[133]

The Agencies' explanation related to the CEQ Repeal Rule is also arbitrary and capricious because the Agencies failed to consider the obvious alternative[134] of adopting CEQ's NEPA implementing regulations that were previously binding on the Agencies and incorporated by reference in the Agencies' NEPA regulations. For the reasons stated above, the Agencies are wrong to say that CEQ's regulations cannot exist again under existing executive orders. The Agencies could have simply initiated a rulemaking to move the language previously codified at 40 C.F.R. pts. 1500 through 1508 and codify it instead at 32 C.F.R. pt. 651, 32 C.F.R. pt. 775, 32 C.F.R. pt. 989, 33 C.F.R. pt. 230, and 33 C.F.R. pt. 325, app. B, rather than choose to eliminate or revise their regulations without providing a reasoned explanation.

Even short of recodifying CEQ's NEPA regulations as their own, the Agencies had many additional and obvious alternatives to the Rescission Rules. The Agencies could and should have initiated a more traditional and deliberative notice-and-comment rulemaking process, involving input from stakeholders on which, if any, regulations to rescind or modify. This process could have evaluated a number of alternatives. For example, CEQ recently encouraged agencies to use the final 2020 Rule as an initial framework for the development of revisions to their NEPA processes.[135] CEQ further directed agencies to "apply their current NEPA implementing procedures with any adjustments needed to be consistent with the NEPA statute as revised by the FRA." Where agencies have historically utilized regulations to implement NEPA, the obvious

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[130] *Id*.

[131] 90 Fed. Reg. 10,610, 10,614 (Feb. 25, 2025).

[132] *Iowa v. Council on Env't Quality*, Case No. 25-1641, Entry ID 5542514 (July 29, 2025).

[133] This analysis appeared in a separate section of the opinion unnecessary to the panel's ultimate decision, and there were serious party presentation concerns called out by CEQ itself as well as by the dissent in *Marin Audubon*.

[134] *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 & n.36 (D.C. Cir. 1986) (the "failure of an agency to consider obvious alternatives has led uniformly to reversal") (collecting cases); *see, e.g.*, *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 48 (failure to "even consider the possibility" of "alternative way of achieving the objectives of the Act" was arbitrary and capricious).

[135] CEQ, Memorandum for Heads of Federal Departments and Agencies: Implementation of the National Environmental Policy Act 4 (Feb. 19, 2025), *available at* https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf

approach, consistent with the public transparency standards the agency has adhered to in the past, was to update their regulations rather than delete the regulations in favor of non-binding internal procedures.

Finally, the Agencies' argument that the Rescission Rules are necessary to promote certainty is wrong. Binding regulations promulgated with notice and comment promote certainty. But internal procedures that DOD and the Agencies insist they can change without public input do not promote certainty.

b. NEPA is a stable area of law and does not require fast-evolving procedures that evade APA notice and comment.

Second, the Agencies argue that the flexibility afforded by using the DoD NEPA Procedures to respond to new developments in a fast-evolving area of law outweighs the appeal of codifying regulations.[136] This argument fails because the law is not "fast evolving," regulations can easily be updated to respond to new developments as they occur, and the Agencies have not accounted for the disadvantages of relying on internal procedures.

NEPA has been a remarkably stable area of law. For example, the Agencies pointed to the *Seven County* case[137] as a basis for its argument that it needed flexibility.[138] In *Seven County*, the Supreme Court discussed the deference afforded to agencies in determining whether an environmental impact statement complies with NEPA with citations to NEPA cases decided in 1978 and 1980—*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227–28 (1980). Other foundational NEPA cases are primarily from the 1970s and 1980s,[139] and

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[136] *See, e.g.,* Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,462.

[137] 145 S. Ct. 1497.

[138] Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,462.

[139] *See Andrus v. Sierra Club*, 442 U.S. 347, 357–58 (1979) (upholding CEQ's construction of NEPA through its regulations and stating "CEQ's interpretation of NEPA is entitled to substantial deference"); *Robertson v. Methow Valley*, 490 U.S. 332, 351 (1989) (recognizing that the "requirement" to include a discussion of mitigation measures flows in part from CEQ's implementing regulations, and finding a revision to CEQ's regulations was "entitled to substantial deference"); *see also Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360 (1989); *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87 (1983); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Department of Transportation v. Pub. Citizen*, 541 U.S. 752, 757 (2004). Nearly every Federal Circuit Court of Appeals followed the Supreme Court and endorsed NEPA regulations. *See, e.g.*, *See Found. on Econ. Trends v. Lyng*, 817 F.2d 882, 884 n.6 (D.C. Cir. 1987); *Com. of Mass. v. Watt*, 716 F.2d 946, 948 (1st Cir. 1983), *abrogated on other grounds by Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360 (1989); *Brodsky v. U.S. Nuclear Regul. Comm'n*, 704 F.3d 113, 120 n.3 (2d Cir. 2013); *State of N.J., Dep't of Env't Prot. & Energy v. Long Island Power Auth*., 30 F.3d 403, 409 n.9 (3d Cir. 1994); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 512 n.3 (4th Cir. 1992); *Sierra Club v. Sigler*, 695 F.2d 957, 964 (5th Cir. 1983); *Kentucky Riverkeeper Inc. v. Rowlette*, 714 F. 3d 402, 407 (6th Cit. 2013); *Rhodes v. Johnson*, 153 F.3d 785, 787 (7th Cir. 1998); *Goos v. I.C.C.*, 911 F.2d 1283 n.2 (8th Cir. 1990); *In re Operation of Missouri River Sys. Litig.*, 516 F.3d 688, 693 (8th Cir. 2008); *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1125-27 (8th Cir. 1999). *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986); *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988), *overruled on other grounds by Vill. of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992); *Defs. of Wildlife, Earth Island Inst. v. Hogarth*, 330 F.3d 1358, 1369 (Fed. Cir. 2003).

there have been relatively few Supreme Court cases interpreting NEPA and requiring major changes to agencies' environmental reviews over the past 45 years.

CEQ's 1978 Regulations[140] were durable and effective, with only a few minor revisions made over the following four decades until President Trump called for their revision in 2017 prior to issuing the 2020 Rule. The changes made in the 2020 Rule were not the result of caselaw developments, but designed to unlawfully narrow environmental review under NEPA, threaten meaningful public participation, and restrict judicial review of agency actions.[141] The amendments to the CEQ regulations during the Biden Administration (the 2022 Rule and 2024 Rule) were similarly not made in response to caselaw developments. Instead, the rulemakings largely addressed the revisions in the 2020 Rule that did not support the statutory purposes of NEPA.[142] The 2022 Rule restored key provisions of the 1978 Regulations, requiring analysis of all reasonably foreseeable effects of a major federal action.[143] The 2024 Rule restored most of the remaining provisions of the 1978 Regulations, strengthened analysis of climate change and human health impacts, including environmental justice concerns, strengthened public participation, and implemented amendments to the NEPA statute enacted in the FRA.[144]

c. The Agencies and DoD have not provided a reasoned explanation for forgoing notice and comment before the effective dates for the Rescission Rules and DoD NEPA Procedures.

Third, the Agencies argue that in the past codification ensured the regulations were more accessible to the public; however, now that the internet is more developed, procedures may be uploaded for easy viewing and the upside of codification is removed.[145] This argument defies common sense and the law. The Agencies made clear in prior rulemakings that codification is not just about making regulations easy for the public to find. Public accessibility encompasses more than ability to view regulations, it also involves engagement. For example, in promulgating its 1988 rule revising its NEPA regulations, the Army Corps provided notice and accepted written comments for 60 days pursuant to the APA, and considered and evaluated the comments received.[146] The process allowed EPA to express its views that "the proposed regulation would have unsatisfactory impacts on the quality of the environment," which led to a referral to CEQ

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[140] National Environmental Policy Act-Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. 55978 (Nov. 29, 1978).

[141] *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020).

[142] *See* Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34,154 (June 29, 2021); National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757 (Oct. 7, 2021) (Proposed "Phase 1" Rule).

[143] National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022).

[144] *See* National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49,924 (July 31, 2023) (proposed Phase 2 Rule); National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35,442 (May 1, 2024) (final Phase 2 Rule).

[145] *See, e.g.*, Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,462.

