March 10, 2020

Ms. Mary Neumayr, Chairwoman
Council on Environmental Quality
730 Jackson Place NW
Washington, D.C. 2-5-3

Re: CEQ-2019-0003, Proposed Revisions to Regulations Implementing the National Environmental Policy Act

Dear Chairwoman Neumayr,

On behalf of our more than one million members and supporters, The Wilderness Society submits these comments on the Council on Environmental Quality's (CEQ) proposed revisions to its regulations implementing the National Environmental Policy Act (NEPA). We are also a signatory to several other comment letters on the proposal, including the detailed technical comments submitted by The Partnership Project on behalf of hundreds of organizations.

Founded in 1935, The Wilderness Society is the leading conservation organization working to unite people to protect America's wild places. With more than one million members and supporters, we have led the effort to permanently protect 111 million acres of wilderness and to ensure sound management of our shared national lands. Going forward, we see a future where people and wild nature flourish together, meeting the challenges of a rapidly changing planet. To accomplish that vision, we must work to ensure that public lands are a solution to the climate and extinction crises and that all people benefit equitably from public lands.

Of all our bedrock conservation laws, NEPA perhaps best speaks to the vision The Wilderness Society seeks to accomplish by enshrining democratic principles of transparency, public participation, and accountability into government decision-making. For fifty years, NEPA has served as our environmental "Bill of Rights," protecting public health and safety and our environment, including the water we drink and the air we breathe. NEPA not only mandates that our government disclose the environmental and health effects of its authorization of mines, power plants, highway interchanges, and other major decisions, but it also guarantees the public a voice and a process to participate in decisions that could impact their lives.

It is no surprise, then, that The Wilderness Society, its members, supporters, and partners have relied on NEPA since its inception to advocate for sound management of our shared national lands. We have

engaged in countless NEPA processes over the last fifty years – everything from small local decisions on a particular national forest ranger district to sweeping national regulatory changes. Through those NEPA processes, we have had decades of productive and informed dialogue with federal land managers, local communities, tribes, and other stakeholders that paved the way for decisions to protect roadless and wilderness-quality lands, policies to reduce climate pollution from fossil fuel development on public lands, and management plans for newly established national monuments and other crown-jewels of our federal public lands system, to name just a few. Through NEPA, we have also been able to hold the government accountable where it fails to uphold the promises of an informed and transparent decision-making process.[1] Conversely, we have stood by federal agencies in defending decisions that were based on solid NEPA analysis.[2] This is precisely how Congress intended NEPA to work, and – while not perfect – the statute and CEQ's 1979 implementing regulations have stood the test of time.

CEQ's proposal to overhaul its NEPA regulations[3] runs counter to the fundamental principles enshrined in the statute, decades of caselaw, and long-standing agency practice. Many of the proposed provisions are unlawful on their face or, at the very least, invite unlawful interpretations, as explained in detail in the technical comments submitted by The Partnership Project on behalf of The Wilderness Society and hundreds of other organizations. In an attempt to cement this Administration's "regulatory reform" and "energy dominance" agendas, CEQ's proposal would put polluters first and make it difficult for affected communities to have a say in decisions affecting their health and the environment. The proposal would also have very real impacts on The Wilderness Society's work to protect wild and sensitive landscapes threatened by mining, drilling, logging, and other extractive uses, make public lands part of the climate solution, and ensure that all people in the U.S. benefit equitably from public lands. While not intended to be comprehensive, these comments highlight several of the most concerning elements of the proposal, as they relate to our work.

Overall, CEQ's proposal is deeply flawed and should be abandoned.[4] If CEQ is genuinely interested in improving implementation of NEPA – a goal that we would support – then it should utilize taxpayer dollars to identify and solve the real barriers to effective and efficient NEPA analysis (like inadequate agency budgets and expertise for conducting reviews and facilitating meaningful public engagement) and invest in strengthening the law as we face dual crises of climate change and loss of biodiversity. Instead, CEQ is proposing to gut the law at a time when we need it more than ever. Adding insult to injury, it is doing so based on a grossly inadequate public process – proposing to drastically overhaul 40 years of NEPA law and practice based on a short 60-day comment period and only two public hearings with access restricted to pre-registered "speakers" and "listeners."

