Alaska Oil and Gas Association

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VIA Federal eRulemaking Portal
Docket CEQ-2019-0003

Council on Environmental Quality
730 Jackson Place NW
Washington, D.C. 20503

RE: Comments of the Alaska Oil and Gas Association on Notice of Proposed Rulemaking—Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

To Whom It May Concern:

This letter provides the comments of the Alaska Oil and Gas Association ("AOGA") in response to the Council on Environmental Quality's ("CEQ") Notice of Proposed Rulemaking—Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act ("Proposed Rulemaking"). *See* 85 Fed. Reg. 1684 (Jan. 10, 2020). AOGA appreciates CEQ's consideration of the comments set forth in this letter.

I. THE ALASKA OIL AND GAS ASSOCIATION

AOGA is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefit of all Alaskans. AOGA's membership includes 14 companies representing the industry in Alaska that have state and federal interests, both onshore and offshore. AOGA's members have a well-established history of prudent and environmentally responsible oil and gas exploration, development, and production in Alaska. Part of AOGA's interest is representing its members in regulatory proceedings such as the Proposed Rulemaking.

Review under the National Environmental Policy Act ("NEPA") is required for exploration, development, and production activities with a federal nexus—which encompasses almost all oil and gas activities in Alaska. Consequently, AOGA and its members are extremely familiar with the NEPA process and have been strong supporters of efficient, effective, accurate, and lawful NEPA review for oil and gas activities in Alaska. AOGA and its members have supported or participated as permit applicants in hundreds of NEPA reviews. AOGA's members have collected data and developed scientific information that has been used in many NEPA documents, and they work with federal agencies, such as the U.S. Bureau of Land Management,

the U.S. Army Corps of Engineers, and the U.S. Fish and Wildlife Service, to inform and improve NEPA analyses.

In short, AOGA and its members have a strong and well-established interest in the NEPA process. Our deep, practical experience with the NEPA process uniquely qualifies us to comment on and constructively inform the Proposed Rulemaking.

II. GENERAL COMMENTS

AOGA applauds CEQ's effort to streamline the NEPA review process, reduce unnecessary delays, and implement a clearer approach to federal planning and decision-making subject to NEPA. These revisions are long overdue. CEQ promulgated its NEPA regulations at 40 C.F.R. Part 1500, *et seq.* in 1978.[1] CEQ made only one amendment to one provision in 1986.[2] Since then, a wealth of agency practice, applicant experience, and case law demonstrates that updates are badly needed to return NEPA review to the efficient and effective process that Congress envisioned.

AOGA generally supports the following components of the Proposed Rulemaking:

- Revisions for efficiency and effectiveness to Sections 1500.3(a) (Mandate), 1500.4 (Reducing Paperwork), 1500.5 (Reducing Delay), 1501.4 (Categorical Exclusions), 1501.7 (Lead Agencies), 1502.2 – 1502.6 and 1502.24 (Methodology and Scientific Accuracy), 1506.3 (Adoption), 1506.6 (Public Involvement), and 1506.9 (Proposals for Regulations);

- Revisions to definitions in Section 1508 for clarity and consistency with existing practice, including revisions to: "Authorization," "Categorical Exclusion," "Cooperating Agency," "Environmental Assessment," "Finding of No Significant Impact," "Human Environment," "Lead Agency," "Legislation," "Mitigation," "Notice of Intent," "Page," "Participating Agency," "Proposal," "Reasonable Alternatives," "Scope," "Senior Agency Official," and "Tiering";

- Revision to the definition of "effects and impacts" to eliminate the current definitions of "direct," "indirect," and "cumulative" effects, and to establish a more straightforward process for identifying and assessing the likely effects of proposed actions; and

- Revisions that reduce paperwork and delay by clarifying the application of NEPA and categorical exclusions.

[1] Implementation of Procedural Provisions, 43 Fed. Reg. 55978 (Nov. 29, 1978).

[2] National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 Fed. Reg. 15618 (Apr. 25, 1986) (amending 40 C.F.R. § 1502.22).

In addition, AOGA strongly supports CEQ's effort to increase applicant involvement in the NEPA process.[3] Based on its members' extensive record of NEPA participation for oil and gas activities in Alaska, AOGA can say without reservation that applicant participation significantly increases effective and efficient NEPA review by providing agencies with essential information available only to a project proponent. Indeed, existing NEPA regulations recognize the importance of applicant involvement by, for example, instructing agencies to "involve environmental agencies, applicants, and the public" in preparing environmental assessments.[4] In practice, however, the existing regulations are not spurring sufficient applicant involvement and applicants may not be consulted in an agency's development of a NEPA document. This can lead to inefficiencies if, for example, the agency improperly characterizes the "purpose and need" of the action or identifies alternatives that are not reasonable or feasible. Improved applicant involvement is essential to creating a better informed and more efficient NEPA process, and this rulemaking presents a good opportunity to direct agencies to work more extensively with applicants.

