



March 10, 2020

*Submitted via <https://www.regulations.gov/>*

Council on Environmental Quality  
730 Jackson Place NW  
Washington, DC 20503  
Attn: Docket No. CEQ-2019-0003

**Re: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA)**

Dear Sir/Madam:

Western Energy Alliance strongly supports the Council on Environmental Quality's (CEQ) proposed Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA). We urge CEQ to expeditiously finalize the proposed rule, with some clarifications discussed below.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fourteen employees.

The NEPA process has become far removed from its original intent, as passed by Congress, to provide decision makers with better environmental information to enable more environmentally sensitive federal projects. In practice, NEPA has instead become a weapon used by activist environmental groups to prevent federal agencies from approving projects under their jurisdiction, thus impacting agencies' ability to carry out their statutory obligations for the benefit of the America people. NEPA has become a way to delay indefinitely or even halt oil and natural gas development, pipelines, roads, bridges, water projects, and other vital infrastructure, even when the projects have mitigated impacts.

Over the past few years, environmental groups have dramatically increased the use of litigation to stymie federal agency actions. These groups are strategically choosing to challenge projects in venues that are known to take expansive views of NEPA's requirements. Every federal oil and natural gas lease sale conducted by this administration has been subject to legal challenge, making it clear these efforts are purely intended to delay or prevent federal oil/gas development. CEQ's updates are therefore necessary and appropriate, given its role in guiding all federal agencies' NEPA implementation.

CEQ's proposed changes will provide clarity to agencies implementing NEPA, more closely align the regulations with certain judicial decisions interpreting NEPA, and help streamline a process that is cumbersome, expensive, and a deterrent to developing federal oil and natural gas resources to benefit the federal treasury, states, and local communities.

We strongly support CEQ's efforts to move forward with a rule to provide more certainty to projects by better managing timeframes, page counts and scope of NEPA documents so that companies can move forward with environmentally protective projects while creating jobs and economic opportunity. The Alliance requests that CEQ finalize the proposed regulations as quickly as possible, while also adhering to Administrative Procedure Act (APA) requirements.

### **Increased Efficiency of Environmental Reviews**

Overly lengthy NEPA reviews serve to limit the production of America's energy resources and the associated economic benefits. The NEPA process for large-scale oil and natural gas projects with a federal nexus can take a decade or more to complete, and oftentimes these projects simply never move forward. The Alliance supports CEQ's efforts to increase efficiency in the NEPA process.

Environmental impact statements (EISs) for major oil and gas projects take much longer to complete than the 4.5-year average preparation time identified in the [December 2018 CEQ report](#). The Alliance has [tracked 19 major projects](#) in Wyoming and Utah that were initiated between 2005 and 2011, and currently only five have received final approval. Most of the remaining 14 projects have been abandoned prior to completion of the NEPA process. These lengthy timeframes cause great uncertainty for project proponents and encourage the companies to focus development on state and private lands where federal NEPA reviews aren't required.

Business conditions can and do change frequently during a years-long environmental review, adding further complications to federal approvals. Projects may no longer be profitable once the NEPA process is complete because of changes in commodity prices, overall global demand, and other factors. Technology advances quickly and, after six to eight years, the technology proposed and analyzed in the NEPA document may be outdated. The lengthy EIS process perversely can be a deterrent to using the very latest, most environmentally protective technologies, because doing so can cause a restart to the NEPA analysis. Environmental conditions such as air quality also change over time, as do the models used to analyze these conditions. A six- to eight-year analysis period can result in the need to re-analyze conditions or re-run models, thus further delaying completion of the NEPA process.

The NEPA process is also expensive. First, project applicants have little or no control over costs because, under the current CEQ regulations, EIS consultants must contract with and take direction from the federal agency, not the applicant. Second, once the NEPA process

is completed, third parties can easily and inexpensively challenge the final decision using the federal agency's administrative process or federal courts, burdening the project with expensive litigation and adding years of uncertainty after project approval.

We strongly support CEQ's efforts to increase the efficiency of environmental reviews by reducing the timeframes and costs associated with the NEPA process. This approach properly recognizes the existing regulatory framework, including the Clean Water Act, Safe Drinking Water Act, Clean Air Act and the Endangered Species Act, which provide tremendous protection of our water, air and species.