[1] *E.g.*, *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683 (10th Cir. 2009) (successful Wilderness Society challenge to BLM oil and gas drilling plan for New Mexico's Otero Mesa – the largest undisturbed expanse of Chihuahuan Desert grassland in the United States – which violated NEPA in numerous respects).

[2] *E.g.*, *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209 (10th Cir. 2011); *Kootenai Tribe v. Veneman*, 313 F.3d 1094 (9th Cir. 2002) (two of several successful Wilderness Society interventions in defense of the Roadless Area Conservation Rule).

[3] All section references are to CEQ's proposed rule at 85 Fed. Reg. 1684-1730 (Jan. 10, 2020).

[4] To the extent CEQ proceeds with promulgating any of the proposed provisions in a final rule, it must fully explain how it accounted for and remedied the deficiencies identified in this and other public comments.

I. Constraining agency NEPA procedures

In a drastic departure from the paradigm of the last 40 years, CEQ's proposed regulations would serve as both the floor and the ceiling for agency NEPA procedures. The proposal forbids agencies from imposing additional procedures or requirements beyond those set forth in the CEQ regulations "except as otherwise provided by law or for agency efficiency."[5] And it would require agencies to adopt new NEPA procedures that "eliminate any inconsistencies with [CEQ's proposed] regulations" within one year.[6] These provisions would eliminate the important and needed flexibility for agencies to promulgate and implement NEPA procedures tailored to their unique missions, cultures, and relationships with the public – something that can require more robust and comprehensive implementation of certain elements of the statute than might be required in other instances. This is often the case with public land management agencies charged with managing for "multiple uses" – something the Supreme Court has described as "a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, 'including but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.'"[7] In this context, a robust NEPA analysis and public process are particularly important for decision-making that attempts to balance these often conflicting uses. Agencies like the Forest Service and BLM must retain discretion to ensure their NEPA processes and procedures are up to the task.

The proposal also calls into question the Forest Service's ongoing effort to revise its NEPA regulations.[8] The Wilderness Society and others submitted extensive comments on the agency's June 13, 2019 proposed rule – which, like CEQ's proposal, suffers from numerous serious deficiencies.[9] Despite those deficiencies, the Forest Service's proposal exceeds CEQ's proposed "ceiling" in numerous respects, including, for instance, the requirement to analyze cumulative impacts. As we articulated in a January 14, 2020 letter to the Forest Service (attached), proceeding with the Forest Service's rulemaking would constitute a waste of taxpayer dollars and agency resources while CEQ proceeds with its rulemaking which, if finalized, will dictate the scope of the Forest Service's rulemaking. If it intends to proceed with the new floor-ceiling paradigm (which it should not), CEQ should order the Forest Service and other agencies to stay ongoing rulemakings pending resolution of the CEQ rulemaking. CEQ must also identify and fully account for the impacts of the proposed floor-ceiling paradigm, including but not limited to identifying inconsistencies with existing and proposed agency regulations and procedures and the colossal effort that will be required for agencies to bring their long-standing practices and procedures into compliance.

[5] § 1500.3(a).
[6] § 1507.3(a).
[7] *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004) (quoting 43 U.S.C. § 1702(c)).
[8] *See* 84 Fed. Reg. 27,544 (June 13, 2019).
[9] *See* Wilderness Society *et al.* August 25, 2019 comments on the Forest Service's proposed NEPA rule (attached and hereby incorporated by reference).