Finally, NEPA directs federal agencies to "identify and develop methods and procedures," in consultation with CEQ, to "insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations."[5] The Proposed Rulemaking's revisions accurately reflect the intended scope of NEPA to consider environmental impacts along with social, economic, and technical considerations as part of federal decision-making. The statute contains no "action-forcing" requirement and dictates no substantive outcome or result. Federal agencies satisfy the statutory directives by properly considering relevant environmental impacts and disclosing that information to the public through the NEPA review process. The Proposed Rulemaking is faithful to the statutory directive to promote environmental quality in conjunction with social, economic, and other national development requirements.[6]

III. DETAILED COMMENTS

As indicated above, AOGA supports the Proposed Rulemaking as an important step toward improving and clarifying NEPA regulations and procedures carried out by federal agencies. Below we identify and comment on specific aspects of the Proposed Rulemaking and provide constructive recommendations to improve the clarity or effectiveness of certain provisions. As stated above, AOGA and its members strongly support efficient, effective, accurate, and lawful NEPA review. Our comments and recommendations below are provided in that context.

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[3] Proposed revisions authorizing applicant involvement include Proposed Sections 1501.5(d), 1501.7(i), 1502.5(b), 1506.5(c), and 1507.2, 85 Fed. Reg. at 1716, 1719, 1725, 1727.

[4] 40 C.F.R. § 1501.4(b).

[5] 42 U.S.C. § 4332(2)(B).

[6] 42 U.S.C. § 4344(4).

A. Any comment summary should be focused on comments that influenced agency decision-making and should not be subject to further public comment.

The Proposed Rulemaking would adopt new public comment summary requirements. Specifically, existing sections would be revised to require agencies to include a summary of alternatives, information, and analysis submitted by the public in draft and final environmental impact statements ("EIS") (the "Summary") (Proposed Section 1502.17). In addition, the Proposed Rulemaking requires an additional 30-day public comment period on the Final EIS to allow parties to comment on the Summary (Proposed Section 1503.1(b)). AOGA has two specific recommendations for improving these proposals.

First, although AOGA recognizes the benefit of the Summary to provide transparency and inform the public, the Summary should be required only for those comments that influenced or persuaded the agency's decision-making, not a mandatory recharacterization of all substantive comments. NEPA review requires agencies to consider alternatives, information, and analysis relevant to the proposed action, and must inform the public of information "useful in restoring, maintaining, and enhancing the quality of the environment."[7] Therefore, only those alternatives, information, and analyses that persuade or help an agency in reaching a decision need be included in an EIS. The Summary should not address all substantive comments considered, regardless of their import or accuracy, as that would be unnecessary, inefficient, and confusing to the public. To ensure that the Summary is properly focused on comments that influenced decision-making, consistent with NEPA—and also to avoid a make-work requirement that could be abused by project opponents—AOGA recommends the following modification to Section 1502.17:

> The environmental impact statement shall include a summary of all alternatives, information, and analyses submitted by public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement **that have influenced or persuaded agency decision-making**.

Second, AOGA recommends that CEQ forgo its proposal to invite *additional* public comment on the agency's summary of public comments in the Final EIS (Proposed Section 1503.1(b)). This unprecedented new step would effectively encourage parties to comment further on the agency's characterization of their own prior comments—which are already in the record and normally require no further elaboration. With a mandatory additional public comment period, it is not difficult to imagine parties engaging in litigation-like cross-commenting or seeking the opportunity to *respond* to other parties' comments on their prior comments. Agencies relying upon comments received on the Summary at the Final EIS stage would be at risk of having to prepare supplemental analyses to allow yet additional consideration of issues that should have been raised earlier on, and that are only now before the agency. Moreover, adding such an unprecedented new step would cause unnecessary delay, which is contrary to CEQ's overarching intent to make the NEPA process more *efficient*. For all of these reasons, CEQ should not require an additional comment period on the Final EIS Summary.

[7] 42 U.S.C. § 4332(2)(G).

In sum, AOGA requests that CEQ revise Section 1502.17 as provided above and strike the requirement to provide an additional opportunity for public comment on the Final EIS Summary in Sections 1503.1(b) and 1503.3(b), as well as references to that comment period in Sections 1500.3(b) and 1505.2(e), and elsewhere in the proposed regulations.

B. Exhaustion requirements should not include additional public comment on the Final EIS's Summary.

Untimely, inaccurate, and irrelevant comments unnecessarily delay the NEPA inquiry, particularly for controversial or complex actions producing voluminous response. AOGA supports the exhaustion provision as an important update to ensure that comments on the Draft EIS are submitted in a thoughtful and timely fashion. As noted above, however, AOGA believes that the requirement to receive public comments on the Final EIS's Summary would create confusion and unnecessary delay. Consistent with our proposed modifications to Section 1502.17, AOGA recommends the following change to paragraph (3) of Section 1500.3(b):

> (3) For consideration by the lead and cooperating agencies, comments must be submitted within the comment periods provided and shall be as specific as possible (§§ 1503.1 and 1503.3). Comments or objections not submitted shall be deemed unexhausted and forfeited. ~~Any objections to the submitted alternatives, information, and analyses section (§ 1502.17) shall be submitted within 30 days of the notice of availability of the final environmental impact statement~~.

C. CEQ should confirm that other statutory requirements may override the judicial review provision at Proposed Section 1500.3(c).