[146] Army Corps 1988 NEPA Regulations, 53 Fed. Reg. 3120-01.

and revisions to the final rule to address concerns.[147] The Agencies and DoD have not provided a reasoned explanation for reversing their position that their NEPA implementing procedures should be subject to notice and comment. Any "unexplained inconsistency" between a rule and its repeal is "a reason for holding an interpretation to be an arbitrary and capricious change."[148]

d. The FRA does not justify the Agencies' rescinding their NEPA implementing regulations and the DoD issuing procedures instead

Fourth, the DoD and the Agencies argue that the DoD NEPA Procedures are needed to implement the statute as amended in 2023. The FRA[149] added certain requirements, including those related to: page limits and deadlines for environmental assessments (EA) and EISs; the definition of "major federal action" and relevant exclusions; the procedure for determining the appropriate level of review; directions for categorical exclusions; the procedures governing project-sponsor-prepared EAs and EISs; and notice and solicitation of comments when issuing a notice of intent to prepare an environmental impact statement. The Agencies' and DoD's argument fails because the amendments introduced in the FRA are not a reason to rescind NEPA regulations and issue internal procedures. Agencies implementing NEPA have previously responded to new legislation that impacts such implementation by updating their regulations.[150] The FRA amendments were in fact quickly and fully addressed in the CEQ's 2024 Rule, which was supported by a regulatory impact analysis and subject to extensive public input. As noted above, the appropriate approach for the Agencies was to update their regulations to incorporate the FRA updates in compliance with APA notice and comment.

The FRA's revisions to NEPA therefore do not justify the Agencies' and DoD's change in position from utilizing NEPA implementing regulations to utilizing internal procedures.

e. The *Seven County* decision does not justify the Agencies' rescission of their NEPA implementing regulations.

Fifth and finally, the Agencies note that the changes in its NEPA regulations reflect the Supreme Court's decision in *Seven County*.[151] In removing key parts of their NEPA implementing regulations, the Agencies invoked the Supreme Court's recent decision in *Seven County*, pointing out that NEPA review is a "purely procedural" requirement that "does not itself require any substantive outcome."[152] Yet, the fact that a statute poses only procedural

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[147] *Id*.

[148] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005).

[149] PL 118-5.

[150] *See, e.g.*, Department of Transportation Environmental Impact and Related Procedures, 72 Fed. Reg. 44,038-01 (Aug. 7, 2007) (making revisions prompted by enactment of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which prescribe[d] additional requirements for environmental review and project decision making that [we]re not appropriately reflected in the existing joint NEPA procedures.")

[151] 145 S. Ct. 1497.

[152] "The Army is repealing the Corps' prior procedures and practices for implementing NEPA, a 'purely procedural statute' which 'simply prescribes the necessary process for an agency's environmental review of a project'—a review that is, even in its most rigorous form, 'only one input into an agency's decision and does not itself require

requirements provides no justification for an agency to *revoke* codified regulations. *Seven County* held that courts should "substantially" defer to agencies regarding the "scope and contents" of environmental review—specifically, their identification of particular impacts and alternatives in environmental impact statements and that NEPA did not require the agency in that case to consider certain indirect impacts.[153] It did not address the propriety of NEPA's procedural requirements. Furthermore, the Court's decision acknowledged that agency choices about the scope of environmental review should still "fall within a broad zone of reasonableness."[154] Rescinding core regulations and replacing them with internal procedures effectively guts environmental review. This flies in the face of NEPA's text and purpose and so is unreasonable. The *Seven County* decision does not justify the Agencies' changed position regarding their NEPA implementing regulations.

To support their Rescission Rules, the Agencies also improperly invoke the Court's observation that NEPA review causes undue delays. The Agencies state that it is "conscious of the Supreme Court's admonition [in *Seven County*] that NEPA review has grown out of all proportion to its origins of a 'modest procedural requirement,' creating, 'under the guise of just a little more process,' '[d]elay upon delay, so much so that the process seems to borde[r] on the Kafkaesque.'"[155] However, judicial expressions of policy views are non-binding. Such policy views were also not grounded in any factual analysis. The Department of the Interior, for example, acknowledges that actions requiring an EIS are "a small proportion of all actions" and that the time to complete an EIS has decreased from 4.4 years to 2.2 years over the last twelve years.[156] Moreover, any concern that NEPA requirements have "grown out of all proportion" is not properly addressed by repealing NEPA regulations altogether. Even if the Agencies take the position that environmental review has become burdensome, the Agencies must still comply with NEPA requirements. Rescinding all regulations—rather than a more tailored approach of revising regulations—is a hyperbolic response, a blunt force tool that topples the very framework that the agency relies on to meet NEPA's statutory requirements. The *Seven County* decision was intended as a "course correction" for *courts*, to bring "*judicial* review . . . back in line" by limiting judges' ability to require agencies to consider specific environmental effects.[157] It does not justify the Agencies' action rescinding its NEPA implementing regulations.

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any particular substantive outcome.'" Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,463 (quoting Seven Cnty., 145 S. Ct. at 1507, 1511); see also Army Corps Permitting Rescission Rule, 90 Fed. Reg. at 29,470 (saying the same).

[153] *Seven Cnty.*, 145 S. Ct. at 1508.

[154] *Seven Cnty.*, 145 S. Ct. at 1513.

[155] Army Corps Permitting Rescission Rule, 90 Fed. Reg. at 29,466 (quoting *Seven Cnty.*, 145 S. Ct. at 1513–14).

[156] Department of the Interior, *Regulatory Impact Analysis for the Interim Final Rule National Environmental Policy Act Implementing Regulations,* RIN: 1090-AB18 (June 30, 2025), available at: https://docs.publicnow.com/viewDoc?filename=139931%5CEXT%5CE7AEDE332336C975D7E281185B5B7404B34C81D9_63F944875636216EC580363B788BA3A4DCF1D4B4.PDF

[157] *Seven Cnty.*, 145 S. Ct. at 1514 (emphasis added).

2. The Agencies Failed to Provide a Reasoned Explanation for Eliminating Regulations Implementing Fundamental NEPA Requirements

In addition to the Agencies' failure to provide a reasoned explanation for rescinding their NEPA implementing regulations, the Agencies and DoD, in its memorandum directing the Agencies to rescind their NEPA regulations, have failed to provide a reasoned explanation for not including fundamental NEPA requirements in their new NEPA procedures and regulations. One of the core tenets set forth in *State Farm* is that "an agency changing its course…is obligated to supply a reasoned analysis for the change."[158] "Reasoned decision making…necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent."[159] The Agencies and DoD have not provided a reasoned explanation for omitting fundamental NEPA requirements, which had been included in the CEQs' and the Agencies' NEPA implementing regulations, from their new procedures and regulations.

The Agencies and DoD provide no explanation or basis for the removal of certain requirements that no longer appear anywhere now that the CEQ regulations have been rescinded. The Agencies and DoD do not even provide any list of the requirements from their prior NEPA regulations that are being removed. Instead, the Agencies note in passing that "where DoD and its components have retained an aspect of their preexisting NEPA implementing procedures, it is because that aspect is compatible with these guiding principles; where DoD and its components have revised or removed an aspect, it is because that aspect is not so compatible."[160]

The Agencies fail to provide a reasoned explanation for the removal of their existing NEPA regulations, previously at 32 C.F.R. pt. 651 (Army), 32 C.F.R. pt. 775 (Navy), 32 C.F.R. part 989 (Air Force), 33 C.F.R. part 230 (Army Corps Civil Works Program) and 33 C.F.R. pt. 325, app. B (Army Corps Permitting Program). The following examples of rescinded regulations are from the Army Corps Civil Works Program, but are similar across all the Agencies' Rescission Rules:

- 33 C.F.R. § 230.4 – Definitions – incorporating 40 C.F.R. pt. 1508 (CEQ regulations) and thus including definitions for "Communities with environmental justice concerns," "Indirect effects," "Cumulative effects," "Environmental justice," "Human environment or environment," "Major Federal action," "Mitigation," and "Significant effects." The rescission and/or revision of these definitions limits the scope and depth of environmental review, and removes previous clarity and detail on what environmental reviews should include. For example, the CEQ regulations defined "Human environment or environment" to include the relationship of "present and future generations" with the environment, whereas the DoD NEPA Procedures and Army Corps Permitting Rescission

[158] 463 U.S. at 42 (finding agency acted arbitrarily and capriciously in revoking the requirement that new motor vehicles include passive restraints).

[159] *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) (citing *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009)).