II. Changing the rules of the game mid-stream

Under the "effective date" provision of CEQ's proposal,[10] agencies could apply the new regulations to ongoing NEPA processes. In other words, the rules of the game could change in the middle of an environmental review process, creating significant confusion for the public, agency decision-makers, and in any court challenges to the final agency action. Given the emphasis in the proposal on efficiency and clarity, this proposed change is seriously counterproductive. It could also have serious implications on a number of ongoing and upcoming high-profile NEPA processes that will have significant impacts on some of the crown jewels of our public lands system. For example, a key promise behind the 2017 Tax Cuts & Jobs Act provision opening the Arctic National Wildlife Refuge to oil and gas drilling was that NEPA and other laws would still apply and provide stringent environmental protections. CEQ's effort to change the rules of the game would undercut those promises. And in northeastern Minnesota, BLM is gearing up to initiate an EIS on a proposed sulfide-ore copper mine plan of operations in the headwaters of our nation's most popular wilderness area – the Boundary Waters Canoe Area Wilderness.

CEQ should abandon this provision and ensure that any final rule becomes effective only for NEPA processes commenced *after* publication of the rule in the Federal Register.

III. Handing the keys to polluters

Some of the most egregious provisions of CEQ's proposal are those that would prioritize the interests of private oil and gas, mining, logging, and other private companies over the public interest. Companies would be allowed to write their own environmental reviews, and federal contractors would no longer need to disclose conflicts of interests or financial stakes in the projects they are reviewing.[11] This would reverse CEQ's long-standing prohibition against private sector applicants or consultants with financial interests in the outcome preparing EISs for their own projects. There is no sound rationale for these proposed changes, which invite corruption of the NEPA process. For example, Chilean mining giant Antofagasta could prepare its own EIS on its proposal to build a polluting sulfide-ore copper mine in the headwaters of the Boundary Waters Wilderness, or the federal government could use the company's hand-picked contractor with a financial stake in the mine to prepare the analysis. Similarly, any oil company that purchases leases to drill the Arctic Refuge could prepare the NEPA analysis for permits to conduct damaging wintertime seismic exploration operations that could potentially crush denning polar bears and their cubs.

Adding to these give-aways to industry, the proposal also ensures that agencies could ignore any options that are not aligned with industry goals. Environmental reviews would be prejudiced from the get-go, with the purpose and need defined by the private company seeking approval.[12] Then, the only alternatives to the proposed action the agency must consider would need to accomplish that polluter-approved purpose and be "economically and technologically feasible" for the company.[13] In other

[10] § 1506.13.
[11] § 1506.5(c).
[12] § 1502.13.
[13] §§ 1502.14, 1508.1(z).

words, all roads would lead to logging, mining, and drilling, and the government could attempt to ignore alternative courses of action proposed by members of the public who depend on healthy forests and wildlife habitat, clean air and water, and other resources.

As a result, BLM could attempt to ignore a proposal by the Bears Ears Inter-Tribal Coalition to re-route a natural gas pipeline away from sensitive cultural resources in Bears Ears National Monument by claiming the alternative route would not be economically or technologically feasible for the gas company. Or BLM could argue that its NEPA analysis must be driven by an oil company's goal of authorizing a development plan in sensitive caribou calving habitat in the Arctic Refuge. In short, these provisions unduly elevate the goals of a private applicant over interests the public and should be withdrawn.

IV. Loopholes for triggering NEPA review

CEQ's proposal also invites agencies to select from a menu of loopholes that would purportedly allow them to avoid triggering NEPA altogether. These loopholes are embedded in a new threshold test for whether an action is "a major action," with a determination of significance relegated to an undefined afterthought.[14] They include vague criteria for projects with "minimal" federal funding or involvement[15] – even though the level of environmental impact may be relatively small despite a large amount of federal funding or involvement, or quite significant despite a modest amount of federal funding or involvement. These provisions are particularly concerning in the context of mining and energy development decisions involving federal public lands or minerals. As just one example, could BLM avoid NEPA analysis of a proposed uranium mining operation with the potential to leach radioactive waste into Grand Canyon National Park because the operation would be situated mostly on nearby private land or not involve federal funding?