Proposed Section 1500.3(c) states: "It is the Council's intention that judicial review of agency compliance with the regulations in parts 1500 through 1508 not occur before an agency has issued the *record of decision or taken other final agency action*."[8] In addition, Proposed Section 1500.3(a) states: "Parts 1500 through 1508 of this title are applicable to and binding on all Federal agencies for implementing the procedural provisions of [NEPA] . . . *except where compliance would be inconsistent with other statutory requirements*."[9] We highlight these two provisions to emphasize their mutual importance in the practical application of NEPA. For example, the Naval Petroleum Reserves Production Act ("NPRPA") provides:

> Any action seeking judicial review of the adequacy of any program or site-specific environmental impact statement under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) concerning oil and gas leasing in the National Petroleum Reserve–Alaska shall be barred unless brought in the appropriate District Court within 60 days after notice of the availability of such statement is published in the Federal Register.[10]

[8] 85 Fed. Reg. at 1713 (emphasis added).
[9] *Id*. at 1712 (emphasis added).
[10] 42 U.S.C. § 6506a(n)(1).

In this example, if Proposed Section 1500.3(a) were strictly applied, then a plaintiff may have no opportunity to challenge an EIS for an action in the National Petroleum Reserve-Alaska if the EIS is issued more than 60 days before final agency action or issuance of a record of decision, which is contrary to the intent of the NPRPA (and may ultimately thwart the purpose of that important statute of limitations). AOGA's interpretation of the Proposed Rulemaking is that Section 1500.3(a) would apply in this example and, as intended by Congress, that the NPRPA's statute of limitations provision, as an "other statutory requirement," would control—*not* Proposed Section 1500.3(c). AOGA requests CEQ's confirmation of this interpretation.

D. AOGA supports, with one minor suggestion, the proposed remedy provisions at Proposed Section 1500.3(d).

AOGA supports clarifying that NEPA does not provide a basis for injunctive relief or a finding of irreparable harm. Explaining the remedies that are, or are not, available under NEPA informs the public and adds clarity to the purpose and scope of the regulations. Section 1500.3(d) can be further clarified and improved as suggested below. Specifically, AOGA recommends that CEQ delete the first sentence as its purpose is unclear and the ambiguity will only invite NEPA challenges.

> [New] Remedies. ~~Harm from the failure to comply with NEPA can be remedied by compliance with NEPA's procedural requirements as interpreted in the regulations in parts 1500 through 1508.~~ These regulations create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm. These regulations do not create a cause of action or right of action for violation of NEPA, which contains no such cause of action or right of action. It is the Council's intention that any actions to review, enjoin, stay, or alter an agency decision on the basis of an alleged NEPA violation be raised as soon as practicable to avoid or minimize any costs to agencies, applicants, or any affected third parties. It is also the Council's intention that minor, non-substantive errors that have no effect on agency decision making shall be considered harmless and shall not invalidate an agency action.

E. Changes to the threshold applicability analysis are necessary to ensure an efficient and effective process.

AOGA supports creating a "threshold applicability analysis" procedure to ensure proper application of NEPA to proposed actions. This will improve the clarity of agency decision-making under NEPA and result in better-documented agency records. AOGA recommends the minor modifications described below to better capture CEQ's intent for this proposed provision.

The Proposed Rulemaking preamble explains that Proposed Section 1501.1(b) "would clarify that agencies can also make [an applicability] determination on a case-by-case basis."[11] AOGA agrees that agencies may make a threshold applicability determination on a case-by-case basis, and recommends the following clarifying modification:

[11] 85 Fed. Reg. at 1695.

Federal agencies may make ~~these~~**general threshold applicability** determinations in their agency NEPA procedures (§ 1507.3(c)) ~~or on an individual~~**as well as on a case-by-case or action-specific** basis.

This change would clarify that agencies may make general threshold applicability determinations as part of their NEPA procedures pursuant to Section 1507.3(c) or on an action-specific basis for those actions that are not generally identified under Section 1507.3(c).

F. Environmental effects and values should be considered "along with" economic and technical analysis.

AOGA strongly supports clarifying, in Section 1501.2(b)(2), that agencies shall "identify environmental effects and values in adequate detail so they can be appropriately considered *along with economic and technical analyses*" rather than "compared to" those analyses.[12] NEPA's plain language mandates that agency methods and procedures consider unquantified environmental amenities and values *along with* economic and technical considerations.[13] Additionally, NEPA's legislative history shows congressional intent to integrate environmental protection with economic development.[14] Judicial opinions have similarly held that NEPA does not require agencies to elevate environmental concerns over other appropriate considerations.[15] Accordingly, this proposed revision is consistent with the plain language of the statute, congressional intent, and judicial opinions.

G. CEQ should clarify that an agency need only evaluate a single action alternative and a no-action alternative in an environmental assessment.

AOGA strongly supports the new provisions presented in Proposed Section 1501.5. An environmental assessment ("EA") should be a *concise* NEPA document because it either (1) is followed by preparation of a full EIS if significant impacts are identified or (2) evaluates actions for which there is no significant impact (and thus no need for an exhaustive analysis). AOGA particularly supports the proposed page limit and recommends that CEQ consider reducing that limit to 50 pages.

