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COMMENTS

THE TRUMP CARD: TARNISHING PLANNING, DEMOCRACY, AND THE ENVIRONMENT

by Robert L. Glicksman and Alejandro E. Camacho

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One of the most important and transformative mechanisms the U.S. Congress has ever created to protect the environment is under assault from the Donald Trump Administration. The National Environmental Policy Act (NEPA)[1] ushered in the modern era of U.S. environmental law. Although NEPA is an entirely procedural statute,[2] it "has become one of the richest fields of U.S. environmental law."[3] It is regularly referred to as the Magna Carta of global environmental law,[4] not only because it has been emulated by many states and other countries, but also because it has transformed the decisionmaking process of federal agencies, and, in particular, those historically inclined to ignore or minimize environmental considerations.

Prior to NEPA, federal agencies could pay no attention to the effects of their actions on local communities and the environment,[5] and agencies could (and did) work at cross-purposes with each other.[6] NEPA addressed this problem first by mandating the generation and analysis of information on the effects and alternatives of major federal actions, and the involvement and coordination of federal authorities in doing so. Second, as stated by a former general counsel of the Council on Environmental Quality (CEQ), the agency that Congress vested with authority to oversee NEPA compliance by other agencies, one of NEPA's "greatest strengths [has] been opening up decision making to the public."[7]

By mandating not only information collection and analysis but also opportunities for public input and government coordination, NEPA both depends on and cultivates democracy and sound government.[8] NEPA leverages this

1. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
2. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350, 19 ELR 20743 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").
3. Jamison E. Colburn, *The Risk in Discretion: Substantive NEPA's Significance*, 41 Colum. J. Envtl. L. 1, 61 (2016). The requirement that federal agencies consider the potential adverse environmental impacts of their actions before committing to them and then disclose the results of that analysis has been widely emulated in both state legislation, *see* Daniel R. Mandelker et al., NEPA Law and Litigation §12:1 (2019 ed.) ("The state 'little NEPAs' are ether identical to or closely resemble NEPA."), and the legislation of other nations. *See* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 Colum. L. Rev. 903, 948 (2002) ("As the world's first statute to insist on comprehensive environmental impact assessment . . . , NEPA represented a conceptual breakthrough at the time of its enactment, and was widely emulated.").
4. *See, e.g.*, Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 Geo. L.J. 1507, 1509-10 (2012); Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 Wash. U. J.L. & Pol'y 293, 293 (2010).
5. *See, e.g.*, Council on Environmental Quality, Executive Office of the President, The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years 17 (1997) [hereinafter CEQ Study] ("Prior to NEPA, however, the public had limited opportunities to engage in the debate about social, economic, and environmental costs and benefits. Nor did the public have much recourse to challenge the federal government on decisions affecting their communities.").
6. *See id.* at 21:

   > During the debate preceding the passage of NEPA, many members of Congress expressed concern that federal agencies were not working cooperatively and in some cases were working at cross purposes. As a result, one of the underlying purposes of NEPA was to provide a framework for a coordinated approach to environmental problem-solving across agencies.

7. Milo Mason, *Snapshot Interview: Dinah Bear*, 23 Nat. Resources & Env't 44, 47 (2009).
8. *See, e.g.*, CEQ Study, *supra* note 5, at 7 ("The Study participants felt that NEPA's most enduring legacy is as a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of their decisions."); Environmental Law Institute, NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government 3 (2010), https://www.eli.org/sites/default/files/eli-pubs/d20-03.pdf ("NEPA democratized decisionmaking."); P. Lynn Scarlett, National Environmental Policy Act: Enhancing Collaboration and Partnerships, Presentation at the Rocky Mountain Mineral Law Foundation Special Institute on the National Environmental Policy Act (Oct. 28-29, 2010), http://lynnscarlett.com/uploads/3/4/0/9/34093313/sp_nepa_collaboration_narrative_final.pdf (former acting U.S. Secretary of the Interior under President George W. Bush stating NEPA has "la[id] out the central architecture for agency collaboration, cooperation, and public participation in evaluating federal actions").

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combination of agency analysis of generated information on the one hand and threats of litigation, actual litigation, and negative publicity on the other to ensure that federal agencies internalize many of the potential environmental and other public costs into planning and development.[9] In doing so, NEPA has increased the production and consideration of information on the environmental impacts of government action, while also fostering public participation and government accountability on actions being contemplated by federal agencies.[10]

However, NEPA's contributions to informed and democratic governance are now at risk. In early 2020, CEQ issued proposed regulations that would overhaul, and fundamentally enfeeble, NEPA and its existing regulations.[11] The proposed revisions would upend decades of NEPA law, precedent, and practice.

Change in and of itself is not objectionable, and is sometimes needed to address changed circumstances or adjust government's mechanisms in response to past shortcomings. But CEQ's proposal would undercut NEPA's capacity to fulfill its core purposes. First, if finalized, those revisions would significantly and unlawfully expand the availability of a number of exceptions from NEPA's more detailed review, and restrict the analysis of reasonable alternatives when detailed review does occur. Second, consistent with the Trump Administration's repeated hostility both to careful government planning and public involvement, the proposed changes impose arbitrary page and time limits without any evidence that they are necessary or likely to lead to either more effective or efficient decisions.

Other changes would provide industry with unprecedented control over the federal government's democratic planning process. Still others would remove the ability of a federal agency to establish its own NEPA procedures, even if it deemed them appropriate for advancing NEPA's analysis or public participation objectives. Finally, the Trump Administration proposes to remove long-standing judicial checks on executive power, despite the absence of any authority to do so. If successful, these changes would radically undercut NEPA's innovative and successful contributions to democratic governance.[12]

Though this Comment identifies a number of instances in which CEQ's proposal is arbitrary or at best of questionable legality,[13] the focus of the analysis is on how the proposal is contrary to NEPA's goals, sensible planning, and democratic governance. Part I provides a brief introduction to NEPA's purposes, structure, and mechanisms. Part II addresses the narrowed scope of agency obligations that would result from the proposal. Part III describes how CEQ's proposal would thwart public participation in the NEPA process, thereby impairing NEPA's most fundamental goal: fostering deliberation and democratic participation to improve the government's capacity to promote social welfare. Part IV concludes.