CEQ's proposal also includes loopholes that would invite agencies to claim that complying with NEPA would be inconsistent with Congress' "intent" under another statute – despite the fact that statutory exemptions from NEPA must be explicit – or that an entirely different process designated to satisfy other goals serves as the "functional equivalent" of NEPA.[16] The functional equivalence loophole is particularly concerning in the context of land management planning, where the corresponding NEPA process provides crucial opportunities for public dialogue, science-based analysis, and agency examination of alternative courses of action for how to manage for multiple uses. BLM has already suggested that it is considering eliminating NEPA review for its resource management planning process.[17]

[14] §§ 1501.1, 1507.3(c), 1508.1(q).
[15] §§ 1501.1(a)(1), 1508.1(q).
[16] §§ 1501.1(a)(4) & (5), 1507.3(b)(6) & (c).
[17] *See* Rebecca Beitsch, *BLM weighs cutting environmental review when crafting public lands plans*, The Hill (Feb. 20, 2020, 5:10 PM), *available at* https://thehill.com/policy/energy-environment/481477-blm-weighs-cutting-environmental-review-when-crafting-public-lands.

These threshold decisions about NEPA's applicability could be made on a case-by-case basis (i.e., behind closed doors with the project applicant).[18] The proposed criteria are extremely vague, create unsatisfactory loopholes for environmental review, and should be removed.

V. Encouraging the minimal level of review

Where NEPA would apply, agencies would be encouraged to do the bare-minimum level of analysis. Detailed environmental impact statements would only be prepared as a last resort, with the vast majority of projects approved via categorical exclusion (i.e., no analysis or public input) or short environmental assessments completed within one year.[19] The provisions encouraging the adoption and use of categorical exclusions – including those of other agencies with distinct statutory obligations and missions – are particularly concerning.[20] If CEQ intends to encourage the lawful adoption and use of categorical exclusions, it must retain the current regulatory requirement that agencies demonstrate that the proposed category does not have individually or cumulatively significant impacts and a robust extraordinary circumstances safety valve. The proposed provisions at sections 1501.4 and 1508.1(d) would eviscerate those requirements, which are necessary to comply with NEPA.

The provisions purporting to adopt so-called "Determinations of NEPA Adequacy" or DNAs as yet another mechanism to avoid NEPA review are likewise deeply concerning.[21] As discussed further in Section VIII, below, we have significant experience with BLM's use of DNAs in the oil and gas leasing and development context, which has led to substantial uncertainty and legal vulnerability where the agency often relies on outdated or programmatic analysis that fails to address the site-specific impacts associated with the relevant proposed action. Where agencies have lawful mechanisms such as programmatic EISs, tiering, incorporation by reference, and categorical exclusions that allow them to appropriately streamline multi-tiered decision-making, DNAs are nothing more than an unnecessary invitation to break the law.

CEQ also proposes to eliminate without further explanation the long-standing factors of context and intensity when determining significance and arbitrarily reference only a subset of the effects that are cognizable under NEPA.[22] Thus, the likelihood that a proposed action would impact irreplaceable archaeological resources, parks, wilderness, endangered species, or other sensitive resources would no longer be a factor in consideration of whether an EIS is necessary. Collectively, these provisions might allow, for instance, the Forest Service to authorize a proposal to log old-growth trees in salmon spawning habitat on the Tongass National Forest via categorical exclusion or a cursory environmental assessment.

These proposed provisions are wrong as a matter of law, contrary to the purpose and policies of NEPA, and must be withdrawn.

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[18] § 1501.1(a)(4)-(5), (b).
[19] §§ 1501.3, 1501.4, 1501.5, 1501.10.
[20] §§ 1501.4, 1507.3(e)(5).
[21] §§ 1502.9(d)(4) & 1507.3.
[22] *Compare* § 1501.3(b) (proposed), *with* § 1508.27 (existing).