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[12] Emphasis added. *Compare* 85 Fed. Reg. at 1714 (proposing language requiring consideration of environmental effects and values "along with economic and technical analyses") *with* 40 C.F.R. § 1501.2(b) (requiring consideration of environmental effects and values "compared to economic and technical analyses").

[13] 42 U.S.C. § 4332(2)(B).

[14] *See, e.g.*, H.R. Doc. No. 20-218, at 16 (1968) ("The system of free enterprise democracy must integrate long-term public interests with private economic prosperity. A full range of incentives, inducements, and regulations must be used to link the public interest to the marketplace in an equitable and effective manner. . . . Standards of quality must not be absolute—rather, they should be chosen after balancing all criteria against the total demands of society.").

[15] *See Balt. Gas & Elec. Co. v. Nat'l Res. Def. Council*, 462 U.S. 87, 97 (1983).

AOGA recommends that CEQ include an additional provision in Proposed Section 1501.5 to clarify that an agency may consider *only a no-action and an action alternative* in an EA. A well-established body of case law supports agency decisions to evaluate only two alternatives in an EA. For example, in *Native Ecosystems Council v. U.S. Forest Service*, the Ninth Circuit decided to "join our sister circuits in holding that an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS," and that an agency preparing an EA is only required to include a brief discussion of reasonable alternatives.[16] The Ninth Circuit and other Circuit Courts have repeatedly held that an agency's consideration of a "no action" alternative and its "preferred" alternative in an EA satisfies that "lesser" obligation.[17] We recommend that CEQ include the following provision in Section 1501.5 to align the regulations with well-established case law:

> **[(f) Agencies may limit consideration of alternatives in an environmental assessment to a single action alternative and a no-action alternative.]**

H. Applicants should be consulted when extending time limits, and their consent should be required for extensions beyond three months for an EIS and one month for an EA.

AOGA strongly supports the Proposed Rulemaking's presumptive time limits for preparing NEPA documents. This is a necessary step to bring consistency to the NEPA process and avoid unnecessary and costly multi-year delays. The proposed revisions are thoughtful, allowing the lead agency to approve a longer time period based on specific factors.

AOGA recommends, however, that the revised regulations recognize the important role of an applicant in this process. Specifically, in considering approving a longer time period for completion of a NEPA document, the lead agency should be required to consult with any applicant. The agency should be allowed to extend the time period without an applicant's

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[16] *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245, 1246 (9th Cir. 2005) (upholding the Forest Service's consideration of a "no action" alternative and its "preferred" alternative, even though no other alternatives were considered in detail); *accord N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1154 (9th Cir. 2008) (holding that agency's consideration of only two alternatives "fulfilled their obligations under NEPA's alternatives provision").

[17] *See, e.g.*, *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1022 (9th Cir. 2012) ("Since [*Native Ecosystems Council*], we are aware of no Ninth Circuit case where an EA was found arbitrary and capricious when it considered both a no-action and preferred action alternative."); *N. Idaho Cmty. Action Network*, 545 F.3d at 1154 (holding agencies "fulfilled their obligations under NEPA's alternatives provision when they considered and discussed only two alternatives in the . . . EA"); *Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1012 (9th Cir. 2011) (same); *see also La. Crawfish Producers Ass'n–W. v. Rowan*, 463 F.3d 352, 356 (5th Cir. 2006) (observing that there is "no caselaw" that "require[s an agency] to consider and reject [a] proposed alternative in [an] EA" (emphasis omitted)); *Save Our Cumberland Mts. v. Kempthorne*, 453 F.3d 334, 342 (6th Cir. 2006) ("an agency has fewer reasons to consider alternatives when it prepares an environmental assessment as opposed to when it prepares an environmental impact statement"); *Friends of the Ompompanoosuc v. Fed. Energy Regulatory Comm'n*, 968 F.2d 1549, 1558 (2d Cir. 1992) ("[T]he range of alternatives an agency must consider is narrower when, as here, the agency has found that a project will not have a significant environmental impact.").

approval by *three* months for an EIS and *one* month for an EA. For those actions involving an applicant, the agency should be required to obtain applicant consent for any extensions beyond three months (EIS) and one month (EA). This proposal is modeled on the Endangered Species Act's ("ESA") Section 7 consultation regulations,[18] and would provide a necessary check on the lead agency's ability to extend time periods for EISs and EAs.

Relatedly, AOGA recommends that CEQ include language in the preamble for the final rule expressing its intent regarding the use of extensions. For example, CEQ could include a statement that it intends for the extension provisions to be used "sparingly" and in no more than 5% of all NEPA processes. In addition, AOGA is concerned that agencies will delay the decision to prepare an EA or the notice of intent for an EIS to give themselves more time to prepare such documents. AOGA recommends that CEQ address this issue in the final rulemaking and specify that agencies shall not unreasonably delay decisions to prepare an EA or EIS, which is consistent with CEQ's intent in establishing deadlines.