The truncated and degraded version of NEPA that would result from the adoption of CEQ's proposal would bear no resemblance to the one Congress chose to adopt, and that CEQ has conscientiously implemented for more than 40 years. Very little of the NEPA infrastructure to which CEQ, the courts, and the agencies subject to NEPA have contributed would be left standing. More fundamentally, the Trump Administration's proposal, and the conspicuous lack of evidence supporting it, is antithetical to the core goals of NEPA that Congress injected, and the courts have reinforced, in federal decisionmaking—the considered generation by government of key information; public engagement in government decisions; and the protection and conservation of scarce natural resources.

I. The Purposes, Structure, and Mechanisms of NEPA

Congress enacted NEPA to force agencies to consider in advance the potential environmental impacts of (and alternatives to) their actions, and to disclose the information they acquire in the course of conducting that inquiry to help foster public input into government decisionmaking processes. CEQ has taken the lead in furthering those goals by overseeing a coordinated and decentralized decisionmaking structure, in which agencies solicit and internalize the expertise of other parts of the government and the views of all affected members of the public.

9. *See, e.g.*, CEQ Study, *supra* note 5, at 7:

> Federal agencies today are better informed about and more responsible for the consequences of their actions than they were before NEPA was passed. As a result, agencies today are more likely to consider the views of those who live and work in the surrounding community and others during the decision-making process.

See also Mandelker, *supra* note 4, at 294 (describing a "legion of studies," most of which conclude that NEPA "has had a moderately positive effect" at "getting agencies to incorporate environmental values into their decision making").

10. CEQ Study, *supra* note 5, at 17 ("Since its enactment, NEPA has significantly increased public information and input into agency decisionmaking. NEPA opened up for public scrutiny the planning and decision-making processes of federal agencies, in many cases providing the only opportunity for the public to affect these processes."); Environmental Law Institute, *supra* note 8, at 5.

11. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020).

12. *See* Robert G. Dreher, NEPA Under Siege: The Political Assault on the National Environmental Policy Act 46 (2005), https://www.yumpu.com/en/document/read/40100233/nepa-under-siege-office-of-the-federal-coordinator-alaska-natural-: "NEPA has succeeded in expanding public engagement in government decision-making, improving the quality of agency decisions and fulfilling principles of democratic governance that are central to our society. . . ."

In sum, NEPA functions as a critical tool for democratic government decisionmaking, establishing a framework for involving the public in major decisions affecting their lives and communities. *See also* Daniel A. Farber et al., *Reinventing Flood Control*, 81 Tul. L. Rev. 1085, 1092 (2007) (arguing that "a major premise of democratic governance, the need for transparency and public accountability," is reflected in NEPA); Jennifer Yachnin, *Colo.: NEPA Reforms Shift Too Much Power to Feds*, Greenwire, Feb. 12, 2020, https://www.eenews.net/greenwire/stories/1062332873 (quoting Colorado county commissioner's observation that "NEPA is not just a tool to reduce impacts to the environment, it's a basic tool of democracy," and his concern that CEQ's proposal would "undercut transparency and accountability, increasing the risk that federal agencies can steamroll local communities with federal projects").

13. For a more comprehensive assessment of the proposed changes and their legal vulnerability, see James M. McElfish Jr., Environmental Law Institute, Practitioner's Guide to the Proposed NEPA Regulations (2020), https://www.eli.org/research-report/practitioners-guide-proposed-nepa-regulations.

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A. NEPA's Purposes

Though substantively concerned with promoting environmental conservation, NEPA's more fundamental objective is promoting good government and democratic decisionmaking. Substantively, NEPA declares

> a national policy which will encourage productive and enjoyable harmony between man and his environment; . . . promot[ing] efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] enrich[ing] the understanding of the ecological systems and natural resources important to the Nation.[14]

The statute also enunciates a policy that the federal government "use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[15]

According to the U.S. Supreme Court, however, Congress adopted NEPA to promote at least two more procedural purposes that are integral to a functioning, legitimate democratic government. First, NEPA activates federal agencies to "stop and think"[16] to ensure that the agency "will have available, and will carefully consider, detailed information concerning significant environmental impacts."[17] Second, NEPA integrates transparency and participation into federal decisionmaking, by guaranteeing "that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision."[18] Some NEPA observers further subdivide this purpose into the public disclosure (or sunshine)[19] and public participation functions of the statute,[20] as have some courts.[21]

NEPA thus endeavors to promote not only better decisions, but also better informed, more transparent, and more democratically legitimate governance.[22] Of course, the three purposes are tightly intertwined because, for example, "[o]ne of the purposes of public participation under NEPA is to promote deliberative decision-making."[23]

B. NEPA's Structure and Mechanisms

NEPA's principal operative tool to promote these goals is its requirement that agencies proposing to pursue major federal actions significantly affecting the quality of the environment prepare a detailed environmental impact statement (EIS) that compares the potential environmental effects of the proposed action and available alternatives to it.[24] This requirement forces agencies that might be (and sometimes had been) inclined to subordinate environmental considerations to unbridled development to consider whether creative approaches might achieve programmatic goals without sacrificing the environment.