VI. Ignoring all but the most direct environmental effects

Under CEQ's proposed rule, analysis of impacts associated with a proposal to mine, drill, or log would be limited to those deemed to have "a reasonably close causal relationship to the proposed action," with no analysis of indirect or cumulative effects that are considered to be "remote in time, geographically remote, or the product of a lengthy causal chain" (i.e., climate change).[23] As discussed further in Section VIII, below, these provisions are particularly concerning (and unlawful) as the planet is increasingly experiencing the impacts of cumulative change associated with greenhouse gas pollution. But even beyond the impacts of climate change, indirect and cumulative impacts are central to the hard look at environmental consequences that NEPA requires. Without a full assessment of all reasonably foreseeable impacts – whether direct, indirect, cumulative, or some other label – agencies will be able to skirt meaningful analysis. For example, in permitting a sulfide-ore copper mine in the headwaters of the Boundary Waters Wilderness, the BLM might attempt to consider only the most direct and immediate impacts associated with building the mine and removing and processing the ore, while ignoring the long-term impacts associated with water and air pollution and degradation of the wilderness. In authorizing logging of old growth on the Tongass National Forest, the Forest Service could attempt to ignore the critical carbon sequestration role of the forest, as well as the erosion, stream sedimentation, and habitat fragmentation impacts of logging and the stress that salmon populations are already facing due to climate change.

CEQ must withdraw this arbitrary proposal. NEPA requires agencies to analyze the full array of reasonably foreseeable impacts. The current regulatory provisions should stand.

VII. Unnecessary barriers to public participation and judicial review

The Wilderness Society strongly opposes the proposed provisions that would impose unnecessary barriers on public participation and purport to limit or constrain judicial review. The proposed rule creates roadblocks to public participation through burdensome commenting requirements, inviting agencies to ignore and deem "forfeited" public comments that are not "specific" enough or do not include references to data sources and scientific methodologies.[24] Would this allow BLM, for instance, to deem comments from indigenous communities that a proposed uranium mine near the Grand Canyon could contaminate their drinking water not "specific" enough because they were based on traditional knowledge, rather than technical data and the government's preferred methodologies?

Additionally, under the proposed rule, comments that are not submitted within the agency's time limits would not be considered.[25] While we understand the need for reasonable comment deadlines, the proposed rule's one-size-fits-all approach will not accommodate the need to tailor the public process to meet the unique needs of the impacted communities, tribes, and stakeholders. For instance, if a comment period on a drilling proposal in the Arctic National Wildlife Refuge falls during caribou harvest or other critical times for subsistence practices, Gwich'in people unable to submit timely comments

[23] § 1508.1(g).
[24] §§ 1500.3(b), 1503.3(a), 1503.4.
[25] §§ 1500.3(b), 1501.10, 1503.3(b), 1503.4.

could risk forfeiting their ability to challenge the project later on. This could prevent important voices from being heard during the NEPA process and undermine a central tenet of the law.

Equally concerning are the proposed barriers on judicial review. Under the proposal, if aggrieved communities or individuals want to challenge an inadequate NEPA analysis in court, they may be precluded from doing so if they did not meet the "exhaustion" requirements discussed above.[26] CEQ also invites agencies to structure their decision-making processes in a manner that would allow for a stay pending judicial review, possibly contingent on a bond and security requirements or other conditions.[27] Such an approach would stifle the ability of vulnerable communities to delay implementation of an agency action while their challenge proceeds in court and is yet another give-away to wealthy corporations.

Once in court, an agency may claim that the judge must presume that it followed the law, based on a certification in its record of decision.[28] The agency's self-certification of compliance with the regulations could act as a shield from the courts' traditional "hard look" at agency compliance by creating a "conclusive presumption" of compliance. As a result, communities affected by oil and gas leasing, hardrock mining, or other impactful decisions may effectively be prevented from challenging those actions in court.

CEQ lacks authority to adopt these provisions or otherwise constrain judicial review under the Administrative Procedure Act and NEPA. The provisions must be abandoned, and CEQ should focus on how the NEPA process can better serve the array of communities, tribes, and members of the public affected by federal decision-making and ensure their voices are heard.