[160] *See, e.g.*, Army Corps Civil Works Rescission Rule, 90 Fed. Reg. 29,461, 29,463.

Rule define this term to include only the relationship of "Americans" with the environment;

- 33 C.F.R. § 230.6 – Actions normally requiring an EIS – clarifying that actions normally requiring an EIS include feasibility reports for authorization and construction of major projects, proposed changes in projects which increase size substantially or add additional purposes; and proposed major changes in the operation and/or maintenance of completed projects.
- 33 C.F.R. § 230.8 – Emergency actions – clarifying, *inter alia*, that "District commanders shall consider the probable environmental consequences in determining appropriate emergency actions" and "NEPA documentation should be accomplished prior to initiation of emergency work if time constraints render this practicable."
- 33 C.F.R. § 230.11 – Finding of No Significant Impact (FONSI) – providing for a minimum 30-day review of the draft FONSI to concerned agencies, organizations and the interested public
- 33 C.F.R. § 230.13 – EIS – Requiring both draft and final versions of a supplement to an EIS to be published and circulated for review in the same manner as an EIS
- 33 C.F.R. § 230.15 – Mitigation and monitoring – requiring district commanders to provide reports on the progress and status of required mitigation upon request
- 33 C.F.R. § 230.18 – Availability – making draft and final EISs and supplements available to the public without charge
- 33 C.F.R. § 230.19 – Comments – detailing requirements regarding comments on draft and final EISs
- 33 C.F.R. § 230.25 – Environmental review and consultation requirements – providing for coordination of environmental reviews, and governmental notifications regarding project impacts on other countries
- Appendix A to Part 230 – Processing Corps NEPA Documents – detailing processes for preparing NEPA documents and multiple stages for public notice and comment.

a. The Agencies and DoD Fail to Provide a Reasoned Explanation for Eliminating the Requirement to Consider Certain Effects

The Agencies and DoD failed to provide a reasoned explanation for eliminating core NEPA requirements through a redefinition of the term "effects." The prior CEQ regulations included in the definition of effects "direct, indirect, and cumulative effects,"[161] and clarified that:

> "Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, such as disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative. Effects also include effects on Tribal resources and climate change-related effects, including the contribution of a proposed action and

[161] 40 C.F.R. § 1508.1(g), as amended in 2022 by 87 Fed. Reg. 23,453, 23,469-70.

its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action and its alternatives."[162]

The Agencies and DoD provide no explanation, much less a reasoned or rational one, for removing "indirect" and "cumulative" from the "effects" definition. The inclusion of "indirect" and "cumulative" impacts in the effects definition originated in CEQ's 1978 Regulations, which the Agencies incorporated into their NEPA regulations.[163] The DoD NEPA Procedures and the Army Corps' new Permitting Program regulations now state: "Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to the limits of its regulatory authority, or that would occur regardless of the proposed action, or that would need to be initiated by a third party."[164] This definition of "effects" fails to expressly include cumulative and indirect effects, in violation of NEPA's plain language, which requires federal agencies to consider all "reasonably foreseeable" effects,[165] and to address impacts to future as well as present generations.[166] This statutory mandate cannot be met without analyzing cumulative and indirect effects. Moreover, since prior to CEQ's promulgation of its 1978 Regulations, courts have consistently affirmed agencies' legal obligation to consider these effects.[167] Therefore, the Agencies and DoD must explain why they are abandoning the indirect and cumulative impact definitions.

NEPA's statutory mandate also requires federal agencies to consider "disproportionate and adverse effects on communities with environmental justice concerns" and "climate-change related effects," as set forth in the 2024 Rule.[168] Yet the Agencies and DoD have not provided any explanation, much less a reasoned or rational one, for removing references to environmental justice and climate change. Consistent with section 102(2)(C) of NEPA, consideration of

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[162] 40 C.F.R. § 1508.1(g)(4), as amended in 2024 by 89 Fed. Reg. 35,442, 35,575.

[163] CEQ has long recognized the need to consider indirect and cumulative effects under NEPA. CEQ recognized in NEPA guidance issued in 1973—less than four years after NEPA was enacted—that indirect or "secondary" effects "may often be even more substantial than the primary effects of the original action itself." Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20,550, 20,553 (Aug. 1, 1973). And even before that, CEQ recognized that the effects of many decisions can be "individually limited but cumulatively considerable." Council on Environmental Quality, Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7724–29 (Apr. 23, 1971) (The 1971 Guidelines were later revised in 1973 (38 Fed. Reg. 20,549–62 (Aug. 1, 1973)) (codified at 40 C.F.R. § 1502)). More recently, CEQ reaffirmed that "cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment." CEQ, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Jan. 1997) [hereinafter Considering Cumulative Effects], https://ceq.doe.gov/publications/cumulative_effects.html.

[164] Army Corps Regulatory Rescission Rule, 90 Fed. Reg. at 29,484; DoD NEPA Procedures, at 15.

[165] 42 U.S.C. § 4332(C)(i)-(ii).

[166] 42 U.S.C. §§ 4321, 4331.

[167] *See, e.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (interpreting NEPA to require consideration of "cumulative or synergistic environmental impact."); *Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 297–98 (D.C. Cir. 1988) (stating "NEPA, as interpreted by the courts, and CEQ regulations both require agencies to consider the cumulative impacts of proposed actions," and holding that NEPA required the Secretary of the Interior to consider the cumulative impacts of offshore development in different areas of the Outer Continental Shelf).

[168] 40 C.F.R. § 1508.1(g)(4), as amended in 2024 by 89 Fed. Reg. 35,442, 35,575.

environmental justice and climate change-related effects has long been part of NEPA analysis.[169] "The impact of GHG emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."[170] With respect to environmental justice, NEPA makes it the federal government's responsibility to "assure for *all* Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,"[171] and states "that *each person* should enjoy a healthful environment."[172] Consideration of how a proposed federal action might disproportionately affect *some* Americans more than others is thus a highly relevant consideration under the statute. NEPA's focus on "the quality of the *human* environment,"[173] is also a concern advanced by analyzing the distribution of environmental burdens in the human environment. Courts have also reviewed NEPA analyses to determine if they appropriately considered environmental justice impacts.[174]

Lastly, the Agencies' and the DoD NEPA Procedures' narrow redefinition of what effects should be considered does not follow the *Seven County* decision. In fact, the Supreme Court explicitly recognized that "environmental *effects* of the project at issue may fall within NEPA even if those *effects* might extend outside the geographical territory of the project or might materialize later in time—for example, run-off into a river that flows many miles from the project and affects fish populations elsewhere, or emissions that travel downwind and predictably pollute other areas."[175] The Supreme Court also noted that other projects may still be "interrelated and close in time and place to the project at hand" and require analysis under NEPA.[176] Thus, by stating that the term "effects" should not generally consider any environmental effects that are "remote in time, geographically remote, or the product of a lengthy causal chain," the Agencies and DoD preclude consideration of effects that the Supreme Court has specifically stated may fall within NEPA's statutory requirements.[177]

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[169] *Ctr. for Biological Diversity v. Nat'l Highway Transportation Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008); *see also* 89 Fed. Reg. at 35452 n.58; *WildEarth Guardians v. U.S. Bureau of Land Mgmt*., 870 F.3d 1222 (10th Circ. 2017) (invalidating an EIS and Record of Decision for coal leases for failing to consider climate change).

[170] *Ctr. for Biological Diversity v. Nat'l Highway Transportation Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008); *see also* 89 Fed. Reg. at 35,452 n.58; *WildEarth Guardians v. United States Bureau of Land Mgmt*., 870 F.3d 1222 (10th Circ. 2017) (invalidating an EIS and Record of Decision for coal leases for failing to consider climate change).

[171] 42 U.S.C. § 4331(b)(2) (emphasis added).

[172] *Id*. § 4331(c) (emphasis added).

[173] *Id.* § 4332(c) (emphasis added).

[174] *See, e.g.*, *Mid States Coalition for Progress v. Surface Transp. Bd*., 345 F.3d. 520, 541 (8th Cir. 2003); *Sierra Club v. Fed. Energy Regulatory Comm'n,* 867 F.3d 1357, 1370 (D.C. Cir. 2017).

[175] *Seven Cnty.* 145 S. Ct. at 1515 (emphasis in original).

[176] *Id.* at 1517.