To help promote NEPA's purposes, the statute created CEQ[25] and directed it to review the programs and activities of federal agencies to determine whether they are complying with NEPA's mandates.[26] In 1977, President Jimmy Carter ordered CEQ to issue regulations to federal agencies to implement NEPA's procedures, and he ordered all fed-

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14. 42 U.S.C. §4321.
15. *Id.* §4331(a).
16. Steven Ferry, Environmental Law 94 (8th ed. 2019) (referring to NEPA as a "'stop and think' statute").
17. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 19 ELR 20743 (1989); *see also* Serge Taylor, Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform 251 (1984) (arguing that NEPA forces agencies to consider environmental effects and moderate actions).
18. *Robertson*, 490 U.S. at 349; *see also* Thomas O. McGarity, *Judicial Enforcement of NEPA-Inspired Promises*, 20 Envtl. L. 569, 573 (1990) (referring to NEPA's "dual purposes"). *See also* Western Watersheds Project v. Zinke, 2020 WL 959242, *28, 50 ELR 20047 (D. Idaho 2020) (quoting California v. Block, 690 F.3d 753, 770-71, 13 ELR 20092 (9th Cir. 1982)) ("NEPA's public comment procedures are at the heart of the NEPA review process. . . . This reflects the paramount Congressional desire to internalize opposing viewpoints into the decision-making process to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision.").
19. *See, e.g.*, Robert L. Glicksman, Modern Public Land Law in a Nutshell 121 (5th ed. 2019) (referring to NEPA as "an environmental full disclosure law").
20. *See, e.g.*, Jessica Diaz, *A Forest Divided:* Minard Run Oil Co. v. U.S. Forest Service *and the Battle Over Private Oil and Gas Rights on Public Lands*, 40 Ecology L.Q. 195, 225 (2013); *cf.* Mark C. Travis, *Collaborative Processes Under NEPA: Are We There Yet?*, 23 Nat. Resources & Env't 36 (2009) (observing that courts have "generally recognized that NEPA's statutory purposes are best accomplished through an interchange of information between interested individuals and organizations and the federal agencies charged with complying with NEPA"); James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. Envtl. L.J. 74, 108 (2003) (arguing that the processes for public input created by CEQ "were certainly consistent with and fostered by NEPA and its purposes").
21. *See, e.g.*, Trout Unlimited v. Morton, 509 F.2d 1276, 1282, 5 ELR 20151 (9th Cir. 1974) (explaining that an EIS prepared under NEPA "should provide the public with information on the environmental impact of a proposed project as well as encourage public participation in the development of that information"). Public participation, and the contributions it makes to the development of the administrative record, "are central elements of sunshine laws because they promote government accountability and create a basis for subsequent litigation." Kevin H. Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. Rev. 2312, 2317 (2004).
22. *See* Sidney A. Shapiro, *Administrative Reformation: Restoring Faith in Pragmatic Government*, 48 U. Kan. L. Rev. 689, 693 (2000) (emphasizing NEPA's advantage of combatting agency capture); Karkkainen, *supra* note 3, at 909-16 ("NEPA may serve as a pluralist democracy-reinforcing statute, producing better informed and more involved citizens . . . even as it arguably produces better informed, more rational, and more responsive government.").
23. Nicholas A. Fromherz, *From Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects*, 116 W. Va. L. Rev. 109, 138 (2013).
24. 42 U.S.C. §4332(2)(C).
25. *Id.* §4342.
26. *Id.* §4344(3).

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eral agencies to comply with those regulations.[27] In 1978, CEQ issued those regulations,[28] which quickly "became 'the bible for the federal establishment and for the reviewing courts'" in interpreting and applying NEPA.[29]

To fulfill its disclosure function, NEPA directs agencies to share with the public the information they develop in assessing the environmental effects of their proposals, and especially with those most likely to be affected.[30] This mandate serves to inform communities and catalyze the democratic process by soliciting input on important governmental choices. Additionally, NEPA mandates that the EIS and all comments on it be made publicly available.[31] That requirement, in turn, fosters public input into, and creates a stake in the outcome of, the agency's decisionmaking process. To further promote its objectives of reasoned decisionmaking and deliberative democracy objectives, NEPA mandates that federal agencies coordinate with other federal agencies over information generation and analysis.[32]

NEPA thus seeks to ensure that each federal agency meets its responsibilities to consider and reduce the effect of its decisions on the environment through a coordinated and decentralized decisionmaking structure in which agencies make decisions, but only after leveraging the expertise of other parts of the government, as well as soliciting and considering the input of all affected interests outside the federal government.

II. Thwarting Full NEPA Review

CEQ's proposed revisions to its NEPA regulations would undercut NEPA's stop-and-think mandate in many ways. They would sharply curtail the duty of agencies to consider adverse environmental impacts by narrowing the range of actions for which agencies would have to prepare EISs, or even the less fulsome environmental assessments (EAs). Among other things, they would encourage agencies to exclude many significant federal actions from detailed review, eliminate consideration of cumulative harm of multiple projects, and indiscriminately cut the range of alternatives agencies must consider. These changes would reduce the projects for which agencies would have to carefully consider the environmental harms of implementing proposed actions and allow them to avoid considering viable alternative courses of action that might achieve their goals at a lower environmental cost.

A. Expanding Categorical Exclusions

The 1978 CEQ regulations allow agencies to avoid preparing an EIS by applying a categorical exclusion (CE). The 1978 regulations define a CE as "a category of actions which do not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an [EA] nor an [EIS] is required."[33] The regulations do not require public involvement in an agency's decision to apply a CE.[34] Under current law, agencies may not apply a CE if "extraordinary circumstances" exist, such that "a normally excluded action may have a significant environmental effect."[35]

CEQ's proposal would expand the use of CEs to avoid more comprehensive environmental analysis by providing that, even if extraordinary circumstances exist, no further NEPA analysis is required if there are "mitigating circumstances or other conditions [that] are sufficient to avoid significant effects and therefore categorically exclude the proposed action."[36] The proposal would also allow agencies to ignore cumulative effects in determining whether application of a CE is appropriate.[37] Analysis of cumulative effects limits an agency's ability to minimize the aggregated effects of a series of actions by considering the effects of each individual action in isolation.[38]

B. Expanding EAs

Even when a CE does not apply, agencies can avoid preparing an EIS by preparing an EA that includes a finding of no significant impact.[39] Both the documentation required to support an EA and the procedural requirements for preparing one (such as the duty to circulate draft documents for public comment) are less rigorous