### **Defining the Scope of Environmental Impacts**

CEQ's proposed changes align with certain judicial decisions interpreting NEPA over the past 40 years. Specifically, the Alliance supports CEQ's proposal to revise the definition of "effects" (or "impacts") at § 1508.1(g) to align with NEPA's statutory language and U.S. Supreme Court precedent. NEPA requires agencies to assess and document "any adverse environmental effects which cannot be avoided should the proposal be implemented[.]" 42 U.S.C. §4332(C)(ii). This mandate does not use the terms "direct," "indirect," or "cumulative" effects or require assessment of these specific categories of impacts, as do the current rules.

As CEQ recognizes, *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767–68 (2009), is the controlling case regarding the scope of effects that NEPA requires agencies to analyze. In *Public Citizen*, the U.S. Supreme Court rejected the argument that an agency must analyze certain "but for" impacts of the agency's action, namely "where an agency's action is considered a cause of an environmental effect when the agency has no authority to prevent the effect." *Id.* at 767. The Court held that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause," similar to the concept of "proximate cause" in tort law. *Id.* Accordingly, when an agency's decision does not have a close causal relationship with a potential environmental impact, the agency is not required to assess the impact under NEPA. *See id.* at 767–68.

CEQ's proposal to remove the requirement to assess cumulative impacts is consistent with *Public Citizen*. In that case, the Supreme Court recognized that federal agencies need not assess impacts that they lack authority to prevent. "We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Public Citizen*, 541 U.S. at 770. By definition, cumulative impacts—which include impacts from past actions and actions outside of an agency's jurisdiction, 40 C.F.R. § 1508.7—are outside of agencies' control and therefore outside the impacts that must be analyzed under NEPA. *See id.* The Alliance strongly supports CEQ's proposed rulemaking to align its regulations with governing Supreme Court precedent.

The Bureau of Land Management (BLM) has recently been challenged on the reasonably foreseeable indirect and cumulative impacts of leasing a parcel of land for oil and natural gas development. At the leasing phase, BLM has limited information about potential bidders' development plans or what formation may be targeted for development. In fact, BLM does not even know if the parcels will be acquired, and if they are acquired, whether the leases will be developed. Even more speculative are emissions from downstream combustion of these products. BLM does not control the specific end use of the oil and natural gas produced from the federal leases, and it is impossible to know how the oil and natural gas produced will actually be used.

CEQ's proposal to expressly recognize that agencies need not analyze effects that are the product of a lengthy causal chain is consistent with *Public Citizen*. The change will be effective at enabling responsible energy development to move forward on lands appropriately designated for leasing and development.

### **Reasonable Alternatives**

The Alliance agrees with CEQ's proposed definition of "reasonable alternatives" in § 1502.14(z): "a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant." This definition is consistent with the alternatives that NEPA requires agencies to analyze. We also suggest CEQ consider a presumptive maximum of alternatives considered in NEPA documents.

Agencies need only analyze a reasonable range of alternatives. The U.S. Supreme Court has held that the number of alternatives that an agency must analyze under NEPA must be reasonable and that NEPA does not require an agency to "ferret out every possible alternative . . ." *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978) ("Common sense also teaches us that the "detailed statement of alternatives" cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to require agencies to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved."). Lower courts have held that agencies are only required to analyze "those alternatives necessary to permit a 'reasoned choice.'" *State of Cal. v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (citation omitted); see also *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) ("The 'rule of reason' guides both the choice of alternatives as well as the extent to which the Environmental Impact Statement must discuss each alternative.").

Alternatives must be technically and economically feasible. Agencies are not required to "consider alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area" or "alternatives which are not significantly distinguishable from alternatives actually considered, or which have

substantially similar consequences.” *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174, 1180–81 (9th Cir. 1990); *accord Biodiversity Conservation All. v. U.S. Bureau of Land Mgmt.*, 404 F. Supp. 2d 212, 218 (D.D.C. 2005). BLM regulations implementing NEPA explicitly recognize that “reasonable alternatives” are those that are technically and economically feasible. See 43 C.F.R. § 46.420(b).