[177] "[S]o-called indirect effects can sometimes fall within NEPA . . .." *Id.*

b. The Agencies Fail to Provide a Reasoned Explanation for Curtailing Public Comment During the NEPA Process

Public involvement by the States and our residents is critical to identifying and evaluating public health and environmental issues of local or statewide concern that may result from federal actions. Public participation further provides a critical tool for identifying alternatives that improve a proposed action or reduce its environmental impacts, identifying shortfalls in the agency's analyses, spotting missing issues, and providing additional information that the agency may not have known existed. For these reasons, NEPA prioritizes democratic values by providing a central role for public participation in the environmental review process.[178]

Consistent with the above principles, CEQ's prior NEPA regulations required federal agencies to request comments on draft EISs from federal and state agencies, Tribes, and the public.[179] In contrast, with respect to the preparation of EISs, the Army Corps' Permitting Rescission Rule states only that the Army Corps "[*m*]*ay* request the comments of…State, Tribal, or local governments that may be affected by the proposed action…and [t]he public."[180] Thus, the Army Corps Permitting Program is not expressly directed to solicit comments from potentially affected State, Tribal, or local governments, or comments from the general public, *at all* during the preparation of EISs. And while the DoD NEPA Procedures state that other agency components will obtain comments of "[a]ppropriate State, Tribal, and local agencies that are authorized to develop and enforce environmental standards" and "the public," these comments may be requested "at any time that is reasonable in the process of preparing the EIS."[181] The DoD NEPA Procedures do not require solicitation of public comments on draft environmental impact statements; instead, they provide for public comment any time during the process of preparing the environmental impact statement. This elimination of public participation opportunities vitiates one of the core purposes of an EIS under NEPA, which is to "make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information."[182] If the public is not allowed to review and comment on the draft EIS—the Agencies' assessment of environmental effects and rationale for its findings—before it is finalized, then the public's ability to engage in the development of information will be hampered. DoD and the Agencies provide no reasoned or rational explanation, or indeed, any explanation at all, for impairing the public's ability to engage in the NEPA decision-making process in this manner.

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[178] *Kleppe*, 427 U.S. at 409 (quoting Conference Report on NEPA, 115 Cong. Rec. 40416 (1969) (internal quotations omitted).

[179] 40 C.F.R. § 1503.1(a), as amended in 2024 by 89 Fed. Reg. 35,442, 35,575.

[180] Army Corps Permitting Rescission Rule, 90 Fed. Reg. at 29,480 (33 C.F.R. § 333.21(a)(3)[emphasis added]).

[181] DoD NEPA Procedures, Part 2.1(b).

[182] *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1287 (9th Cir. 1974).

To the extent the Agencies or DoD seek to justify this change by citing the need for efficiency in environmental reviews under NEPA, neither has provided a reasoned or rational explanation for how it has chosen to balance the aims of efficiency and public participation. Therefore, to comply with the APA, the Agencies and DoD must explain why they are no longer requiring the solicitation of public comment on draft EISs and the Army Corps must explain why it is no longer requiring solicitation of public comment *at all* during the preparation of EISs for its Permitting Program.

c. The Army Corps Failed to Provide a Reasoned Explanation for the Presumption that an EA Rather than an EIS Is Required

The Army Corps has not provided a reasoned explanation for changes to the standards for when and whether an EA or EIS is prepared.[183]

NEPA requires preparation of an EIS for all major federal actions "significantly affecting the quality of the human environment." 42 U.S.C. § 4332. The EIS lies at the heart of NEPA's purpose, directing agencies to consider reasonable alternatives and mitigation that would avoid adverse environmental effects of the proposed action.[184] NEPA prescribes a process for determining whether an EIS is required: an agency must prepare an EIS "with respect to a proposed agency action . . . that has a reasonably foreseeable significant effect on the quality of the human environment"; an agency must prepare an EA "if the significance of such effect is unknown."[185] Simply put, an EA is required, absent a categorical exclusion, for the purpose of determining whether a proposed action may have significant effects and require an EIS to analyze alternatives and mitigation.

CEQ's regulations reflected this prescribed process, stating that an agency "shall prepare an [EA] for a proposed action that is not likely to have significant effects or when the significance of the effects is unknown" unless a categorical exclusion applies.[186] The CEQ regulations also required that an agency, "[b]ased on [an] [EA] make its determination whether to prepare an [EIS]."[187] Further, courts have held that preparation of an EA is not a cursory exercise, applying "hard look" review to an agency's decision not to prepare an EIS based on an EA's finding of no significant impact, requiring the agency to provide a "convincing statement of reasons why a project's impacts are insignificant." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001), *abrogated on other grounds recognized by Monsanto*

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[183] *See, e.g.*, Army Corps Permitting Rescission Rule, 90 Fed. Reg. at 29,468.

[184] *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756 (2004).

[185] 42 U.S.C. § 4336(b).

[186] 40 C.F.R. § 1501.5(a).

[187] 40 C.F.R. § 1501.4(b) (1978); ("Based on the [EA] [the agency shall] make its determination whether to prepare an [EIS].") 40 C.F.R. § 1501.5(a) (2020) (an EA "shall provide sufficient evidence and analysis for determining whether to prepare an [EIS]"); 40 C.F.R. § 1501.5 (c)(1) (2024) (same as 2020 Rule)).

Co. v. Geerston Seed Farms, 561 U.S. 139 (2010); *see also Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 339 (6th Cir. 2006).

The Army Corps has not provided a reasoned explanation for the statement in the Army Corps Permitting Rescission Rule that "the District Engineer must prepare an assessment unless an [EIS] is clearly required."[188] Such a presumption inverts the process dictated by the text and purpose of NEPA and the regulatory framework established by the Army Corps' previous NEPA regulations.

The Army Corps is required under NEPA and regulations to study the potentially significant impacts of a proposed action, absent a categorical exclusion, and provide a defensible explanation for its decision not to prepare an EIS. There is no reasoned explanation for the Army Corps Permitting Rescission Rule's change from CEQ's regulations, which contain no presumption in favor of an EA, to the Army Corps Permitting Rescission Rule's statement that certain major federal actions not subject to a categorical exception are presumed to require an EA but not an EIS.[189] The Army Corps' procedure is therefore arbitrary and capricious and contrary to NEPA.

Nor has the Army Corps or DoD provided a reasoned explanation for its alteration of the significance factors for determining whether to prepare an EIS.[190] Although the NEPA statute does not define significant effects, CEQ's regulations required consideration of several factors.[191] The Army Corps and DoD's alteration of the definition of significance is therefore arbitrary and capricious.

3. The Agencies Failed to Consider Important Aspects of the Problem

Moreover, the Agencies fail to consider multiple important issues in the Rescission Rules. When an agency amends its regulations, it must demonstrate by reasoned explanation that it has considered the context and intent behind the original regulation.[192] In promulgating the Rescission Rules, the Agencies entirely fail to consider the impact of rescinding its NEPA regulations in conjunction with the repeal of the CEQ regulations on the NEPA regulatory

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[188] Army Corps Permitting Rescission Rule, 90 Fed. Reg. at 29,468; *see also* U.S. Army Corps Procedures, § 333.15 ("Most permits or permissions under the authorities identified in § 333.1(b) normally require environmental assessments, but likely do not require an environmental impact statement.").

[189] Army Corps Permitting Rescission Rule, 90 Fed. Reg. at 29,468.

[190] DoD NEPA Procedures, at 24-25; Army Corps Permitting Rescission Rule, 90 Fed. Reg. at 29,464.

[191] *See* 40 C.F.R. 1501.3(b) (2020) (requiring consideration, in determining significance, of the "potentially affected environment," such as impacts on endangered species and critical habitat under the ESA; and the "degree of effects); 40 C.F.R. § 1501.3(d) (2024) (restoring context and intensity factors from 1978 Regulations. Note that several agencies seem to adopt the 2020 Rule definition. *See* Dep't of Energy, NEPA Implementing Procedures, § 3.2; Dep't of Agric., 7 C.F.R. § 1b.11(50), 90 Fed. Reg. 29,632, 29,673-74 (July 3, 2025); U.S. Army Corps Procedures, 30 C.F.R. § 333.12 ("Most permits or permissions under the authorities identified in § 333.1(b) normally require environmental assessments, but likely do not require an environmental impact statement."), Army Corps Permitting Rescission Rule, 90 Fed. Reg. 29,465, 29,473-74.