27. Exec. Order No. 11991, 3 C.F.R. 124 (1978). It is generally accepted that the "CEQ regulations implementing NEPA are binding on all federal agencies." Sierra Club v. Sigler, 695 F.2d 957, 964, 13 ELR 20210 (5th Cir. 1983). *But cf.* Nat'l Parks Conservation Ass'n v. Jewell, 965 F. Supp. 2d 67, 74 (D.D.C. 2013) (citations and internal quotations omitted) ("The D.C. Circuit has recognized that the binding effect of CEQ regulations is far from clear, . . . but both agencies and courts have consistently looked to them for guidance.").
28. National Environmental Policy Act—Regulations, 43 Fed. Reg. 55978 (Nov. 29, 1978) (codified as amended at 40 C.F.R. §§1500.1 to 1517.7).
29. Jamison E. Colburn, *Administering the National Environmental Policy Act*, 45 ELR 10287, 10317 (Apr. 2015) (quoting Lazarus, *supra* note 4, at 1518).
30. 42 U.S.C. §4332(2)(C).
31. *Id.* CEQ regulations also require agencies to "cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements," including by engaging in joint planning processes, joint environmental research and studies, joint public hearings, and joint environmental assessments. 40 C.F.R. §§1500.4(n), 1506.2(b)(1)-(4) (2019).
32. NEPA requires federal agencies to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. §4332(2)(C); *see also* 40 C.F.R. §1503.1(a)(1) (2019). The lead agency must request the participation of other relevant agencies at the earliest time and use their environmental analyses and proposals "to the maximum extent possible consistent with its responsibility as lead agency." *Id.* §1501.6(a)(1)-(2).
33. 40 C.F.R. §1508.4 (2019).
34. *See* Mandelker et al., *supra* note 3, §7:10. Public participation is required when an agency adopts a CE, which it must do through notice-and-comment rulemaking, subject to CEQ approval. *See* Wildlaw v. U.S. Forest Serv., 471 F. Supp. 2d 1221, 1243 (M.D. Ala. 2007).
35. 40 C.F.R. §1508.4 (2019).
36. 85 Fed. Reg. at 1715 (proposed §1501.4(b)(1)).
37. *Id.* (proposed §1501.4(a)).
38. *See, e.g.*, Ron Deverman et al., *Environmental Assessments: Guidance on Best Practice Principles*, 45 ELR 10142 (Feb. 2015) (identifying cumulative effects analysis as one of the "most important" best practice principles in advancing the effective and efficient development of quality EAs); Courtney A. Schultz, *History of the Cumulative Effects Analysis Requirement Under NEPA and Its Interpretation in U.S. Forest Service Case Law*, 27 J. Envtl. L. & Litig. 125, 132 (2012) (noting Congress' desire to require that agencies look "beyond incremental decision-making . . . to consider long-term and cumulative effects").
39. 40 C.F.R. §1501.4(e)(1) (2019).

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than for an EIS.[40] The proposed CEQ revisions would significantly expand agency authority to prepare EAs instead of EISs. For example, they would eliminate the requirement to consider cumulative effects altogether[41] and curtail the duty to consider an action's indirect effects.[42] There is little doubt that both the intention and effect of these revisions would be to minimize agency responsibilities to consider climate change, given the complexity of the causal chains between some human activities and the resulting climate effects, and the length of time it may take for climate effects to manifest.[43]

C. Hampering the Analysis of Reasonable Alternatives

The proposed regulations would also weaken NEPA's requirement that agencies consider a meaningful range of alternatives to agency proposals, and the comparative environmental effects of the main proposal and its alternatives.[44] The existing CEQ regulations characterize the discussion of alternatives as "the heart" of the EIS.[45] CEQ's proposal would eliminate that reference.[46] It would truncate the required discussion of alternatives in several ways.

The preamble to CEQ's proposal states that "an EIS need not include every available alternative where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum."[47] CEQ's approach would *preclude* agencies from considering alternatives outside the agency's jurisdiction,[48] whereas the existing regulations *require* agencies to "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency."[49] The current mandate fits more comfortably with NEPA's disclosure function because, even if the agency itself lacks the authority to implement a more environmentally beneficial alternative that would nevertheless serve a proposed action's objectives but that is outside its jurisdiction, disclosure may induce lawmakers to alter the scope of the agency's authority, such as through statutory amendments, or generate public pressure to do so.

Finally, and perhaps most alarmingly, CEQ has invited comments on "whether the regulations should establish a presumptive maximum number of alternatives for evaluation."[50] Limiting agency duties to consider alternatives in this way is of a piece with the current proposal's arbitrary limits on the length of EAs and EISs and of the time needed to prepare those documents.[51]

These proposals to allow agencies to prepare EAs instead of EISs in a wider range of cases than the 1978 CEQ regulations allow, and to limit the range of alternatives agencies need to consider even when they do prepare EISs, would not only curtail agency consideration of the full range of environmental effects that may result from their proposed actions. They would also impair NEPA's capacity to promote democratic governance by limiting opportunities for public input and participation, as the discussion in the next part demonstrates.

III. Limiting Public Participation

CEQ's proposed overhaul of its NEPA regulations conflicts in numerous ways with NEPA's most fundamental goals: fostering deliberation (the stop-and-think purpose) and democratic participation to improve government's capacity to promote social welfare (which is closely associated with NEPA's disclosure function). The proposal would subvert both deliberation and democratic governance by limiting public participation in agencies' implementation of their NEPA responsibilities.