I. Agencies should have broad discretion to use tiering for efficiency.

Section 1502.4(d) of CEQ's existing regulations encourages agencies to use tiering and other methods to address programmatic or more narrow actions and avoid duplication and delay. The Proposed Rulemaking would add helpful language to further clarify that agencies may use 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."[19] AOGA supports this clarification, which would underscore an agency's ability to conduct its NEPA reviews as necessary details become available.

J. Page limits are necessary to ensure meaningful EISs and should only be extended in limited circumstances.

The unnecessarily lengthy and repetitive EISs sometimes produced by agencies under current regulations fail as a matter of practicality because an EIS ranging in the hundreds to thousands of pages is unreadable, is undigestible, and provides nearly unlimited fodder for litigation. The deleterious consequences of NEPA delay distress complex, broad-scope projects in significant ways and too often result in documents that are nearly impossible to comprehend, particularly in any useful time frame. For these reasons, AOGA strongly supports establishing presumptive page limits for final EISs to limit NEPA documents to a reasonable and manageable length with detailed technical information provided in appendices. This type of streamlined approach has been used in some of the EISs produced by the U.S. Bureau of Land Management for certain Alaska actions, and has resulted in EISs that are practical, readable, meaningful, and useful.

[18] The ESA regulations allow agencies to extend the 90-day consultation period up to 60 days without applicant consent, but require an applicant to approve longer extensions. 50 C.F.R. § 402.14(e) ("A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant."). Although NEPA and the ESA differ, both statutes analyze the impact of proposed actions on the environment.

[19] 85 Fed. Reg. at 1718-19.

To guarantee that the proposed revisions meet the goal of ensuring that agencies focus on significant effects and useful information, AOGA believes that the regulations should be clearer that extensions can only be approved for proposals of "unusual scope or complexity." The regulations should create an explicit presumption *against* extending page limits and should require that they be extended only in extreme circumstances where the senior agency official determines that the purpose of NEPA *cannot be met* within the default page limits because either (1) the scope and complexity of the proposed action is unprecedented, or (2) the potential for environmental impacts cannot be adequately described in 300 pages or less. In deciding to extend the page limit, the senior agency official must conclude that the extension will not impact the agency's ability to meet the time limits provided in Section 1501.10(b). These additions to the language are necessary to avoid agencies uniformly extending page limits as a matter of course, which would defeat the purpose of presumptive page limits.

K. Proposed Section 1502.9 should be modified to align with established practice and law regarding agency documentation of decisions to not supplement a NEPA document.

AOGA supports CEQ's proposed recodification of the existing practice for documenting determinations of whether a supplemental analysis is required or whether new circumstances or information is not significant. However, AOGA recommends the following modification to improve the clarity and application of Proposed Section 1502.9(d)(4):

> (4) May find that changes to the proposed action or new circumstances or information relevant to environmental concerns are not significant and therefore do not require a supplement. The agency ~~should~~**may** document the finding consistent with its agency NEPA procedures (§ 1507.3) **or in any other manner deemed appropriate by the agency in its discretion.**~~, or, if necessary, in a finding of no significant impact supported by an environmental assessment.~~

AOGA agrees that agencies may, at their election, document a decision that no supplementation is necessary in a finding of no significant impact supported by an EA. However, no such documentation is required and courts have even affirmed agency decisions not to supplement when the agency simply documents its determination in a record of decision instead of, for example, a supplemental information report or a determination of NEPA adequacy.[20] Although discretionary decisions as to whether it is necessary to document findings should be entitled to deference, the "if necessary" language (stricken above) creates an opportunity for NEPA litigants to argue that it was "necessary" for the agency to prepare a finding of no significant impact or some other formal means of documentation. AOGA recommends that CEQ align Proposed Section 1502.9(d)(4) with established practice and law, and eliminate the potential for time-consuming and unnecessary litigation.

[20] *See, e.g.*, *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 855 (9th Cir. 2013) (finding no error where agency did not complete supplemental information report because the record of decision provided "adequate documentation of the Forest Service's reasoned decision that no SEIS was required").

L. AOGA agrees that the purpose and need statement *must* be based on the goals of the applicant.

AOGA strongly supports CEQ's proposed modification to the regulation addressing the statement of purpose and need. Specifically, AOGA agrees that the purpose and need statement must be based "on the goals of the applicant and the agency's authority" (Proposed Section 1502.13). Indeed, for an applicant-proposed project, there is no logical justification for *not* requiring the purpose and need statement to be based on the applicant's goals. If it were not for the proposed project, there would be no permit application and no need for NEPA review in the first place.

