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November 19, 2021

Hon. Brenda Mallory
Chair, Council on Environmental Quality
Docket CEQ-2021-0002
730 Jackson Place NW
Washington, D.C. 20503

Re: Council on Environmental Quality (CEQ) Notice Titled "National Environmental Policy Act Implementing Regulations Revisions," Docket No. CEQ-2021-0002, 86 Fed. Reg. 55757 (October 7, 2021)

Dear Chair Mallory:

The Institute for Agriculture and Trade Policy (IATP) appreciates the opportunity to provide comments on the CEQ's October 7, 2021 proposed revisions to National Environmental Policy Act (NEPA) regulations. IATP is a 35-year-old 501(c)(3) nonprofit organization based in Minneapolis, Minnesota. We work at the local, state, national and international levels to create fair and sustainable agriculture and trade systems that benefit family farmers, rural communities and the environment, including addressing climate impacts.¹

The comments herein are intended to supplement comments IATP is submitting jointly with the Animal Legal Defense Fund. That submission particularly addresses the need for the CEQ to reverse a series of provisions in the 2020 NEPA rules that excluded review of federal financing of Concentrated Animal Feeding Operations (CAFOs) and which in multiple ways narrowed the scope of review and alternatives analysis with respect to federal actions related to these operations. IATP's policy analysis and advocacy extend to a wide range of federal actions related to rural communities and farms that have been or will be affected by the 2020 NEPA rule revisions. Our work includes how climate change threatens the viability of agriculture and how agriculture itself significantly contributes to climate-altering greenhouse gas emissions.²

CEQ's proposed rule³ will better align agency guidance with the statutory intent of NEPA, and with more than 40 years of judicial interpretation and practical implementation that has cemented the law

¹ IATP also has offices in Washington, D.C., Hallowell, Maine and Berlin, Germany (IATP Europe). For more information, see www.iatp.org.

² IATP's policy analysis on climate and agriculture may be accessed on our website, <https://www.iatp.org/climate-change>. Recent policy analysis includes climate impact of fertilizers (<https://www.iatp.org/new-research-chemical-fertilisers>) and financing climate resilience for agriculture (<https://www.iatp.org/blog/202009/us-agricultural-finance-climate-resilience>).

³ Council on Environmental Quality. National Environmental Policy Act Implementing Regulations Revisions, Notice of proposed rulemaking. 86 FR 55757, October 7, 2021.

as the cornerstone of our national environmental policy. IATP generally supports the proposed revisions, as far as they go. We wish to highlight the importance of moving quickly, however, to restore the full scope of longstanding NEPA policy that was in effect until 2020. We understand that this rulemaking is Phase 1 of CEQ's proposed restoration; we encourage CEQ to move forward as soon as practicable with the remaining portions of its rulemaking in order to restore NEPA's effectiveness as a tool for careful and inclusive environmental decision-making.

IATP strongly supports the proposed changes to restore and codify longstanding NEPA policy including:

- that the full range of reasonable alternatives are considered when a project is reviewed;
- that the purpose and need for the project not be limited to the applicant's goals;
- that all reasonably foreseeable adverse impacts are disclosed and considered, including so-called indirect impacts;
- that cumulative impacts, which may individually be minor but collectively significant, must be considered; and
- that individual agencies should be allowed, as they had been for 40 years, to address criteria and establish procedures consistent with NEPA that augment those listed in the CEQ's rules, to reflect specialized agency expertise and authority; in other words, the CEQ's guidance should be considered a floor, not a ceiling.

Indirect and cumulative impacts. Of the above proposed revisions, we wish to focus in these comments on changes to the definition of adverse impacts. Adopting these changes is essential for evaluating and mitigating the climate impacts of agency actions and to avoid perpetrating environmental injustices.

As CEQ has clearly laid out in the rulemaking, guidance at NEPA's inception affirmed its critical role in protecting the environment for subsequent generations. The Cuyahoga River is not literally on fire today — as it was in 1969 as NEPA was brought into existence — *but the earth itself is on fire*.⁴ Climate change is an example of how both indirect and cumulative impacts of agency decisions and actions over years can contribute to devastating impacts on biodiversity, human health, access to water and food, and promote extreme weather events including flooding and fires that destroy farms, forests and communities. Greenhouse gasses emitted into the atmosphere many years past and from facilities dispersed across the country are incrementally increased with each project that is permitted. The result is a cumulative impact that far outstrips the immediate effect of each emitter. Likewise, a fossil fuel pipeline has climate and other environmental impacts far beyond the immediate damage caused by its construction over permafrost, through a forest or across a wetland.