As the previous discussion indicates, opportunities for input by those outside the agency are significantly constrained when agencies prepare CEs or EAs instead of EISs. By expanding the authority of agencies to virtually avoid NEPA analysis altogether through application of a CE, or to prepare a "low-budget" EA[52] instead of a more fulsome EIS, the CEQ proposal would indirectly limit

40. Myron L. Scott, *Defining NEPA Out of Existence: Reflection on the Forest Service Experiment With "Case-by-Case" Categorical Exclusion*, 21 Envtl. L. 807, 811 (1991).
41. *See* 85 Fed. Reg. at 1729 ("Analysis of cumulative effects is not required."). For arguments that the statute requires agencies to consider cumulative effects, see McElfish, *supra* note 13, at 3-6; *see also* Kevin Cronin, Comment Letter on Proposed Rule: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (Jan. 17, 2020), https://www.regulations.gov/document?D=CEQ-2019-0003-0463 (arguing that NEPA requires consideration of both cumulative and indirect effects).
42. 85 Fed. Reg. at 1708 (noting that the proposal strikes the references to direct, indirect, and cumulative effects).
43. *See* Seth Jaffe & Aaron Lang, *Trump's Reform Is No "Nixon to China" Moment*, Law360, Jan. 29, 2020, https://www.law360.com/energy/articles/1238518/trump-s-nepa-reform-is-no-nixon-in-china-moment ("The administration doesn't even have the grace to admit that [by eliminating the duty to consider cumulative and indirect effects] it is trying to leave climate change out of NEPA."); Press Release, Congressman Raúl Grijalva, Chair Grijalva: Trump Administration Changes to NEPA Implementation Are Illegal, More About Protecting Polluters Than Listening to the Public (Jan. 9, 2020), https://grijalva.house.gov/press-releases/chair-grijalva-trump-administration-changes-to-nepa-implementation-are-illegal-more-about-protecting-polluters-than-listening-to-the-public/ ("The courts have been crystal clear that NEPA requires considering climate impacts, so this is just another inevitably doomed effort by this administration to try to illegally rewrite the rules it doesn't like.").

    The proposal would also expand the discretion of agencies to prepare EAs instead of EISs by excluding agency inaction from the definition of the "action" that may trigger EIS preparation duties. The current regulations define a "major federal action" to include a failure to act if it is "reviewable by courts or administrative tribunals under the Administrative Procedure Act." 40 C.F.R. §1508.18 (2019). The Administrative Procedure Act defines "agency action" to include a "failure to act." 5 U.S.C. §551(13). Some courts have held that inaction qualifies as agency action if it violates a mandatory statutory duty to act. *See, e.g.*, Ramsey v. Kantor, 96 F.3d 434, 445, 27 ELR 20158 (9th Cir. 1996).
44. 42 U.S.C. §4332(2)(C)(iii). Agencies must consider alternative courses of action even when they prepare EAs. *Id.* §4332(2)(E).
45. 40 C.F.R. §1502.14 (2019).
46. 85 Fed. Reg. at 1720 (proposed §1502.14).
47. *Id.* at 1702.
48. *Id.*
49. 40 C.F.R. §1502.14(c) (2019). James McElfish contends that wholesale negation of a duty to consider alternatives outside of an agency's jurisdiction is inconsistent with the "rule of reason" courts have applied in evaluating the range of alternatives agencies must consider. McElfish, *supra* note 13, at 7.
50. 85 Fed. Reg. at 1702.
51. *See infra* Section III.B.
52. *See* Cronin v. U.S. Dep't of Agric., 919 F.2d 439, 443, 21 ELR 20492 (7th Cir. 1990) ("An environmental assessment is a rough-cut, low-budget environmental impact statement. . . .").

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public participation. Limitations on both the requirement and authority to explore a full range of alternatives would have the same effect. This truncated approach to NEPA implementation is consistent with previous efforts by the Trump Administration to short-circuit the NEPA process, as Section A below indicates.[53]

But as the remaining sections of this part illustrate, the proposal would impair public participation opportunities more directly in several ways. It would impose arbitrary deadlines for preparing NEPA documents, allow private project proponents to play a larger role in NEPA decision-making (thereby increasing the risk of capture), prohibit agencies from adopting NEPA procedures that are more rigorous than those demanded by CEQ, and curtail the role of the courts as overseers of NEPA compliance in suits brought by litigants alleging unlawful shortcuts.

A. *The Trump Administration's Long-Standing Hostility to Public Participation and NEPA*

CEQ's proposed overhaul of the 1978 NEPA regulations is just the latest (if most capacious) Trump Administration initiative to gut NEPA and avoid transparency and public participation. A recent study of the U.S. Department of the Interior catalogued routine disregard of public comments on proposed rule changes.[54] In June 2019, Trump's U.S. Forest Service (USFS) proposed regulatory changes to its NEPA procedures seeking to avoid NEPA reviews for various projects.[55] Relying on flimsy evidence, these modifications propose to significantly expand the types of CEs available to the USFS so as to allow the approval of various mining, logging, and other construction activities in national forests without consideration of reasonable alternatives or rigorous review of the potential effects.[56]

Another regulatory change proposed by CEQ in 2019 makes significant changes to previous guidance that helped agencies engage in rigorous climate analyses.[57] Despite repeated judicial directives to calculate a proposed action's greenhouse gas emissions, CEQ's draft guidance allows agencies conducting NEPA reviews to opt out of such assessments if the agency decides it "would be overly speculative," and that they only need to do so when "a sufficiently close causal relationship exists" between the action and broader emissions.[58]

Lastly, the Trump Administration's primary contribution to U.S. infrastructure policy has been Executive Order No. 13807,[59] which, by truncating the permitting and NEPA review processes for major infrastructure projects, is likely to reduce the quality of U.S. infrastructure and cause unnecessary environmental harm.[60] In particular, Executive Order No. 13807 includes (1) a requirement that agencies complete environmental reviews and provide authorization decisions within "not more than an average of approximately 2 years, measured from the date of the publication of a notice of intent to prepare an" EIS; (2) a One Federal Decision policy that instructs federal agencies to publish in a single document all authorization decisions on major infrastructure projects; and (3) increased authority for the Office of Management and Budget and lead infrastructure agencies throughout permitting and environmental review.[61] CEQ's proposed NEPA overhaul essentially seeks to codify these aspects of Executive Order No. 13807 and expand them beyond infrastructure projects.