Moreover, as CEQ recognizes, a key function of the purpose and need statement is to provide the basis for the agency's identification of reasonable alternatives. Reasonable alternatives *must* be technically and economically feasible and realistically implemented by the applicant.[21] Accordingly, a purpose and need statement that does not consider the applicant's goals *cannot* logically lead to the identification of reasonable alternatives. In short, as proposed by CEQ, the purpose and need statement must be based on the goals of the applicant and the permitting agency's authority.[22]

At least one outlier case in the Ninth Circuit invalidated an EIS on the basis of a purpose and need statement that was "unreasonably narrow."[23] Specifically, the court held:

> The BLM may not circumvent this proscription by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives, yet that was the result of the process here. The BLM adopted Kaiser's interests as its own to craft a purpose and need statement so narrowly drawn as to foreordain approval of the land exchange. As a result of this unreasonably narrow purpose and need statement, the BLM necessarily considered an unreasonably narrow range of alternatives. We therefore affirm the district court's grant of summary judgment on both the "purpose and need" and "reasonable range of alternatives" claims under NEPA.[24]

With due respect to the Ninth Circuit, *National Parks* was wrongly decided. NEPA does not require agencies to prepare broad purpose and need statements in order to allow for the development of alternatives that do not "meet specific private objectives." Rather, as recognized by CEQ, it is essential that the alternatives *do* meet private objectives—otherwise they would not be economically or technically feasible. AOGA encourages CEQ to address *National Parks* in

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[21] *See* 85 Fed. Reg. at 1702. Relatedly, AOGA supports CEQ's proposed definition for "reasonable alternatives."

[22] *See Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) ("Agencies . . . are precluded from completely ignoring a private applicant's objectives."); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) ("[T]he agency should take into account the needs and goals of the parties involved in the application.").

[23] *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt*., 606 F.3d 1058, 1070-72 (9th Cir. 2010).

[24] *Id*. at 1072 (footnote omitted).

the preamble for its final rule and make clear that the new Section 1502.13 supersedes that incorrect holding.

M. Agencies should not be required to evaluate alternatives that are not within their jurisdiction and should minimize the number of alternatives.

Similarly, AOGA supports CEQ's proposal to strike 40 C.F.R. § 1502.14(c), which requires agencies to include "reasonable alternatives not within the jurisdiction of the lead agency." As CEQ recognizes in the Proposed Rulemaking, it is *impossible* to have a "reasonable" alternative that is not within the jurisdiction of the lead agency because "alternatives outside the agency's jurisdiction . . . would not be technically feasible due to the agency's lack of statutory authority to implement that alternative."[25] Requiring agencies to evaluate alternatives that are outside the jurisdiction of the lead agency, and therefore *not* feasible and *not* reasonable, does not inform the NEPA process because such alternatives will *never* be implemented. This, in turn, amounts to a substantial waste of already-limited agency time and resources. CEQ's proposal makes both practical and legal sense, and should be implemented.

Additionally, CEQ requests input on whether it should "establish a presumptive maximum number of alternatives for evaluation of a proposed action, or alternatively for certain categories of proposed actions."[26] AOGA generally believes that federal agencies should have discretion to determine the scope of alternatives appropriate for a particular project. Specifying a presumptive maximum is potentially problematic because such a maximum will inevitably be a larger number than is required for *most* projects and, through litigation and administration changes over time, the "maximums" may become the "new norm." However, AOGA recommends that CEQ include regulatory language stating that agencies, in an EIS, should evaluate no more than the number of alternatives that sufficiently allows for evaluation of significant impacts while meeting applicant goals.

N. CEQ's proposal to combine the description of the environment and environmental consequences sections in an EIS is practical and sensible.

AOGA supports the amendment to Section 1502.15, which allows the description of the environment of the area to be affected by a proposed action to be combined with the evaluation of the environmental consequences required by Section 1502.16. This proposed revision streamlines the NEPA review process by condensing the EIS, eliminating duplicative requirements, and prompting agencies to focus on the effects the proposed action in the context of the relevant environment. The U.S. Bureau of Land Management has taken this approach with recent EISs for Alaska oil and gas-related actions, and AOGA has generally found the format to be effective.[27]

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[25] 85 Fed. Reg. at 1702; *see Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1294 (11th Cir. 2019) (NEPA analysis for dredge and fill permit not required to consider post-mining impacts where agency had no jurisdiction to regulate mining, production, or storage of the extracted mineral).

[26] 85 Fed. Reg. at 1702.

[27] *See, e.g.*, Bureau of Land Mgmt., Coastal Plain Oil and Gas Leasing Program Environmental Impact Statement (2019), https://eplanning.blm.gov/epl-front-

O. Applicants should be consulted as agencies consider public comments.

Responding to comments can be one of the most time-consuming aspects of the NEPA process. AOGA supports additional agency discretion over responses to comments. In addition, however, CEQ should require that agencies consult with any applicant regarding changes made as a result of comments received. In particular, applicants should be provided with a formal opportunity to submit additional information responsive to public comments and discuss with the agency any proposed changes to the proposed action or alternatives prior to the agency's development of a Final EIS. Applicants have particular knowledge about the proposed activities and can provide detailed information regarding technical issues or the feasibility of a proposed modification. Applicants should be consulted as the agency considers comments received to ensure that the Final EIS reflects the best available information and analyses.

P. CEQ should clarify that applicant spending does not constitute an irreversible and irretrievable commitment of resources.