[192] *See NAACP, Jefferson County Branch v. Donovan*, 765 F.2d 1178, 1185 (D.C. Cir. 1985).

landscape, and the value of a consistent and unifying approach to NEPA implementation which no longer exists. The Agencies and DoD also fail to consider the confusion that will be caused by the Agencies, DoD, and other federal agencies promulgating new and disparate NEPA regulations, internal procedures, and guidance. The Agencies and DoD therefore are making decisions that runs counter to the evidence before the agencies, including the findings in CEQ's 1978 Regulations that inconsistent agency regulations make it difficult for the public to participate in the environmental review process, and cause unnecessary duplication, delay, and paperwork.[193]

a. The Agencies and DoD Failed to Consider the Impact of Rescinding Regulations in Conjunction with the Repeal of the CEQ's Regulations.

The Agencies and DoD acted arbitrarily and capriciously by ignoring the importance of reliance on time-tested and unifying regulations to guide decisions under NEPA, and the impact of the rescission of its NEPA regulations together with the repeal of the CEQ regulations on this situation. The Agencies do not consider that the rescission of their regulations and CEQ's repeal of the NEPA regulations left a chasm in the NEPA regulatory landscape. Where the CEQ regulations previously bridged the gap between NEPA and unique agency regulations such as the Agencies' specific categorical exclusions, federal agencies are now left with a dissonant set of individual regulations, procedures, and non-binding guidance documents. Nothing prevents the Agencies or DoD from adopting CEQ's unifying regulations as its own and restoring the order that these regulations previously provided. The Agencies' and DoD's failure to even consider doing so exhibits a disregard for the history of the CEQ regulations.

As described in Section II(A) above, in 1978, in accordance with E.O. 11991, CEQ promulgated regulations to address concerns of "inconsistent agency practices and interpretations of the law" under CEQ's non-binding guidance, which impeded both Federal coordination and public participation in the environmental review process.[194] CEQ's prior NEPA regulations fulfilled their intended purpose of guiding federal agencies in a "uniform, government-wide approach" to NEPA implementation.[195] The Agencies and DoD fail entirely to address the lack of a uniform regulatory approach to implementing NEPA in the Rescission Rules and DoD NEPA Procedures. They provide no recognition of the initial rationales for CEQ's NEPA implementing regulations or the Agencies' NEPA regulations supplementing CEQ's regulations, and no explanation why rescinding these regulations and issuing new regulations and internal procedures that diverge from other agencies' NEPA procedures, will not implicate the same concerns.

In addition, the varied and inconsistent, and sometimes non-binding, NEPA internal procedures issued by other federal agencies also create confusion. There is now a patchwork of regulations, partial regulations, and non-binding guidance across different federal agencies. Now,

[193] 1978 Regulations, 43 Fed. Reg. at 55,978.

[194] *Id*.

[195] *Id*.

when planning projects that require NEPA approvals from multiple federal agencies, states, territories, and tribal and local governments, and project proponents will be subject to uncertainty as to how to apply multiple agencies' divergent and possibly conflicting internal procedures.

For example:

- DOE's new NEPA procedures list the actions that a project applicant must take, including initiating any request to DOE to prepare the NEPA review with the application or during the early scoping period, providing environmental information used to prepare or evaluate the environmental document, replacing the applicant-directed contractor at DOE's request, and developing a consolidated administrative record within two weeks of DOE's request.[196] In contrast, the DoD NEPA Procedures do not set forth these expectations for project applicants.[197]
- The DOE procedures state that "the environmental document needs a description of the affected environment that is sufficient to support a reasoned explanation of DoE's conclusion regarding the significance of effects,"[198] whereas the DoD's NEPA procedures call for the DoD to "consider the potentially affected environment and degree of the effects of the action" without expressly requiring a description of the affected environment.[199]
- DOT's revised NEPA procedures outline a notification and consultation process and guidelines for preparing environmental documentation during emergencies.[200] DoD's and DOE's NEPA procedures do not provide as much detail regarding emergencies that may interfere with the preparation of environmental documents.[201]

As a result, state agencies that are delegated authority to comply with NEPA must develop different procedures to meet various federal agency regulations and guidelines. Additionally, for projects involving more than one federal agency, the Rescission Rules will increase uncertainty about which of the federal agencies' inconsistent NEPA processes apply.

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[196] DOE, *National Environmental Policy Act (NEPA) Implementing Procedures* (DOE Procedures) at pp. 10-11. (June 30, 2025), available at: https://www.energy.gov/sites/default/files/2025-06/2025-06-30-DOE-NEPA-Procedures.pdf.

[197] Department of Defense National Environmental Policy Act Implementing Procedures (DoD NEPA Procedures) at p. 23 (June 30, 2025), available at: https://www.denix.osd.mil/nepa/denix-files/sites/55/2025/06/DoD-NEPA-Procedures-FINAL.pdf.

[198] DOE Procedures at p. 14.

[199] DoD NEPA Procedures at p. 3.

[200] Department of Transportation, DOT Order 5610.1D, *DOT's Procedures for Considering Environmental Impacts*, at pp. 25-26, available at https://www.transportation.gov/sites/dot.gov/files/2025-07/DOT_Order_5610.1D_OST-P-250627-001_508_Compliant.pdf.

[201] DoD NEPA Procedures at p. 21; DOE Procedures at p. 20.

The Agencies' existing categorical exclusion regulations, the Army Corps' new Permitting Program regulations, and the DoD NEPA Procedures do not and cannot exist in the same unifying framework as existed under CEQ's NEPA regulations. Instead, the internal procedures may lead to inconsistent decisions by the agency. For example, the procedures do not provide specific guidance as to when public comment is to be invited, and do not expressly provide for public comment on draft environmental impact statements. The procedures also fail to define "mitigation" and do not reference national emergency declarations. The lack of clear guiding principles in the Army Corps' new Permitting Program regulations and DoD NEPA Procedures leave room for widely varying processes and determinations for similar projects.

In rescinding their NEPA regulations and issuing new internal procedures without consideration of the important unifying role served by the Agencies' regulations and CEQ's regulations, and the gaping chasm created by the rescission of those regulations, the Agencies and DoD have "entirely failed to consider an important aspect of the problem" in violation of the APA.[202]

b. The Agencies and DoD Failed to Evaluate the Uncertainty the Rescission Rules Will Cause

The Agencies claim that the Rescission Rules and adoption of the DoD NEPA Procedures will reduce uncertainty in accordance with E.O. 14154, but they will do the opposite. The Agencies' rationale ignores and minimizes the uncertainty the rescission of its NEPA regulations and issuance of internal procedures will cause.

As compared to regulations, internal procedures are more uncertain because an agency may argue that it need not comply with these procedures and they can be changed at any time without notice and comment. In fact, the Rescission Rules state that DoD's decision not to codify its NEPA procedures "will enable it to rapidly update these procedures in response to future court decisions…, Presidential directives, or the needs of the services."[203] CEQ's regulations had been in place for more than four decades and provided reliable guideposts for the evaluation of environmental effects under NEPA. CEQ's regulations were binding the Agencies and referenced in their NEPA implementing regulations. When CEQ repealed its NEPA regulations, the Agencies could have revised their regulations to incorporate the CEQ regulations as its own. Instead, the Agencies and DoD are now engaged in experimentation—they adopted internal procedures and regulations that do not benefit even from the collective wisdom that could have been provided by public notice and comment. Moreover, the Agencies and DoD may argue that the DoD NEPA Procedures can be ignored, revised, discarded and replaced at any time. The Agencies and DoD may be in a perpetual cycle of new internal procedures which States and project applicants cannot rely on. The "flexib[le]" nature of the Agencies' and DoD's internal procedures will likely raise concerns—similar to those regarding repeal of the CEQ regulations—that the rescission of Agencies' NEPA regulations would lead to "tremendous

[202] *State Farm*, 463 U.S. at 43.

[203] *See, e.g.*, Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,462.

uncertainty" which would "frustrate project backers that want clear, predictable and efficient procedures."[204]

Moreover, CEQ's NEPA regulations and the Agencies' previous NEPA regulations were far more detailed than the new DoD NEPA Procedures and the Army Corps' new Permitting Program regulations. CEQ's regulations provided, *inter alia*, requirements for how each reasonable alternative is developed and analyzed, data source and quality standards for information used, specific environmental consequences that must be addressed, and criteria for cost-benefit analyses.[205] In comparison, the new DOD NEPA Procedures and the new Army Corps' Permitting Program regulations do not provide sufficient guidance for conducting NEPA reviews. For example, the Army Corps' new regulations and the DoD NEPA Procedures now contain just a few paragraphs describing the contents of an EIS with the majority of the focus on limiting the scope of analysis and brevity.[206] The Rescission Rules will engender inconsistent decision-making and lead to uncertainty in environmental reviews and project approvals. This will be detrimental to the Rescission Rules' stated goals of efficiency and certainty.