B. *Arbitrary Deadlines*

CEQ would also impose arbitrary page limits on NEPA documents, as well as codify capricious and thoroughly discredited two-year time limits for preparing those documents. Presumably in the name of efficiency, CEQ's 2020 proposed regulations adopt default page limits of 150 pages or fewer for EISs (300 pages or fewer for "proposals of unusual scope or complexity").[62] They also establish time limits on preparation of EAs (one year beginning with the date of decision to prepare an EA and ending with publication of a final EA) and EISs (two years beginning with the date of issuance of a notice of intent and ending with the date a record of decision is signed).[63]

The Trump Administration does not provide any reliable data supporting the conclusion that requiring one year for completion of any EA and two years for completion of any EIS is either necessary or practicable. The public evidence typically pointed to for support of a two-year target for environmental review is a flimsy analysis[64] repudiated

53. The Southern Environmental Law Center has filed suit to block further action on the proposed NEPA overhaul until the Administration responds to a request for documents under the Freedom of Information Act whose disclosure, according to the Center, is necessary to allow meaningful public input into the rulemaking process. *See* Kelsey Brugger, *Greens Ask Court to Stop NEPA Overhaul*, E&E News PM, Feb. 13, 2020, https://www.eenews.net/eenewspm/stories/1062343193/print (describing Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, S. Envtl. Law Ctr. v. Council on Envtl. Quality, No. 3:18-cv-00113-GEC (W.D. Va. Feb. 13, 2020)).
54. Jennifer Yachnin, *Interior Ignores Public Input on Rule Changes—Analysis*, Greenwire, Jan. 14, 2020, https://www.eenews.net/greenwire/2020/01/14/stories/1062080161.
55. National Environmental Policy Act (NEPA) Compliance, 85 Fed. Reg. 27544 (June 13, 2019). *See also* National Environmental Policy Act, Revised Procedures, 85 Fed. Reg. 8544 (Feb. 14, 2020) (establishing and updating existing USFS CEs and incorporating them into the Forest Service Handbook).
56. National Parks Conservation Association, Comment Letter on the Forest Service's Proposed Rulemaking to Revise Its NEPA Regulations (Aug. 25, 2019), https://www.npca.org/articles/2295-comment-letter-on-the-forest-service-s-proposed-rulemaking-to-revise-its.
57. Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 85 Fed. Reg. 30097 (June 26, 2019).
58. *Id.* at 30098.
59. Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug. 24, 2017).
60. Alejandro E. Camacho, *Bulldozing Infrastructure Planning and the Environment Through Trump's Executive Order 13807*, 91 U. Colo. L. Rev. 513 (2020).
61. 82 Fed. Reg. at 40464-66.
62. 85 Fed. Reg. at 1719 (proposed §1502.7).
63. *Id.* at 1717 (proposed §1501.10(b)).
64. Philip Howard of the nonprofit Common Good drafted a report claiming that major infrastructure projects regularly take 10 years to approve but could take two years through changes in the U.S. "permitting system." *See* Philip K. Howard, Common Good, Two Years Not Ten Years: Redesigning Infrastructure Approvals 3 (2015), https://www.common-good.org/wp-content/uploads/2017/07/2YearsNot10Years.pdf.

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by the U.S. Congressional Research Service (CRS) and others.[65] CRS' criticisms are unsurprising, as it is fundamentally arbitrary to define "delay as any review that takes more than two years."[66]

In reality, claims that there are massive avoidable delays and administrative costs in the NEPA review process are simply wrong. The aforementioned 2017 CRS report thoroughly debunks the contention that environmental reviews have been responsible for costly and avoidable delay in implementing infrastructure projects.[67] An even more recent study concludes that "NEPA review does not appear to delay federal decision making and the process may create a vehicle for coordinating other permitting decisions to improve overall permitting efficiency."[68]

Of course, speeding up the review process through arbitrary deadlines can actually lead to more rather than fewer inefficiencies. Such deadlines will "encourage agencies to inadequately evaluate projects or miss issues," which may ultimately delay environmental review and project implementation through successful legal challenges.[69] In short, more thorough analysis may be more efficient in the long run. More concerning is the fact that page and time limits can lead to less effective agency planning and decisionmaking, by artificially truncating agency analysis.

As one set of commenters notes, "streamlining" through mandatory preparation time limits "comes at a significant risk for agencies that sacrifice quality for speed."[70] Short-circuiting the NEPA process also can reduce opportunities for public input, which might be precisely the point for the Trump Administration.[71] The Administration pays virtually no attention to how these changes impact the effectiveness of environmental review.

C. *Promoting Agency Capture*

CEQ's proposal would lessen the impact of public participation by expanding agency authority to delegate EIS preparation responsibilities to the proponents of private projects that require federal agency approval (such as a company seeking a permit to graze cattle on public lands). The regulations would allow applicants for federal licenses, permits, or other project approvals to prepare both EAs and EISs.[72] Although the agency would retain the responsibility to independently analyze the results, the generation of information on the effects of and alternatives to the proposed government action would be undertaken by the applicant. Private contractors performing government functions are exempt from "basic rules of public law to constrain the government in the name of such public values as transparency, public participation, due process for affected individuals, and public rationality."[73]

Delegating governmental functions to self-interested private entities creates a risk that the public values reflected in legislation such as NEPA will be undermined.[74] The inevitable result would be documents that downplay or outright ignore adverse environmental effects and discount public comments that identify those effects as problematic.[75] At least as significantly, the potential for information generation transforming a federal agency's decisionmaking is almost certainly considerably reduced when the agency does not actually perform any information-generating functions.