VIII. Impacts on oil and gas leasing & development

The Wilderness Society has worked for decades to ensure that fossil fuel development on federal public lands is conducted responsibly, utilizing NEPA and its guarantees of informed decision-making and public participation at every decision-point – from national-level policy-making, to land management planning, to leasing, to development plans, to permitting. Now, with the catastrophic impacts of climate change and the significant contribution from public lands to our nation's greenhouse gas (GHG) emissions, NEPA plays a more important role than ever in driving informed and equitable decision-making about leasing and development of publicly owned fossil fuel resources. A recent Wilderness Society analysis found that, "[i]f U.S. public lands were their own country, they would rank 5th in the world for greenhouse gas emissions."[29]

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[26] § 1500.3(c).
[27] § 1500.3(c).
[28] § 1502.18.
[29] The Wilderness Society, "Federal Lands Emissions Accountability Tool," *available at* https://www.wilderness.org/articles/article/federal-lands-emissions-accountability-tool (attached). The 9.9 million acres of public lands and waters that have been leased for oil and gas development during the Trump administration could result in lifecycle emissions from extraction and end-use of up to 5.95 billion metric tons (MT) of carbon dioxide equivalent (CO2e). That equates to more than half of the annual emissions of China – by far the world's largest emitter. *See* The Wilderness Society, "The Climate Report 2020: Greenhouse Gas Emissions from Public Lands," *available at*

The impacts from these public-lands-originating emissions are highly significant, and courts have made clear that both the emissions and their impacts must be fully analyzed under NEPA, including quantification of downstream emissions.[30] This obligation also applies at the planning stage, where lands are made available for leasing.[31] Indeed, as one federal court has recognized, "[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."[32] Absent a full accounting of GHG emissions and climate impacts, agencies like the BLM cannot possibly make informed decisions about if, where, when, and under what circumstances public oil and gas resources should be leased to private companies and developed.

Yet even as BLM continues to struggle to meet its obligations under NEPA to fully analyze the climate impacts of its oil and gas and other energy development decisions, CEQ proposes to eliminate consideration of effects that do not have a "reasonably close causal relationship" or are considered remote in time, geographically remote, or "the product of a lengthy causal chain."[33] In short, the proposed rule purports to allow agencies to analyze only the most direct impacts of a proposed action and ignore indirect and cumulative effects, including climate change. Rather than providing additional clarity consistent with the statute and case law, this would violate the requirements of NEPA and cause significant confusion and legal liability.[34] Regardless of what CEQ's regulations state, it is undoubtedly reasonably foreseeable that the vast majority of oil and gas produced on lease parcels will be burned downstream (otherwise why would companies drill for it?), which in turn will lead to GHG emissions and contribute to climate change. There is nothing remote or speculative about this causal chain. It is also strikingly bad policy at a time when consideration and mitigation of climate change impacts are crucial to the survival and wellbeing of communities, ecosystems, and the planet.

CEQ's proposed weakening of the requirement to analyze climate impacts under NEPA would also frustrate BLM's ability to comply with other obligations to fully consider and mitigate the climate impacts of its oil and gas leasing and development decisions. For instance, the Federal Land Policy and Management Act requires BLM to "take any action necessary to prevent unnecessary or undue degradation" of the public lands, including from climate change.[35] The BLM also must comply with its

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https://www.wilderness.org/sites/default/files/media/file/TWS_The%20Climate%20Report%202020_Greenhouse%20Gas%20Emissions%20from%20Public%20Lands.pdf (attached).

[30] *See, e.g.*, *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 76-77 (D.D.C. 2019); *San Juan Citizens Alliance v. BLM*, 326 F. Supp. 3d 1227, 1244, 1249 (D.N.M. 2018); *High Country Conservation Advocates v. U.S. Forest Serv.,* 52 F. Supp. 3d 1174, 1189-92, 1196-98 (D. Colo. 2014); *W. Org. Res. Councils v. BLM,* 2018 U.S. Dist. LEXIS 49635, at *29, *40, *53-54 (D. Mont. Mar. 26, 2018).

[31] *See, e.g.*, *Wilderness Workshop v. BLM,* 342 F. Supp. 3d 1145, 1155–56 (D. Colo. 2018).