The Proposed Rulemaking invites comment on whether CEQ should make any additional changes to Section 1506.1, including "whether there are circumstances under which an agency may authorize irreversible and irretrievable commitments of resources."[28] AOGA supports clarification on this issue to avoid confusion around the activities that may proceed while NEPA review is underway. The current regulations lack this clarity and may unnecessarily discourage early development efforts that have no significant environmental impacts, such as leasing equipment, construction staging, or purchasing lands. AOGA believes that the regulations should recognize that applicant spending does not, in fact, influence agency decision-making. As such, the regulations should authorize commitments of resources at the applicant's expense while NEPA review is underway.

Ample case law supports this recommended approach. Courts have held that an agency does not irreversibly or irretrievably commit resources when it retains authority to change the course of action and properly consider alternatives. For example, in *Wildwest Institute v. Bull*, the court held that the U.S. Forest Service's expenditure of financial resources to pre-mark trees for logging "did not irretrievably commit [the agency] to a particular course of action" where the expenditure "was clearly not so substantial an investment that it limited" the choice of reasonable alternatives.[29] Courts have also held that commitments of resources do not violate NEPA when the commitment does not, or cannot, influence agency decision-making, either because the commitment relates to an effect the agency need not consider or because the action falls outside

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office/projects/nepa/102555/20003762/250004418/Volume_1_ExecSummary_Ch1-3_References_Glossary.pdf; Bureau of Land Mgmt., Willow Master Development Plan Environmental Impact Statement (2019), https://eplanning.blm.gov/epl-front-office/projects/nepa/109410/20002247/250002672/Willow_MDP_DEIS_Vol_1_508-2019-08-23.pdf.

[28] 85 Fed. Reg. at 1704.

[29] 547 F.3d 1162, 1169 (9th Cir. 2008); *see also Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998) (no irretrievable commitment of resources in violation of NEPA where agency developed a tentative logging schedule but retained authority to change the course of action).

agency jurisdiction.[30] However, courts have also created confusion by prohibiting applicant expenditures thought to pressure agency approvals (mischaracterized as putting a "gun barrel" to the head of an agency).[31]

The lack of clarity around appropriate expenditures pending the conclusion of NEPA review—particularly by applicants—has created administrative confusion and spurred litigation. The Proposed Rulemaking presents an opportunity to clarify that applicant expenditures are at an applicant's own risk and do not, in fact, pressure federal agencies. Moreover, related actions not subject to the approval analyzed under NEPA should be permitted to proceed, as long as the actions do not commit federal resources.[32]

Q. An applicant should be allowed to prepare an EIS under the direction of the lead agency.

AOGA supports the proposed amendment to Section 1506.5(c) authorizing the applicant to prepare an EIS under the direction of the lead agency. Along with AOGA's general support for formally recognizing the important role of the applicant in the NEPA process, allowing applicants to participate in preparing environmental documents increases efficient, effective, and informed review. Applicants will be incentivized to create robust, defensible documents knowing that an agency will not approve and adopt an EIS that does not meet NEPA standards. Additionally, applicant preparation of EISs, where appropriate, will help to free up severely constrained agency resources.

R. Limited, targeted guidance, subject to public review and input, can aid the NEPA process.

AOGA recognizes that the existing variety of agency guidance is cumbersome and confusing to both the public and applicants. Yet, targeted guidance on complicated topics can be necessary and helpful. Assuming adoption of the proposed regulations, CEQ and implementing agencies will likely need to publish new conforming guidance for *limited* topics. AOGA recommends that any new guidance be subject to public review and comment to ensure consistency with the Proposed Rulemaking.

S. AOGA strongly supports a revision and clarification of "effects or impacts."

As CEQ appropriately acknowledges, NEPA simply refers to environmental "impacts" and "effects"—it does not expressly or impliedly define those terms with subcategories such as

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[30] *See, e.g.*, *Nat. Res. Def. Council v. U.S. EPA*, 822 F.2d 104, 129 & n.25 (D.C. Cir. 1987) (holding that CEQ regulations at 40 C.F.R. § 1506.1 cannot be used to limit private actions that are beyond the scope of agency's permitting authority).

[31] *See North Carolina v. City of Virginia Beach*, 951 F.2d 596, 602-03 (4th Cir. 1992).

[32] This revision is necessary to give full force to the proposed revisions to the scope of the effects analysis. If an agency is not analyzing an effect, then the action producing that effect should not be prohibited.

"direct," "indirect," or "cumulative."[33] The current regulations' division of "effects" into these three categorical definitions has resulted in an inordinate amount of agency and applicant expenditures of time and resources associated with well-intended attempts to interpret and apply these inherently ambiguous terms. Ambiguity also breeds litigation—particularly by advocacy organizations that use NEPA challenges as a means to delay or disrupt activities to which they are opposed. Challenges involving "indirect" and "cumulative" effects comprise a substantial portion of all NEPA litigation. And all of the time and money spent on interpreting, applying, and litigating these ambiguous definitions is ultimately a non-substantive paper exercise that does not result in constructive modifications to proposed actions, helpful permit conditions, or better mitigation measures.

AOGA therefore strongly supports CEQ's proposal to provide a single definition for the term "effects or impacts" and to eliminate the existing definitions of "direct," "indirect," and "cumulative" effects. Agency determinations about "effects" will still be the subject of litigation, but a single definition will better focus agencies, applicants, and the courts on relevant issues, and ultimately make the NEPA process more efficient and meaningful. In this vein, AOGA respectfully recommends the following edits to further improve and clarify the definition of "effects or impacts."