D. *Treating the CEQ Regulatory Procedures as a Ceiling, Not a Floor*

CEQ has long allowed individual agencies to adopt NEPA procedures that are more extensive than CEQ's, or that provide more extensive opportunities for input from those outside the agencies. Agencies have regularly exer-

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65. *See* Memorandum from CRS to House Committee on Transportation and Infrastructure, Subcommittee on Highways and Transit (June 7, 2017), https://fas.org/sgp/crs/misc/twonot.pdf (questions regarding the report *Two Years Not Ten Years: Redesigning Infrastructure Approvals*). *See also*, *e.g.*, Kevin DeGood, *Debunking the False Claims of Environmental Review Opponents*, Ctr. for Am. Progress, May 3, 2017, https://www.americanprogress.org/issues/economy/reports/2017/05/03/431651/debunking-false-claims-environmental-review-opponents/; Keith J. Benes, *Streamlining Infrastructure Permitting: Two Steps Forward, One Step Back*, Atlantic Council, Oct. 10, 2017, https://www. atlanticcouncil.org/blogs/new-atlanticist/streamlining-infrastructure-permitting-two-steps-forward-one-step-back; Russell Berman, *Why President Trump Is Going It Alone on Infrastructure*, Atlantic, Mar. 29, 2018, https://www.theatlantic.com/politics/archive/2018/03/trump-infrastructure-speed-permitting/556706/ (detailing how the Administration was "significantly overstating the length of time it takes the federal government to approve infrastructure projects").
66. DeGood, *supra* note 65.
67. Memorandum from CRS, *supra* note 65.
68. John Ruple & Heather Tanana, *Debunking the Myths Behind the NEPA Review Process*, 35 Nat. Resources & Env't (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3520212 (manuscript at 4).
69. Benes, *supra* note 65. *See also* Ruple & Tanana, *supra* note 68, at 8 ("The benefits gained by expediting NEPA may, in short, be subsumed by even greater costs associated with NEPA litigation and document revision. Another old adage appears apt: do it right the first time.").
70. Ruple & Tanana, *supra* note 68, at 7; *see also* Dominique Custos & John Reitz, *Public-Private Partnerships*, 58 Am. J. Comp. L. 555, 574 (2010) ("Critics argue that this streamlining reduces the deliberation over the environmental documentation and permits a rush to the start of construction, the point after which it is very hard to stop any project.").
71. *See* Camacho, *supra* note 60, at 545.
72. 85 Fed. Reg. at 1725 (proposed §1506.5(b)-(c)); *see also id*. at 1705 ("Applicants and contractors would be able to assume a greater role in contributing information and material to the preparation of environmental documents, subject to the supervision of the agency.").
73. Custos & Reitz, *supra* note 70, at 577.
74. *Id*.; *see also* Mandelker et al., *supra* note 3, §7:4 ("The delegation of impact statement preparation to private applicants for federal assistance, permits or other approvals can raise serious conflict of interest questions."); Jessica Owley, *The Increasing Privatization of Environmental Permitting*, 46 Akron L. Rev. 1091, 1120 (2013) ("Accountability concerns emerge when it appears that the private contractors are insulated from legislative, executive, and judicial oversight."); Kelsey Brugger, *Opponents Storm Hearing on NEPA Rules*, Greenwire, Feb. 25, 2020, https://www.eenews.net/greenwire/2020/02/25/stories/1062446787 (describing former CEQ official's strong opposition to this provision of CEQ's proposal).
75. *See* McElfish, *supra* note 13, at 10 (arguing that CEQ's proposal "departs from both the longstanding CEQ regulations and earlier pre-regulation NEPA case law regarding conflicts of interest"); *cf.* Joseph DeQuarto, *Landmark Environmental Rules Slated for Overhaul*, The Regulatory Review, Feb. 18, 2020, https://www.theregreview.org/2020/02/18/dequarto-landmark-environmental-rules-slated-overhaul/ (predicting that, if adopted, the proposal would give individuals from communities adversely affected by government projects "a tougher time engaging in the public comment process" because it "imposes stricter and more technical requirements on public comments").

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cised that authority.[76] CEQ's proposal, for the first time, would prohibit individual agencies from "impos[ing] additional procedures or requirements beyond those" mandated by CEQ.[77]

Shackling the authority of federal agencies to seek more input, and provide more process, than CEQ itself requires runs directly contrary to the commitment to democratic governance reflected in both the statute and CEQ's historical practice to date. CEQ professes to be interested in promoting robust public participation in the NEPA process to enhance the information base on which environmental decisions are made.[78] If that were true, CEQ would welcome an individual agency's efforts to provide more expansive participation opportunities than the CEQ minimum requirements if the agency thinks that those opportunities will improve its NEPA-based decisions.[79]

E. Removing Vital Judicial Checks on Executive Power

CEQ's proposal seeks to impair public participation even after agencies have completed their NEPA deliberations. It purports to limit access to judicial review and limit the authority of the courts in conducting that review, even though agencies have no authority to dictate how courts address NEPA challenges. These measures would frustrate both public participation and governmental accountability.[80]

CEQ's proposal would narrow access to the courts by declaring that the CEQ regulations "do not create a cause of action or right of action for violation of NEPA."[81] That provision flies in the face of the judicial review provisions of the Administrative Procedure Act (APA), which create a cause of action for any person who has been "adversely affected or aggrieved by agency action within the meaning of a relevant statute,"[82] as well as the Supreme Court's recognition of a presumption that agency action is judicially reviewable.[83] The proposal also authorizes agencies to allow private parties to seek agency stays of final agency decisions pending administrative or judicial review of those decisions.[84] It also provides, however, that agencies may require the posting of a bond as a condition of granting a stay.[85] As one environmental attorney has noted, "the clear purpose [of the bond requirement] is to chill public involvement" in agency decisions.[86]

Even when review is available, the regulations purport to narrow the grounds on which courts can find NEPA violations. The regulations require the lead agency in the NEPA process to certify in the administrative record that it considered "analyses submitted by public commenters for consideration" by the agency.[87] That certification would then trigger "a conclusive presumption" that the agency has actually done so,[88] which purports to be binding on the courts in any challenge to the agency's NEPA compliance.[89]

It is not hard to imagine agencies choosing to certify compliance with procedural requirements governing public participation despite questionable grounds for doing so, in an effort to accelerate implementation of desired projects and block judicial review of alleged procedural noncompliance. If agencies pursuing such strategies are not held accountable through independent judicial review of allegedly improper certifications, agency efforts to limit public input that may be critical of proposed agency actions may go unchecked. According to one NEPA expert, "the idea of an agency statement determining the limits of judicial review of compliance with statutory requirements has no apparent precedent," and may raise separation-of-powers issues.[90]