[32] *Ctr. For Biological Diversity v. Nat'l Highway Transp. Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008).

[33] § 1508.1(g)

[34] *See, e.g.*, 42 U.S.C. § 4332(2)(C)(i)-(v) (requiring consideration of the environmental impacts of a proposed action (whether direct, indirect, cumulative, or otherwise), as well as the adverse environmental effects (whatever they are called), the local short-term uses of the environment and maintenance of long-term productivity, and the irreversible and irretrievable commitment of resources); *see also id.* § 4332(2)(F) (worldwide and long-range character of environmental problems must be recognized to prevent "a decline in the quality of mankind's world environment"); *id*. § 4331(b)(1)-(6) (agencies must use "all practicable means" to carry out NEPA's policy goals, which necessarily require consideration of climate change and other indirect and cumulative impacts).

[35] 43 U.S.C. § 1732(b).

multiple use mandate, including considering the present and future needs of the American people, providing for the long-term needs of future generations, and ensuring the "harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment" considering the relative values of the resources.[36] And the Mineral Leasing Act requires environmental protection measures on oil and gas leases.[37] Collectively, these mandates require the agency to fully account for and mitigate the climate impacts associated with fossil fuel availability, leasing, and development decisions, and the relevant NEPA analysis provides the vehicle for ensuring it can satisfy those obligations through informed and transparent decision-making.

Other elements of CEQ's proposal would also undermine BLM's ability to make informed decisions about oil and gas leasing and development and frustrate the public's ability to meaningfully participate. As "the heart of the environmental impact statement," an alternatives analysis that "[r]igorously explore[s] and objectively evaluate[s] all reasonable alternatives" is crucial to "sharply defin[e] the issues and provide a clear basis for choice among options."[38] CEQ's proposal to weaken alternatives analysis would have particularly devastating impacts on oil and gas decision-making, where BLM already often takes an "all or nothing" approach of considering only a no action alternative or leasing all (or nearly all) of the parcels nominated by industry. Federal courts have invalidated this approach.[39]

As described above, under CEQ's proposal, the goals of oil and gas companies could drive the purpose and need statement, and thereby what constitutes a reasonable alternative.[40] Along with elimination of the bedrock language in existing § 1502.14 and the new requirement that alternatives be "technologically and economically feasible,"[41] this would not only hand over the keys to the oil and gas industry, but it could also spell the end of citizen-proposed alternatives in response to oil and gas leasing and development proposals – a potent tool for affected communities to set forth their vision and engage in collaborative and constructive dialogue with the agency and other stakeholders. As just one example, a federal court invalidated BLM's 2008 leasing decision for Colorado's remote Roan Plateau in part because it failed to analyze a community alternative that would have protected the top of the plateau while allowing development on the less sensitive areas around its base.[42] Following the ruling, The Wilderness Society and other parties to the lawsuit reached a settlement that led BLM to prepare a

[36] *Id.* § 1702(c).
[37] 30 U.S.C. § 226(g).
[38] 40 C.F.R. § 1502.14 (current).
[39] *See, e.g.*, *Wilderness Soc'y v. Wisely*, 524 F. Supp. 2d 1285, 1312 (D. Colo. 2007) (BLM violated NEPA by failing to consider a "middleground compromise between the absolutism of the outright leasing and no action alternatives"); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (NEPA analysis failed to evaluate a reasonable range of alternatives where it "considered only a no action alternative along with two virtually identical alternatives").
[40] § 1502.13.
[41] §§ 1502.14, 1508.1(z).
[42] *See Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1248-50 (D. Colo. 2012). *See also, e.g.*, *N.M. ex rel. Richardson*, 565 F.3d at 715 (BLM's failure to consider an alternative that closed Otero Mesa to development was arbitrary and capricious); *Wilderness Workshop v. BLM*, 342 F. Supp. 3d 1145, 1167 (D. Colo. 2018) (BLM failed to consider alternative that would have made low-potential lands unavailable for leasing); *High Country Conservation Advocates v. United States Forest Serv.*, No. 18-1374, 2020 U.S. App. LEXIS 6454, at *19 (10th Cir. Mar. 2, 2020) ("the Forest Service's elimination of the Pilot Knob Alternative from detailed study in the North Fork SFEIS was arbitrary and capricious").