*Alternatives must meet the purpose and need for the proposed action.* “An agency need not consider alternatives that ‘extend beyond those reasonably related to the purposes of the project.’” *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1071 (9th Cir. 2012) (citation omitted); see also *Partners in Forestry Co-op., Northwood All., Inc. v. U.S. Forest Serv.*, 638 F. App’x 456, 464 (6th Cir. 2015) (“Rather, the number of alternatives that an agency considers is within its discretion, as long as it takes into account the project’s purpose and environmental consequences.”). “An alternative is ‘reasonable’ if it is objectively feasible as well as ‘reasonable in light of [the agency’s] objectives.’” *Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 72 (D.C. Cir. 2011) (citation omitted).

*Alternatives must meet a non-federal applicant’s goals.* “Congress did expect agencies to consider an applicant’s wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for the applicant what the goals of the applicant’s proposal should be.” *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991). For example, the U.S. Court of Appeals for the District of Columbia Circuit upheld a BLM EIS that adopted the non-federal applicants’ proposal to revise an existing decision to expand the authorized number of oil and gas wells that may be drilled and to relax seasonal restrictions. *Theodore Roosevelt Conservation P’ship*, 661 F.3d at 73.

The court found that BLM’s chosen range of alternatives were reasonable because each alternative addressed the applicants’ proposal, which BLM also had adopted as its objective. *Id.* at 74. The court also rejected claims that BLM should have analyzed an additional alternative to “cap or scale back development” to increase wildlife populations because that alternative did not conform with the BLM’s purpose and need: “The Bureau selected a reasonable range of alternatives in light of its purpose; it was under no obligation to include a scaled-back-development alternative that would not “bring about the ends of the federal action.” *Id.* at 74–75.

CEQ has recognized that reasonable alternatives include those that are technically and economically feasible. It defined “reasonable alternatives” as “those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.” Council on Environmental Quality Memorandum, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026 (1981). CEQ’s proposed revisions to §1502.14(z) are consistent with this longstanding definition.

Courts have reinforced this conclusion. The range of alternatives assessed in an EIS must be “bounded by some notion of feasibility.” *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 551 (“To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility.”). Courts have upheld NEPA documents that reject alternatives on the grounds of infeasibility. For example, the U.S. District Court for the District of Columbia upheld an environmental assessment (EA) that considered and rejected alternative methods for acquiring subsurface geologic data for oil and gas development that were not “technically,” “physically,” “logistically,” or “economically feasible.” *Biodiversity Conservation All.*, 404 F. Supp. 2d at 218.

Given CEQ and caselaw precedent, agencies have incorporated this economic and technical feasibility requirement into their own definitions of “reasonable alternatives.” For example, BLM defines “reasonable alternatives” as: “alternatives that are technically and economically practical or feasible and meet the purpose and need of the proposed action.” 43 C.F.R. § 46.420(b).

*Presumptive maximum of alternatives.* Additionally, we propose that CEQ revise §1502.14 to require a presumptive maximum of four alternatives in EISs and a presumptive maximum of two alternatives in EAs in order to simplify and clarify the agencies’ analysis.

Agencies would benefit from a presumptive maximum number of alternatives, and caselaw supports this change. Agencies should focus on the substance of the alternatives, “not the sheer number of alternatives considered.” *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005). The Ninth Circuit has upheld an EIS analyzing only one alternative to the proposed action—the required no action alternative—as reasonable because “there is no minimum number of alternatives that must be discussed.” *California ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep’t of the Interior*, 767 F.3d 781, 797 (9th Cir. 2014) (citation omitted).

Because agencies have been implementing NEPA for 50 years, CEQ and the agencies can determine the maximum number of alternatives that an EIS or EA normally should consider. The Alliance, however, recommends that CEQ adopt a “presumptive” maximum number of alternatives (rather than a hard maximum) to recognize that, for complex or unusual projects, more alternatives may be necessary.

A presumptive maximum of four alternatives for an EIS would include the proposed action, the required “no action” alternative, and a maximum of two additional economically and technically feasible alternatives. The Alliance bases this recommendation on a survey of recent EISs for recent energy projects published by BLM. Generally, in EISs for both energy projects and BLM’s resource management plans, BLM has analyzed four alternatives. Based on the Alliance’s survey, an agency evaluating five or more alternatives is unusual and an outlier.