The Rescission Rules and the DoD NEPA Procedures also may significantly increase litigation. Currently, most NEPA analyses do not result in litigation.[207] According to CEQ data, "the number of NEPA lawsuits filed annually has consistently been just above or below 100, with the exception of a period in the early- and mid-2000s."[208] "Given that the number of federal actions potentially subject to NEPA is roughly 100,000 or so annually, litigation rates are exceedingly low."[209] Even for EISs, which represent a small fraction of NEPA review processes, on average 20% are challenged and just 13% are actually litigated."[210] However, the Agencies cannot rely on the rescinded CEQ regulations, which have been upheld time and again by the courts, and therefore, the Agencies' environmental decision-making may be subject to an increasing number of legal challenges. Courts will need to determine whether the Agencies' environmental review of federal projects is consistent with NEPA without the benefit of CEQ's regulations. Furthermore, if various agencies' rescission rules and internal procedures are challenged in court, confusion will likely arise as different courts may make conflicting decisions about the myriad agency rules and procedures, which do not rely on the unifying provisions set forth in the former CEQ regulations. The Agencies' assertion that the Rescission Rules will

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[204] *See* Juan Carlos-Rodriguez, *Better Process Not Certain as White House Loses NEPA Regs*, Law 360 (Feb. 20, 2025).

[205] 40 C.F.R. § 1502.

[206] DOD NEPA Procedures, Part 2.3; Army Corps Permitting Rescission Rule, 90 Fed. Reg. at 29,480-81.

[207] U.S. Gov't Accountability Off., GAO-14-369, National Environmental Policy Act: Little Information Exists on NEPA Analyses [hereinafter "GAO Report"], at 19 (2014), https://www.gao.gov/products/gao-14-369.pdf.

[208] *Id*.

[209] David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 Ariz. St. L.J. 4, 50 (2018).

[210] *Id*.; *see also* GAO Report at 19; Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1510 (2012), http://law.harvard.edu/faculty/rlazarus/docs/articles/Lazarus_APeekBehindtheCurtain_2012.pdf (as of 2012, the Supreme Court had decided only 17 NEPA cases).

reduce uncertainty thus "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[211] This position is thus arbitrary and capricious.

In sum, the varied and unpredictable application of standards and procedures leads to uncertainty in environmental review and introduces greater ambiguity in the event of legal challenges under NEPA.

4. The Agencies Failed to Adequately Consider Reliance Interests

The Agencies argue that the Rescission Rules do not implicate any reliance interests because: 1) NEPA is a "purely procedural statute"; 2) it is unclear how parties can assert reliance interests in prospective procedures; and 3) any reliance interests are outweighed by policy considerations related to, *inter alia*, project costs and the economy. The Agencies' assertions are contrary to law and fact.

Under the APA, in changing course, an agency must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[212] When an agency's "prior policy has engendered serious reliance interests that must be taken into account," it must "provide a more detailed justification [for its change in policy] than what would suffice for a new policy created on a blank slate."[213] A "summary discussion" is insufficient where decades of reliance on an agency's previous position exists.[214] An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[215]

Over the nearly fifty-year lifespan of CEQ's NEPA regulations, significant reliance interests have developed across the nation. CEQ's regulations have been in place as legislative rules since 1978, and had been relied on by states, industry, and the public. As noted, above, CEQ's NEPA regulations were binding on the Agencies and in some cases incorporated in the Agencies' NEPA implementing regulations. At the state level, the States drafted their own little NEPAs in reliance on CEQ's NEPA implementing regulations providing clarity as to the content of federal environmental reviews. The States conduct environmental reviews at the state level in coordination with federal agencies' environmental reviews under NEPA. With the repeal of CEQ's NEPA implementing regulations, and the rescission of the Agencies' NEPA regulations, States will need to reassess not only their own state environmental law processes, but also the procedures applicable to and content of individual project environmental reviews to ensure they meet the statutory goals and requirements of state law. The repeal of CEQ's regulations and

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[211] *State Farm*, 463 U.S. 29, 43.

[212] *Dep't of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1914-15 (2020).

[213] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[214] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (finding reliance by industry on an agency position in place since 1978 required more than a summary discussion of the reasoning for the change).

[215] *Encino Motorcars, LLC*, 579 U.S. at 222.

subsequent rescission of the Agencies' NEPA regulations will "necessitate systemic, significant changes" for all who interact with NEPA.[216]

Considering this reliance on longstanding CEQ's and the Agencies' NEPA regulations, the Agencies' cursory dismissal of reliance interests is wrong and renders their decision to repeal their NEPA regulations arbitrary and capricious. First, the Agencies state that because NEPA is a "purely procedural statute" that "imposes no substantive environmental obligations or restrictions," there are no reliance interests. But this argument is misguided. Procedural obligations set forth by NEPA regulations form a central, and enduring (until now), part of an environmental review framework relied upon by the States, applicants and the public for federal projects across the country. In addition, the Agencies' focus on the *type* of reliance interests is too narrow; the argument that NEPA is a procedural statute does not overcome the fact that the States and project applicants rely on the dependability of the Agencies' NEPA regulations when planning potential projects, or series of projects under a program or programmatic environmental document, that may stretch over a period of years. The Agencies cannot absolve themselves of the responsibility to "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns" by simply declaring that there are no reliance interests in the first place.[217]

Second, the Agencies also appear to argue that there are no reliance interests in prospective NEPA procedures.[218] This argument misses the mark, however, as the States have reliance interests not in prospective procedures, but in the longstanding NEPA regulations rescinded by CEQ and the Agencies through interim final rules. As stated above, the States have a strong reliance interest in the stability of the rules that govern environmental review of decision-making; this stability was undermined by the Agencies' Rescission Rules and issuance of the DoD NEPA Procedures.

Third, the Agencies claim that to the extent any reliance interests exist, they are outweighed by other policy considerations.[219] But this argument is unsupported by any assessment of what the reliance interests are, and only highlights the fact that the Agencies both failed to determine whether the public's reliance interests in the relative stability provided by NEPA regulations is significant, and unlawfully declined to weigh these interests against competing policy concerns.

The States' and the public's reliance interests in stable and well-established NEPA regulations should not be waved off arbitrarily. The States rely on NEPA regulations to guide the uniform and adequate review of projects. Without sufficient NEPA review by federal agencies, the States are required to expend costs and resources to understand project impacts and, for some

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[216] *Encino Motorcars, LLC,* 579 U.S. at 222.

[217] *Dep't of Homeland Security*, 140 S. Ct. at 1914-15 (2020).

[218] *See, e.g.*, Army Corps Permitting Rescission Rule, 90 Fed. Reg. at 29,466; Army Civil Works Rescission Rule, 90 Fed. Reg. at 29,451; Navy Rescission Rule, 90 Fed. Reg. 29,454-55.

[219] *Id*.

projects, to comply with state law.[220] Moreover, as explained above, the Agencies' rescission of their NEPA regulations and DoD's issuance of the DoD NEPA Procedures will lead to uncertainty as to which procedures to follow, and will disrupt environmental reviews across the country, where the States already have significant resources devoted to NEPA implementation. It will also require the States to invest more resources in environmental review processes because the staff assigned in each State must familiarize themselves with the regulations of the individual federal agencies involved in each project. The Agencies' failure to consider these reliance interests renders the Rescission Rules arbitrary and capricious.

C. The Agencies' Rescission Rules and the DoD NEPA Procedures are Procedurally Improper

The APA requires agencies to follow the same procedural steps when amending or repealing a rule as they do when promulgating a rule, including providing notice and an opportunity for public comment unless a specific exception applies. The APA prohibits an agency from issuing an interim final rule to repeal a regulation promulgated through rulemaking.