> (g) *Effects or impacts* means effects of the proposed action or alternatives that are ~~reasonably foreseeable~~**likely to occur** and have a reasonably close causal relationship to the proposed action or alternatives. Effects **or impacts** include ~~reasonably foreseeable effects~~**those** that occur at the same time and place **as the proposed action or alternatives** and may include ~~reasonably foreseeable~~ **likely** effects that are later in time or ~~farther~~ removed in distance.
>
> (1) Effects **or impacts** include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic (such as the effects on employment), social, or health effects. Effects **or impacts** may ~~also include those resulting from actions that have~~ **be** ~~both~~ beneficial **or**~~and~~ detrimental ~~effects, even if on balance the agency believes that the effect will be beneficial~~.
>
> (2) A "but for" causal relationship **between the proposed action or alternatives and a particular effect or impact does not establish an effect or impact under this subsection**. ~~is insufficient to make an agency responsible for a particular effect under NEPA.~~ Effects **or impacts** **are**~~should~~ not ~~be considered~~ significant if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects **or impacts under this subsection** do not include effects **or impacts** that the agency **or applicant** has no **legal** ability to prevent **or modify. Effects or impacts under this subsection do not include effects or impacts**

[33] *See* 85 Fed. Reg. at 1707.

that ~~due to its limited statutory authority or~~ would occur regardless of the proposed action. Analysis of cumulative effects **or impacts** is not required.[34]

Additionally, AOGA does not recommend that CEQ "affirmatively state [in the regulations] that consideration of indirect effects is not required."[35] "Indirect effects" is an ambiguous term and introducing it into the regulations will only create more ambiguity and opportunities for litigation. The record for the Proposed Rulemaking is clear that CEQ is eliminating the definitions of "direct," "indirect," and "cumulative" effects, and AOGA believes it is sufficient to affirmatively define "effects or impacts" without referring to "indirect effects or impacts." In contrast, AOGA believes it is helpful to clarify that "[a]nalysis of cumulative effects is not required" in order to make clear that an agency need not consider the effects of actions other than the proposed action.

Relatedly, "CEQ invites comments on whether it should codify any aspects of its proposed GHG guidance in the regulation, and if so, how CEQ should address them in the regulations."[36] AOGA recommends that CEQ follow its default approach to the Proposed Rulemaking and *not* codify the proposed GHG guidance in the regulations. That guidance (which AOGA supports) sets forth a method to apply regulatory terms to a specific potential effect. AOGA agrees with CEQ that the NEPA implementing regulations should be generally applicable and not address specific potential effects. If CEQ is inclined to codify the GHG guidance into regulations, then AOGA recommends it do so in a *separate* rulemaking so that the Proposed Rulemaking proceeds on schedule.

With that said, AOGA recommends that CEQ include a minor *regulatory* clarification stating:

> **Agencies are not required to monetize the costs and benefits of a proposed action but may do so in their sole discretion for a single effect or impact or for multiple effects or impacts.**

Some recent NEPA litigants have incorrectly argued that agencies act arbitrarily when they monetize some impacts (such as socioeconomic impacts) and not other impacts (such as GHG-related impacts). These arguments have been properly rejected.[37] However, more such challenges are inevitable and it would be helpful to clarify in the regulations that agencies have

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[34] AOGA's proposed changes would eliminate the need for a definition of the term "reasonably foreseeable." AOGA believes that "likely to occur" better captures CEQ's intent and is less susceptible to varying interpretations.

[35] 85 Fed. Reg. at 1708.

[36] *Id*. at 1711.

[37] *See Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145, 1158-60 (D. Colo. 2018); *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. 16-21-GF-BMM, 2018 WL 1475470, at *14 (D. Mont. Mar. 26, 2018); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 77-79 (D.D.C. 2019); *Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt.*, 377 F. Supp. 3d 1223, 1239-41 (D. Colo. 2019).

broad discretion to "monetize" impacts at their election and do not act arbitrarily when they do so for some impacts and not others.

Finally, AOGA supports the proposed GHG guidance and encourages CEQ to adopt it. If CEQ does so, AOGA recommends that CEQ align the terms used in the GHG guidance with the new regulatory language (*e.g.*, eliminate references to "direct," "indirect," and "cumulative" effects).[38]

IV. CONCLUSION

AOGA appreciates the opportunity to review and provide comments on CEQ's Proposed Rulemaking. We believe that, on the whole, the proposed regulatory revisions will significantly improve the NEPA process by providing clarity, creating efficiencies, and maintaining an accurate and effective approach to environmental review. AOGA believes that the comments provided above will further improve the Proposed Rulemaking and encourages CEQ to incorporate them into the final rulemaking. If you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,

Patrick Bergt
Regulatory & Legal Affairs Manager

[38] Also related to CEQ's proposed definition revisions, AOGA supports the revised definition of "major federal action," but does not understand why the proposed definition refers to "major federal action *or action*." AOGA believes that "or action" can be deleted. *See* 85 Fed. Reg. at 1729.