Similarly, the Alliance recommends that CEQ revise proposed § 1501.5(c) to state that the presumptive maximum number of alternatives that an agency must analyze in an EA is two alternatives. Courts have confirmed that the alternatives analysis in an EA requires less consideration than the alternatives analysis in an EIS. *See, e.g., Mt. Lookout-Mt. Nebo Prop. Prot. Ass'n v. F.E.R.C.*, 143 F.3d 165, 172 (4th Cir. 1998) (“The rigor with which an agency must consider alternatives is greater when the agency determines that an EIS is required for a particular federal action.”); *Native Ecosystems Council*, 428 F.3d at 1246 (“[A]n agency’s obligation to consider alternatives under an EA is a lesser one than under an EIS.”).

Courts have upheld EAs that only analyze the proposed alternative and the no action alternative. *Idaho Cmty. Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147, 1153–54 (9th Cir. 2008) (upholding an EA analyzing the “preferred” alternative of changes to an approved highway construction project and “no action”); *Native Ecosystems Council*, 428 F.3d at 1245–49 (upholding an EA analyzing the “preferred” alternative of certain fire management measures and “no action”); *see also Ctr. for Env’tl. Law & Policy v. U.S. Bureau of Reclamation*, 715 F. Supp. 2d 1185, 1193–94 (E.D. Wash. 2010), *aff’d*, 655 F.3d 1000 (9th Cir. 2011) (upholding an EA analyzing the “preferred” alternative of increasing drawdown from a reservoir and “no action”).

Therefore, the Alliance recommends a presumptive maximum of two alternatives, including the no action alternative, in each EA to ensure a streamlined analysis. The Department of the Interior currently has regulations recognizing that agencies need only analyze two alternatives in specific situations, such as when there are no unresolved conflicts about the proposed action. *See* 43 C.F.R. § 46.310.

If CEQ declines to revise its proposed § 1501.5(c) and § 1502.14 to include presumptive maximum number of alternatives for EAs and EISs, the Alliance requests that CEQ direct individual agencies to define a presumptive number of alternatives when they develop or revise their NEPA regulations after the final rule is published for these proposed regulations. *See* proposed 40 C.F.R. § 1507.3.

### **Scoping Process**

The Alliance supports the presumptive time limits to prepare EAs and EISs that CEQ proposed in § 1501.10 (one year for EAs and two years for EISs). However, we are concerned that these timeframes understate the length of the NEPA process because they do not account for the scoping process. Under the proposed scoping regulation, agencies have discretion as to when to issue a notice of intent and thus when the presumptive time limits begin to run. Specifically, under proposed § 1501.9(d), agencies must issue notices of intent “[a]s soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment.”

The Alliance is also concerned that, without public notice of a proposed action, all interested parties may not be aware of the project or ongoing scoping process, leading to

duplicative effort. Although proposed § 1501.9(b) requires agencies to invite participation of agencies and governments that are “likely affected,” the lead agency may not identify all interested entities. If additional entities learn about the project after the notice of intent is issued, then the lead agency must redo its prior work by holding additional meetings and, potentially, adjusting the preliminary alternatives.

To avoid both of these concerns, CEQ should revise proposed § 1501.9 so that the scoping process follows the procedure currently outlined in 40 C.F.R. § 1501.7, whereby publication of the notice of intent initiates the scoping process.

Additionally, the Alliance recommends that CEQ revise proposed § 1501.9(d)(3) (“A brief summary of expected impacts”) to require the lead agency to identify in the notice of intent the specific impacts the agency believes may be significant and therefore necessitate preparation of an EIS. This requirement would ensure agencies are utilizing the appropriate level of NEPA review and properly inform the public of potential impacts.

#### **Definition of Major Federal Action**

We support CEQ’s proposal to define “major Federal action” independently of “significantly” in proposed § 1508.1(q). However, this term would benefit from clarification of its use and definition.

First, CEQ should specifically state that actions that are not “major Federal actions” do not require any analysis under NEPA, including preparation of an EA or approval under a categorical exclusion. Although proposed §1501.1(a)(1) appears to compel this result, CEQ should explicitly confirm this point.