Under the APA, the effort to repeal regulations is a rulemaking and held to the same standard as a rulemaking to promulgate new regulations.[221] The Agencies and DoD cite to the text of NEPA and E.O. 14154 as the authority under which the Agencies issues the Rescission Rules, and the DoD promulgates the DoD NEPA Procedures, but fail to acknowledge that the APA explicitly requires notice and comment for rulemaking. Specifically, agencies must publish a general notice of proposed rulemaking in the Federal Register and provide an opportunity for public participation through written comments before adopting, amending, or repealing a rule.[222] This requirement applies equally to the repeal of a previously promulgated final rule, as the APA defines "rulemaking" to include the process of "formulating, amending, or repealing a rule."[223] Courts have consistently held that the repeal of a rule constitutes substantive rulemaking and is therefore subject to these procedural requirements.[224] Notice and comment prior to repealing a rule prevents agencies from undoing their prior rulemaking efforts without giving stakeholders an opportunity to comment on the proposed repeal. As the D.C. Circuit has recognized, notice and comment ensures agencies cannot arbitrarily reverse their prior decisions.[225] The Agencies'

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[220] *See Texas v. United States*, 40 F.4th 205, 227-28 (5th Cir. 2022) (finding the Department of Homeland Security did not adequately consider relevant costs to the plaintiff States or their reliance interests in the pre-existing enforcement policy).

[221] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515, (2009) (the APA "make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action")).

[222] 5 U.S.C. § 553.

[223] 5 U.S.C. § 551(5).

[224] *See Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2018) ("These requirements apply with the same force when an agency seeks to delay or repeal a previously promulgated final rule").

[225] *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982).

issuance of the Rescission Rules and DoD's issuance of the DOD NEPA Procedures should have complied with the APA's requirements for formal notice and comment.

The APA provides limited exceptions to the notice-and-comment requirement, such as when an agency finds "good cause" that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. But courts have narrowly construed these exceptions and they do not apply the Agencies' Rescission Rules. DoD did not invoke any exception under the APA for establishing the DoD NEPA Procedures without an opportunity for notice and comment. However, the exceptions also do not apply to the DoD NEPA Procedures for the reasons discussed below.

1. The "Good Cause" Exception Does Not Apply

The Agencies invoke the "good cause" exception as a basis for avoiding notice and comment, citing a supposed "need for speed and certainty" following CEQ's repeal of its NEPA regulations.[226]

The APA only exempts rules from notice and comment "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest."[227] The APA makes clear that the exception "should be limited to emergency situations,"[228] or scenarios where notice and comment "could result in serious harm."[229] The good cause exception is "narrowly construed and only reluctantly countenanced."[230] The self-imposed goal of "speed and certainty" does not fit into these categories.

First, the CEQ Guidance specifically instructs agencies to rely on prior regulations, undercutting any argument that this scenario constitutes an emergency warranting evasion of notice-and-comment rulemaking. The CEQ Guidance provides: "While these revisions are ongoing, agencies should continue to follow their existing practices and procedures for implementing NEPA consistent with the text of NEPA, E.O. 14154, and this guidance."[231] It is simply illogical for the Agencies to claim that there is an "emergency" need to remove all of its NEPA implementing regulations from the Code of Federal Regulations at the same time that CEQ has directed agencies to continue to rely on its own removed regulations.

Second, DoD created its own "emergency" situation by instructing the Agencies to rescind their NEPA regulations by June 30, 2025, when it was not required to do so.[232] Emergencies that are of the executive's own making do not qualify for the "good cause"

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[226] *See, e.g.*, Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,464.

[227] 5 U.S.C. § 553(b)(B).

[228] *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 448 (D.C. Cir. 1982).

[229] *Chamber of Com. of U.S. v. S.E.C.*, 443 F.3d 890, 908 (D.C. Cir. 2006); *see also Jifry v. F.A.A.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004).

[230] *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018).

[231] Memorandum from Katherine R. Scarlett, Council on Environmental Quality, for Heads of Federal Departments and Agencies (Feb. 19, 2025) (on file with author).

[232] *See, e.g.*, Army Corps Civil Works Rescission Rule, 90 Fed. Reg. at 29,462.

exception. For example, in *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004), the court considered a DOE rule that delayed the effective date of certain efficiency standards without notice and comment because the agency wanted more time to consider the standards, and the standards were set to become effective imminently. The court held "an emergency of DOE's own making" could not "constitute good cause."[233] Further, the court noted that no true emergency existed because the only thing "that was imminent was the impending operation of a statute intended to limit the agency's discretion (under DOE's interpretation), which cannot constitute a threat to the public interest."[234] Here, similarly, the mere existence of self-imposed deadlines does not constitute good cause.

Third, the Agencies fail to explain in the Rescission Rules how the purported need for "speed and certainty" is an emergency or situation where allowing time for the Agencies' consideration of comments would result in serious harm. To the contrary, receiving and responding to the public's and the States' input on a rule that rescinds the vast majority of the Agencies' NEPA implementing regulations would promote more certainty in the new procedures. For all these reasons, the "good cause" exception does not apply to the Rescission Rules or the DoD NEPA Procedures.

2. The exception for "interpretive rules, general statements of policy, or rules of agency organization, procedures, or practice" does not apply

For similar reasons, the Agencies are simply incorrect in arguing that the Rescission Rules are "interpretive rule[s]" that "provide[] an interpretation of a statute, rather than make discretionary policy choices, which establish enforceable rights or obligations for regulated parties."

An interpretive rule is one in which an agency announces its interpretation of a statute in a way that "only reminds affected parties of existing duties."[235] These rules allow "agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings. . . . '[R]egulations,' 'substantive rules,' or 'legislative rules' are those which create law, usually complementary to an existing law; whereas interpretive rules are statements as to what administrative officer thinks the statute or regulation means."[236] Interpretive rules do not "effect[] a substantive change in the regulations."[237] If a "rule effectively amends a prior legislative rule," it is a "legislative, not an interpretive rule" that requires notice and comment.[238]

The Rescission Rules substantively change the Agencies' existing, longstanding NEPA regulations by repealing them and removing them from the Code of Federal Regulations altogether, eliminating longstanding provisions that impose requirements for how the agency

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[233] 355 F.3d at 205.

[234] *Id.*

[235] *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc)).

[236] *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

[237] *Warder v. Shalala*, 149 F.3d 73, 80 (1st Cir. 1998).

[238] *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

must conduct environmental review to comply with NEPA. They therefore plainly exceed the narrow exception for interpretive rules.

Further, as discussed above, "an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked" and "may not alter [such a rule] without notice and comment."[239]

The Agencies' prior NEPA-implementing regulations went through notice and comment and were binding. Repealing those binding regulations is therefore not an interpretive act; it requires full notice-and-comment rulemaking. The "interpretive rule" exception does not apply to the Rescission Rules.

Nor can the Agencies succeed in arguing that the Rescission Rules are a "general statement of policy" that "provide[s] notice of an agency's intentions as to how it will conduct itself, . . . without creating enforceable rights or obligations." Rather, the Rescission Rules are final and specific actions repealing the Agencies' longstanding NEPA regulations.

A general statement of policy is "merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications."[240] Such statements are distinguished from substantive rules because they do not establish binding norms but instead "announce[] the agency's tentative intentions for the future."[241]

The Rescission Rules and the DOD NEPA Procedures are not a tentative announcement or an expression of future intentions. Instead, the Rescission Rules are final and decisive. They remove all iterations of the Agencies' NEPA implementing regulations from the Code of Federal Regulations. The rules are "final" and there is no suggestion that the Agencies will undertake future rulemaking to resurrect regulations. The "general statement of policy" exception does not apply to the Rescission Rules.

In summary, since none of the APA § 553(b) exceptions apply to the Rescission Rules or the DoD NEPA Procedures, the Agencies and DoD violated the APA by not complying with notice and comment requirements.

3. The comment periods for the Rescission Rules are insufficient

Even if the Agencies intended to respond to comments before finalizing the Rescission Rules, 30 days for comment would be insufficient. The Rescission Rules fundamentally change how the Agencies must consider the environmental impacts of major federal actions. These short 30-day comment periods are nowhere near enough time for the public to properly understand and meaningfully respond to the Rescission Rules.

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[239] *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (quoting *Nat'l Fam. Plan. & Reprod. Health Ass'n. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992)).

[240] *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

[241] *Id.* at 38.