supplemental NEPA analysis considering an alternative similar to the community alternative. In 2016, the agency selected that alternative, protecting the undisturbed wildlife habitat and exceptional wilderness values of the plateau while allowing development to proceed on less sensitive lands around the base. In short, CEQ's proposal is likely to have the effect of sanctioning further unlawful narrowing of alternatives analysis in oil and gas planning, leasing, and development decisions at a time when BLM should be considering a broad suite of alternatives that include more resilient uses for the land, full mitigation of climate impacts, and measures to protect and preserve biodiversity, water quality, and other multiple uses.

The constrained purpose and need, alternatives analysis, and impacts analysis provisions of the proposed rule will collectively result in BLM failing to take the requisite "hard look" at the myriad impacts of oil and gas development on public lands. This includes impacts to at-risk species such as the Greater sage-grouse, lands with wilderness characteristics, water quality and quantity, air quality, big game migration corridors and critical winter ranges, public health, and Areas of Critical Environmental Concern, among many others. Impacts to these and other resources must be fully considered at all stages of decision-making for oil and gas development, including in the EIS for resource management plan decisions about what public lands to make available for leasing and what stipulations should apply to leasing; in the EIS or EA for a lease sale, which constitutes an irreversible and irretrievable commitment of resources; and at the development plan or permitting stage, where analysis of site-specific impacts is crucial.

The timing of the agency's hard look at the point of an irreversible and irretrievable commitment of resources is also important in the context of oil and gas leasing. The courts have recognized that issuance of an oil and gas lease that does not require "no surface occupancy" (NSO) for development operations constitutes an irreversible and irretrievable commitment of resources, requiring preparation of an EIS prior to the lease sale.[43] Nevertheless, BLM regularly avoids this requirement on the vast majority of its "non-NSO" leases by preparing mitigated findings of no significant impact. And it often fails to conduct site-specific analysis altogether by utilizing DNAs at the leasing or permitting stage, which in turn rely on plan- or leasing-level NEPA analyses that purport to defer site-specific analysis to the permitting stage.[44] In other words, BLM plays a shell game where the site-specific analysis never actually happens. CEQ's proposal would exacerbate this problem. First, it would allow tiering "to defer detailed analysis of environmental impacts of specific program elements until such program elements are ripe for decisions that would involve an irreversible or irretrievable commitment of resources."[45] CEQ also suggests that it is considering amending § 1506.1 for agencies to avoid preparing an EA or EIS where there is an irreversible and irretrievable commitment of resources.[46] And the proposal endorses the use of DNAs.[47] These provisions invite further uncertainty and legal liability, given the clear direction

[43] *E.g.*, *Conner v. Burford,* 848 F.2d 1441, 1450 (9th Cir. 1988); *Sierra Club v. Peterson,* 717 F.2d 1409, 1414 (D.C. Cir. 1983); *Southern Utah Wilderness Alliance,* 166 IBLA 270, 276-77 (2005).
[44] For more information on BLM's use of DNAs and a detailed critique of their questionable legality, see pages 182-186 of The Wilderness Society *et al.*'s August 25, 2019 comments on the Forest Service's proposed NEPA rule (attached and hereby incorporated by reference).
[45] § 1502.4(d).
[46] 85 Fed. Reg. at 1704.
[47] 1502.9(d)(4) & 1507.3.

from federal courts that oil and gas lease sales constitute an irreversible and irretrievable commitment of resources. They should be abandoned.

IX. Conclusion

For the reasons discussed in this comment letter and many others, CEQ should withdraw its proposed rule, which constitutes an unjustified, unlawful, and short-sighted attack on NEPA. Please do not hesitate to contact me with questions.

Sincerely,

Drew McConville
Senior Managing Director, Government Relations
The Wilderness Society
drew_mcconville@tws.org
202-429-2654