Second, CEQ should revise the definition of “major Federal action” at § 1508.1(q) to remove the phrase “with effects that may be significant.” This phrase appears to again link the concept of a “major Federal action” with significant impacts, which CEQ appears to be trying to avoid. Further, given that the assessment of significant effects occurs in § 1501.3, it's unnecessary to include this concept in the definition of “major Federal action.”

Finally, CEQ should consider applying a minimum percentage for federal ownership of the mineral interest in a project, below which the project would not be subject to NEPA reviews.

#### **Definition of Significance**

The Alliance requests that CEQ define the term “significantly” in proposed §1508.1. We also recommend that CEQ move proposed §1501.3(b) (considerations for determining whether the effects of the proposed action are significant) to proposed



§1508.1 to construct the definition of “significantly.” In addition to this change, the Alliance requests that CEQ make the following changes to the text in proposed §1501.3(b) (after moving it to the definition of “significantly” in proposed §1508.1):

- Eliminate the phrase “Both short and long-term effects are relevant” in subsection (b)(1) because this phrase conflicts with CEQ’s revised definition of effects in proposed § 1508.1(g).
- In subsection (b)(2), add two factors that agencies should consider when evaluating whether an effect is significant:
  - Existing land uses and existing land use designations (including zoning and land management plans). *See, e.g., Ricker v. Willis*, 484 F.2d 158 (4th Cir. 1973) (additional fishing pier and boat was not significant because of existing similar facilities in area); *Maryland-National Capital Park & Planning Comm’n v. U.S. Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973) (articulating presumption that effects are insignificant when an agency complies with local land use restrictions).
  - The duration and permanency of adverse environmental effects. For example, surface disturbance resulting from an oil and gas well will only exist for approximately 30 years, are subject to interim reclamation and eventually will be fully reclaimed.

The Alliance supports removal of subsections (b)(4) (“The degree to which the effects on the quality of the human environment are likely to be highly controversial.”) and (b)(5) (“The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.”) from current 40 C.F.R. §1508.27. The “highly controversial” criterion is often cited incorrectly when an action is publicly controversial, rather than the effects being scientifically controversial. These days, all oil and natural gas development appears to be “highly controversial” to certain activist interest groups. Furthermore, “highly uncertain or involve unique or unknown risks” is cited by agencies as precipitating an EIS when, for example, they lack surface access to an area and therefore cannot fully assess impacts.

CEQ should revise the significance criterion in proposed §1501.3(b)(2)(iii) related to effects that would violate Federal, State, Tribal, or local law. CEQ should clarify that “violations” of laws include the failure to comply with law and not exceedance of ambient standards, such as air quality standards. This criterion is confusing and often leads to litigation. It could be interpreted to find a significant effect when, for example, a federal approval would be projected to cause an exceedance of a National Ambient Air Quality Standard (NAAQS) under certain modeled conditions, but not actually cause an area to become in nonattainment of the NAAQS.

In such a scenario, it is unclear whether the mere modeled “exceedance” of NAAQS constitutes a violation of an environmental law. This factor also overlooks that such effects

may be separately regulated by a different agency than the approving agency. For example, BLM may approve a project with air quality impacts, but states and the EPA may regulate the air quality impacts of such project by requiring permits for pollution sources.

### Close Causal Relationship

The Alliance does not support further modifying CEQ's proposed §1508.1(g) ("Effects") to state that a close causal relationship is "analogous to proximate cause in tort law." Many legal scholars have moved away from using the term "proximate cause" because application of the term is often confusing and inconsistent. See Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, *The Law of Torts* § 198 (2d ed.) (explaining that both the Second and Third Restatement of Torts have rejected the concept of "proximate cause").

Instead, the Alliance strongly recommends that CEQ more specifically define "close causal relationship." In *Public Citizen*, the U.S. Supreme Court directed courts, when assessing whether a "close causal relationship" exists, to "look to the underlying policies or legislative intent in order to draw a *manageable line* between those causal changes that may make an actor responsible for an effect and those that do not." 541 U.S. at 767 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)) (emphasis added).