The Agencies have determined that the Rescission Rules are significant and that E.O. 12866 applies. Therefore, the Agencies are required to abide by the terms of that executive order, which states that "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."[242]

"In cases involving the repeal of regulations, courts have considered the length of the comment period utilized in the prior rulemaking process as…well as the number of comments received during that time-period" in determining whether an agency has afforded sufficient time for comment. *California v. United States Dep't of Interior*, 381 F. Supp. 3d 1153, 1177 (N.D. Cal. 2019) (citing *N. Carolina Growers' Ass'n*, *Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012).

The Agencies' previous rulemakings for revisions to NEPA regulations provided 60 days for comment and multiple public hearings. A minimum of 60 days should be provided for the public to comment on the significant legal and factual issues implicated in the Rescission Rules, as described above.

D. The Agencies' and DoD's Actions are Contrary to Law

The Agencies' Rescission Rules and the DoD NEPA Procedures are contrary to law, and thus violate the APA,[243] because the Rescission Rules and procedures do not comply with the requirements of NEPA.

1. The Agencies and DoD Unlawfully Limit Responsibility to Consider "Indirect" and "Cumulative" Effects

As noted above in Section XX, the Agencies and DoD did not reasonably explain the absence of the terms "indirect" and "cumulative" from the "effects" definition in the DoD NEPA Procedures and Army Corps Permitting Program regulations. For the same reasons that the redefinition of "effects" is unreasonable, it is also contrary to law. The analysis of cumulative and indirect effects is necessary to allow for the full consideration of significant impacts required by NEPA. The elimination of that analysis thus violates one of NEPA's central mandates.

NEPA's "primary function is information forcing, … compelling federal agencies to take a hard and honest look at the environmental consequences of their decisions."[244] NEPA requires federal agencies to prepare a "detailed statement" on the impacts of certain actions prior to making decisions.[245] Section 102 of NEPA requires that agencies disclose "any adverse environmental effects which cannot be avoided" if the agency action goes forward.[246] And NEPA requires agencies to consider the larger context, directing them to "recognize the

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[242]Exec. Order. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[243] 5 U.S.C. § 706(2)(A).

[244] *Am. Rivers v. FERC*, 895 F.3d 32, 49 (D.C. Cir. 2018) (citations and internal quotation marks omitted).

[245] 42 U.S.C. § 4332(2)(C).

[246] *Id.* § 4332(2)(C)(ii).

worldwide and long-range character of environmental problems."[247] NEPA's legislative history, too, makes clear that, through NEPA, Congress sought to prevent agencies from making decisions without considering the larger context and incremental impact of projects on the environment. For instance, the Senate expressed concern that "[i]mportant decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades."[248]

Consistent with NEPA's plain text and purpose, for over 40 years the courts and CEQ have interpreted NEPA's "hard look" requirement to demand consideration of direct, indirect, and cumulative effects.[249] Identifying and analyzing only direct effects that are close in time and geography to the proposed federal action ignores the true nature of most environmental problems, which Congress recognized as "worldwide and long-range" in character.[250] A robust analysis of a project's environmental effects is critical for informing decision makers and the public, particularly where projects may contribute incrementally to larger environmental or climate harms. Or, as the Second Circuit noted in *Hanly v. Kleindienst*, "[o]ne more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel. Hence the absolute, as well as comparative, effects of a major federal action must be considered."[251] The *Seven County* decision does not change the principle that indirect effects should be considered in appropriate cases. As described above, the decision recognizes that indirect effects such as "run-off into a river that flows many miles from the project and affects fish populations elsewhere, or emissions that travel downwind and predictably pollute other areas" may fall under NEPA. [252]

The DoD NEPA Procedures and the new Army Corps Permitting Program regulations, however, are eliminating a clear requirement to consider the three categories of effects, replacing them with a vague redefinition directing agencies not to consider effects that are "remote in time, geographically remote, or the product of a lengthy causal chain."[253] NEPA requires that an agency assess *all* of the project's reasonably foreseeable significant impacts,[254] and the

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[247] *Id*. § 4332(2)(F).

[248] S. Rep. No. 91-296, at 5.

[249] 40 C.F.R. §§ 1508.7, 1508.8, 1508.25(c); *Kleppe*, 427 U.S. at 410; *Hanly v. Kleindienst*, 471 F.2d 823, 830–31 (2d Cir. 1972); *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 666 (9th Cir. 2009) ("NEPA requires the Forest Service to perform a cumulative impact analysis in approving projects.").

[250] 42 U.S.C. § 4332(2)(F); *see also* S. Rep. No. 91-296, at 5 (Senate report stating "[i]mportant decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.").

[251] *Id.* at 831.

[252] 145 S. Ct. at 1515.

[253] Army Corps Permitting Rescission Rule, 90 Fed. Reg. at 29,484; Department of Defense, NEPA Procedures, at 15 (June 30, 2025), https://www.denix.osd.mil/nepa/denix-files/sites/55/2025/06/DoD-NEPA-Procedures-FINAL.pdf./

[254] 42 U.S.C. § 4332. Moreover, CEQ itself previously stated that "[p]erhaps that most significant environmental impacts results from the combination of existing stresses on the environment with the individually minor, but cumulatively major, effects of multiple actions of over time." CEQ, Exec. Office of the President, National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years at 29 (Jan. 1997), https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf.

exclusion of impacts that are "remote in time" or "geographically remote," would unlawfully take such "long range" environmental impacts out of NEPA's purview and undermine NEPA's mandate and purpose to ensure that agencies are fully equipped to make decisions concerning all significant environmental impacts.[255]

The elimination of the NEPA regulations in conjunction with the treatment of "remote" impacts also ignores the reality that some major federal actions will have adverse effects that are remote in time but also reasonably foreseeable if not certain. Examples include the proposed geologic repository for the disposal of high-level radioactive wastes at Yucca Mountain, Nevada, identified in the Nuclear Waste Policy Act, as well as other interim storage options currently under development by the DOE. Radioactive releases from the repository to the environment are not likely to occur for hundreds and possibly thousands of years, but after that, significant releases are certain to occur and must be evaluated.[256]

For these reasons, the Agencies' and DoD's replacement of the traditional definition of effects with a definition that does not include indirect or cumulative impacts is unlawful and contrary to law.

2. The Agencies and DoD Unlawfully Curtail the Public Participation at the Heart of the NEPA Process

Public participation is one of the "twin aims" of NEPA.[257] The process is rooted in statutory obligations that a federal agency "consider every significant aspect of the environmental impact of a proposed action" *and* "inform the public that it has indeed considered environmental concerns in its decision-making process."[258] NEPA regulations have long "ensured that agencies identify, consider, and disclose to the public relevant environmental information early in the process before decisions are made and before actions are taken[,]"[259] just as courts even predating the 1978 Regulations have recognized the public's role in making certain that federal decision-making is "premised on the fullest possible canvassing of environmental issues[.]"[260] Thus, NEPA requires that agencies prepare environmental impact statements to disclose and address potentially significant environmental effects of a project; and as stated above, one purpose of this document is to "make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information."[261]

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[255] *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 349 (1989); 42 U.S.C. §§ 4332(2)(F), 4332(2)(C)(ii).

[256] The certainty of releases to the environment thousands of years into the future led both the U.S. EPA and the U.S. Nuclear Regulatory Commission to require the Department of Energy to estimate releases for one-million years. 40 C.F.R. § 197.20; 10 C.F.R. § 63.311; 40 C.F.R. § 197.12 (defining "period of geologic stability" as one million years following disposal).

[257] *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (internal citation omitted).

[258] *Id*.

[259] 40 C.F.R. § 1500.1(b).

[260] *Jones v. D.C. Redevelopment. Land Agency*, 499 F.2d 502, 511 (D.C. Cir. 1974).

[261] *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1287 (9th Cir. 1974).

As described above, the new Army Corps Permitting Program regulations do not expressly direct the solicitation of public comment *at all* during the EIS process. And while the DoD NEPA Procedures call for public comment during the EIS process, it does not specify that the public may comment on the draft EIS. The effect of these provisions is to allow the Agencies to analyze environmental effects and their significance without public input. By doing so, the Agencies and DoD strike at the heart of NEPA's purpose and environmental review requirements, in violation of NEPA and, accordingly, the APA.

IV. CONCLUSION

In conclusion, the Agencies should repeal their Rescission Rules and DoD should withdraw the DoD NEPA Procedures, and the agencies should issue new NEPA regulations after undertaking notice and comment under the APA.

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