Finally, the proposed regulations also purport to limit judicial authority to enjoin NEPA violations when courts find that they have occurred. CEQ proclaims that the regulations do not create a presumption that a NEPA violation is a basis for either injunctive relief or a finding of irreparable harm.[91] The regulations also specify which violations courts should treat as harmless error.[92] All of these provisions are designed to limit public participation at the litigation stage, supplementing the constraints on

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76. *See*, *e.g.*, George C. Coggins et al., Federal Public Land and Resources Law 241 (7th ed. 2014) ("[N]early every federal land management agency has its own counterpart regulations, adapting the CEQ framework to its own activities.").
77. 85 Fed. Reg. at 1713 (proposed §1500.3(a)). *Compare* 40 C.F.R. §1507.3 (2019) (imposing no such prohibition).
78. *See* 85 Fed. Reg. at 1703 (claiming that the proposed provisions governing the submission of comments on EISs would "structure public participation for greater efficiency and inclusion of interested persons").
79. CEQ does state in the preamble that its proposal would "give agencies flexibility in the public involvement process to solicit comments 'in a manner to inform' parties interested or affected 'by the proposed action.'" *Id*.
80. Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wildness*, 34 Envtl. L. 1015, 1082 (2004) ("[T]he availability of judicial review fosters accountability."); *cf.* Christopher Harding, *Democratic Rights in European Law: Taking Stock at the Close of the 20th Century*, 2 Or. Rev. Int'l L. 64, 75 (2000) (contending that "much of the virtue of transparency in the context of governance resides . . . in its availability and use in *ex post facto* judicial review of the legality of official action"). *But cf.* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 Va. L. Rev. 1243, 1300 (1999) (arguing that "the availability of judicial review draws resources and accountability away from the more representative branches").
81. 85 Fed. Reg. at 1713 (proposed §1500.3(d)). CEQ also purports to define when a judicially reviewable final agency action has occurred. *See id*. at 1693-94. The APA limits judicial review under that statute to final agency action, 5 U.S.C. §704, but it does not delegate the task of determining when action is final to agencies sued in causes of action based on the APA. "[T]he finality of [an agency action] is determined by its consequences," Shea v. Office of Thrift Supervision, 934 F.2d 41, 44 (3d Cir. 1991), not by unilateral agency declaration.
82. 5 U.S.C. §702.
83. *See* Robert L Glicksman & Richard E. Levy, Administrative Law: Agency Action in Legal Context 1118-20 (3d ed. 2020).
84. 85 Fed. Reg. at 1713 (proposed §1500.3(c)).
85. *Id*.
86. *Critics Flag Host of Measures in NEPA Proposal That Chill Public Input*, InsideEPA, Jan. 31, 2020, https://insideepa.com/daily-news/critics-flag-host-measures-nepa-proposal-chill-public-input.
87. 85 Fed. Reg. at 1713 (proposed §1500.3(b)(4)).
88. *Id*. at 1720 (proposed §1502.18).
89. *Id*. at 1691-92 (citing "case law upholding regulatory presumptions").
90. McElfish, *supra* note 13, at 9.
91. 85 Fed. Reg. at 1713 (proposed §1500.3(d)); *see also id*. at 1694 ("A showing of a NEPA violation alone does not warrant injunctive relief or a finding of irreparable harm.").
92. *Id*. at 1713 (proposed §1500.3(d)); *see also id*. at 1694 (denying that (1) a showing of a NEPA violation alone warrants injunctive relief, (2) a showing of irreparable harm entitles a litigant to an injunction, (3) the regulations create a cause of action, and (4) "minor, non-substantive errors" are sufficient to invalidate agency action).

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such participation during the NEPA process itself that we discuss above.[93]

IV. Conclusion

CEQ's proposed overhaul of its NEPA regulations would not only facilitate the Trump Administration's efforts to disregard environmental concerns, but also truncate and diminish the participatory process that has long played such a critical role in promoting NEPA's stop-and-think and disclosure functions. NEPA has made careful democratic planning a bedrock of federal decisionmaking and, according to a study by the Environmental Law Institute, "affected governance for the better."[94] Though not flawless, it has been hailed by Democrats and Republicans alike for, as Russell Train (Administrator of the U.S. Environmental Protection Agency under President Richard Nixon) put it, recognizing "that what the people know has great value to a government that seeks their knowledge and takes it seriously."[95]

If policymakers are intent on improving the implementation of NEPA, there are a number of straightforward actions much more likely to lead to efficient decisionmaking without compromising NEPA's goals of informed decisionmaking, transparency, and democratic governance. These include providing agencies sufficient resources, as well as fully implementing recent bipartisan initiatives that focus not only on efficiency, but also more effective review.[96] Reforms that would make the NEPA process more effective at avoiding or curtailing the adverse environmental effects of government decisionmaking might include enhanced interagency coordination in the dissemination of NEPA-related information, post-approval monitoring, and even project implementation.[97] They might also include requiring agencies to learn by monitoring the actual effects of adopted actions and making appropriate adjustments to account for such new information.[98]

CEQ's proposal follows none of these paths. Instead, it is an ill-disguised hatchet job on NEPA's capacity to foster informed deliberation, public participation, agency coordination, and judicial checks on agency action. If the Administration's goal is to impair deliberative democracy on environmental issues, this proposal is tailor-made.

93. For further discussion of how the CEQ proposal would impair "NEPA's capacity to foster informed deliberation, public participation, agency coordination, and judicial checks on agency action," see Alejandro E. Camacho & Robert L. Glicksman, *Trump Is Trying to Cripple the Environment and Democracy*, The Hill, Jan. 18, 2020, https://thehill.com/opinion/energy-environment/478904-trump-is-trying-to-cripple-the-environment-and-democracy.
94. Environmental Law Institute, *supra* note 8, at 3-4.
95. *Id*. at 4.
96. Camacho, *supra* note 60, at 554-56.
97. *See* Alejandro E. Camacho & Robert L. Glicksman, Reorganizing Government: A Functional and Dimensional Framework 107-10, 118-20 (2019).
98. *See id*. at 108.