When applying the Supreme Court's directive, one court has reasoned that, "[t]o determine whether an agency must consider a particular effect, courts must 'look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.'" *Nat'l Parks Conservation Ass'n v. Jewell*, 965 F. Supp. 2d 67, 82 (D. D.C. 2013) (quoting *Metro. Edison Co.*, 460 U.S. at 774 n. 7). Consistent with the U.S. Supreme Court's holdings, the Alliance recommends that CEQ revise proposed § 1508.1(g) to add the following language designated in bold:

*Effects or impacts* means effects of the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. **A reasonably close causal relationship requires a manageable line between the proposed agency action and alleged environmental effect.** Effects include reasonably foreseeable effects that occur at the same time and place and may include reasonably foreseeable effects that are later in time or farther removed in distance.

Additionally, agencies would benefit from guidance from CEQ regarding the meaning of "close causal relationship" and the implication of intervening actions. The Alliance encourages CEQ to provide examples—in the preamble of the final regulation or in subsequent guidance—of a close causal relationship between an action and an effect, triggering the need for analysis in a NEPA document, and a situation in which intervening

effects prevent a close causal relationship between an action and an environmental impact.

### **Reasonably Foreseeable**

The Alliance recommends that CEQ incorporate the concept of “reasonable forecasting and speculation” into its proposed definition of “reasonably foreseeable” at proposed §1508.1(aa). “Section 102(C)'s requirement that the agency describe the anticipated environmental effects of proposed action is subject to a rule of reason. The agency need not foresee the unforeseeable, but by the same token neither can it avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting.” *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

Recent changes to the regulations implementing the Endangered Species Act also acknowledge that “foreseeable future” is conditioned by a similar standard of reasonableness: “The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species’ responses to these threats are likely.” 50 C.F.R. § 424.11(d). To ensure that agencies apply the “rule of reason,” to the term “reasonably foreseeable,” the Alliance recommends that CEQ add the following sentence designated in bold to proposed § 1508.1(aa):

*Reasonably foreseeable* means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.  
**Unreasonable forecasting and speculation is not required.**

### **Determinations of NEPA Adequacy**

BLM uses a “determination of NEPA adequacy” (DNA) to document when an existing NEPA document or documents adequately analyze an action. See 43 C.F.R. § 46.120; [BLM NEPA Handbook H-1790-1, chapter 5.1](#). The Alliance recommends that CEQ incorporate BLM’s DNA concept into proposed §15061.3 to provide a means of documenting when an agency relies on its own existing NEPA documents to satisfy NEPA’s obligations:

A Determination of NEPA Adequacy confirms that an action is adequately analyzed in existing NEPA document(s) and is in conformance with the land use plan. Not all new proposed actions will require new environmental analysis. In some instances an existing environmental analysis document may be relied upon in its entirety, and new NEPA analysis will not be necessary.

### **Applicant-Prepared Environmental Impact Statements**

The Alliance strongly supports CEQ’s proposed §1506.5(c) to allow applicants to prepare their own EISs for an agency’s consideration. Allowing applicants to choose and work

directly with consultants on EIS preparation will encourage efficiency and timeliness, and ensure that the resulting EIS meets the applicant's purpose and need. However, we request that CEQ revise §1506.5(c) to clarify an agency's role when an applicant prepares an EIS. Specifically, the Alliance recommends that CEQ incorporate the following concepts into proposed §1506.5(c):

- A requirement that the lead agency adhere to EA and EIS preparation timeframes of one year and two years, respectively (proposed § 1501.10), even when the applicant prepares its own EIS.
- A timeline on both lead and cooperating agency review and input during the NEPA process. Agencies should be allowed no more than 60 days to review and provide input during the NEPA process.
- Impose a deadline for the lead agency to issue a final decision document within 60 days of completion of an EA or DEIS.

#### **Time Limitations**

The Alliance supports the proposed time limits in proposed §1501.10. The Alliance further recommends that CEQ include requirements in proposed §§1501.10. and 1506.5(c) that agencies and contractors must update a project's schedule and budget semi-annually to ensure that the NEPA process will be completed within the timeframes required in proposed §1501.10.

To further promote efficiency, CEQ should also revise the regulations to require agencies to train NEPA project managers in management skills such as schedule development, scope management, change orders, and cost control.

#### **Conclusion**

Western Energy Alliance strongly supports CEQ's proposed updates to regulations implementing the National Environmental Policy Act, with the targeted revisions discussed above. We urge CEQ to finalize the revisions expeditiously. Please do not hesitate to contact me with any questions.

Sincerely,



Tripp Parks  
Vice President of Government Affairs