Future generations will pay the heaviest price for the cumulative consequences of actions taken now and in the future; actions that continue to disproportionately burden some communities over others. On this last point, CEQ has invited comment specifically on the relationship of this rulemaking to Executive Order 12898 on environmental justice, and whether the proposed rule "would cause disproportionately high and adverse human health or environmental effects on minority populations

⁴ For those born more recently, this article nicely sums up the relationship between the environmental calamity of the Cuyahoga River, which by June 1969 had caught fire about 10 times, and passage of NEPA: "Cuyahoga River Fire & The National Environmental Policy Act (NEPA)," by Ron Dodson (January 13, 2020), <https://www.thedodsongrp.com/index.php/2020/01/13/cuyahoga-river-fire-the-national-environmental-policy-act-nepa/>

and low-income populations” [86 FR at 55768]. We concur with CEQ that it would not; indeed, this rule reverses policy adopted in 2020 that itself would, if fully implemented, lead to just these kinds of environmental injustices. In particular, the proposed requirement to consider cumulative impacts will benefit these communities by taking into consideration past pollution and land use policies that have unfairly, and often intentionally, dumped on minority and low-income communities both rural and urban — with disastrous health and environmental consequences.⁵

CEQ should remove loopholes in the categorical exclusions. CEQ has limited the scope of this rulemaking in ways that undermine the effectiveness of the important changes it proposes. CEQ states that it chose to limit Phase I of its NEPA rulemaking to provisions that “pose significant near-term interpretation or implementation challenges for Federal agencies and would have the most impact to agencies’ NEPA processes during the interim period before a ‘Phase 2’ rulemaking is complete.” [86 FR at 55759] Yet CEQ’s proposed rule does not meet this test. The categorical exclusions will surely be relied on by agencies to exclude projects from full NEPA review before CEQ completes a Phase 2 of this rulemaking. Current rules give agencies broad authority to exclude entire “categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement.” [40 C.F.R. § 1501.4(a)]

CEQ’s proposed rule governing agency NEPA procedures [40 C.F.R. §1507.3(a) and (b)] appear to retain most of the 2020 changes to the Categorical Exclusions provisions in 40 C.F.R. §1501.4, which greatly expanded their scope. The 2020 NEPA regulations eliminated the words “individually or cumulatively” as part of the definition of a categorical exclusion and state that, to be deemed an action for which a categorical exclusion is appropriate, the action must be one that “normally” does not have a significant effect on the human environment. Retaining this limiting and imprecise language (the term “normally” has no universally understood meaning) undermines much of what CEQ seeks to fix in the definitional changes it proposes in 40 C.F.R. §1508.1, which removes similar language from the definitions. If CEQ intends those definitions to inform the interpretation of the categorical exclusion provisions, it should say so directly and remove this inconsistent and confusing text. Otherwise, CEQ has retained a potentially significant loophole that could negate the impact of the changes it has proposed.

The 2020 rule contains other language that greatly expanded the scope of categorical exclusions, language that CEQ should excise now, not later. Like the 1978 regulation it replaced, the 2020 rule retained the possibility that an EIS could still be required if there were “extraordinary circumstances” in which a normally excluded action may have a significant adverse environmental effect. This safety valve was completely negated, however, by new language giving agencies almost complete discretion to categorically exclude the proposed action even after making such a finding [40 C.F.R. § 1501.4(b)(1)]. CEQ should eliminate these ambiguities as part of its Phase 1 rulemaking to avoid perpetuating a major loophole.

⁵ For a history of racist federal land use actions, see Rothstein, Richard. 2018. *The Color of Law: A forgotten history of how our government segregated America*. New York, NY: Liveright Publishing Corporation. For the nexus between racism, federal farm policy and climate, see “Two Biden Priorities, Climate and Inequality, Meet on Black-Owned Farms,” *New York Times* (January 31, 2021), <https://www.nytimes.com/2021/01/31/climate/black-farmers-discrimination-agriculture.html>.

CEQ should address actions taken prior to completion of the NEPA process. This is another instance of a fix that should be addressed now, because otherwise there may be actions taken in the near term that are inconsistent with CEQ’s proposed Phase 1 guidance. The 2020 rule greatly expanded the kinds of activities that could be pursued even though the NEPA review process was incomplete. While the 2020 rule retained language from the 1978 regulations that stated that, prior to the completion of the NEPA process, no action concerning the proposal shall be taken which would “have an adverse environmental impact or limit the choice of reasonable alternatives” [40 C.F.R. § 1506.1(a)], it added an expansively drafted exception. The current rule now states: “An agency considering a proposed action for Federal funding may authorize such activities, including, but not limited to, acquisition of interests in land (e.g., fee simple, rights-of-way, and conservation easements), purchase of long lead-time equipment, and purchase options made by applicants.” [40 C.F.R. § 1506.1(b)]

Once again, this is an example of the 2020 changes inserting at best, a confusing ambiguity into the NEPA rules and at worst, a loophole that will swallow the protections this section originally ensured. The actions authorized in this paragraph include potentially significant financial investments and contractual obligations that could put a thumb on the scale in favor of approving a project and also limit the scope of alternatives that could be pursued instead. CEQ should delete this exception as part of its Part 1 NEPA rulemaking.

Restoring robust public participation. As detailed in the Animal Legal Defense Fund submission in which IATP has joined, there is an extensive list of 2020 changes to the NEPA rules which *inter alia* limited public participation and engagement in the NEPA process, shielded information including Environmental Impact Statements from timely public view, and limited agency consideration of scientific research. Restoring robust public participation fits squarely within the scope of CEQ’s Phase 1 rulemaking. Agency decisions made before CEQ finalizes its Phase 2 NEPA rulemaking — a conjectural action for which no timeline has been provided — won’t have the benefit of pre-2020 levels of public access and participation. Delaying action on these provisions means that agencies will be denied access to information that would have been provided by the public, including from communities that have been disproportionately burdened by negative environmental impacts.

Conclusion

IATP supports CEQ’s proposed revisions to the 2020 NEPA regulations and urges CEQ to expand the scope of its rulemaking to promptly address the additional concerns discussed above.

Respectfully submitted,

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