November 23, 2021

ATTORNEY GENERAL RAOUL CALLS ON FEDERAL GOVERNMENT TO ENSURE MEANINGFUL ENVIRONMENTAL REVIEW OF FEDERAL PROJECTS

Chicago — Attorney General Kwame Raoul, as part of a multistate coalition, submitted comments in support of a federal government proposal to restore rules requiring meaningful environmental reviews of federal projects under the National Environmental Policy Act (NEPA).

The proposal is an important first step toward undoing a rule enacted in 2020 that upended requirements ensuring that federal agencies comprehensively evaluate the impacts of their actions on the environment and public health. However, according to Raoul and the coalition, the proposed changes are only a first step. In today's comments, Raoul and the coalition express support for the proposal, but urge the federal government to move swiftly to further revise or repeal the unlawful 2020 rule in its entirety.

"The unlawful rule enacted in 2020 undermined important regulations put in place to ensure that public safety and environmental impact are key considerations federal agencies must take into account before beginning a significant project," Raoul said. "I am urging the federal government to take action to repeal the 2020 rule, in large part because not requiring federal agencies to take into account the direct and indirect effects of a project harms low-income communities and communities of color."

Enacted in 1970, NEPA is one of the nation's foremost environmental statutes. Before any federal agency undertakes a major federal action that will significantly affect the quality of the environment, NEPA requires the agency to consider the environmental impacts of the proposed action, alternatives to the action, and any available measures to mitigate the action's impacts. A wide range of federal actions, including the approval of significant energy and infrastructure projects and key decisions concerning the management of federal public lands, require compliance with NEPA. Following the prior administration's previous efforts to undermine environmental review of federal projects, Raoul and a coalition of 20 states filed a lawsuit arguing that the 2020 rule violated NEPA and the Administrative Procedure Act.

In today's comment letter, Raoul and the coalition express their support for efforts to ensure meaningful environmental review of federal projects under NEPA, but argue that the unlawful 2020 rule must be further revised or repealed in its entirety. Specifically, Raoul and the coalition urge the federal government to:

- Repeal each of the illegal provisions identified in the coalition's lawsuit.
- Take action to ensure robust and diverse participation in public hearings.
- Expressly require agencies to consider climate change and environmental justice in their NEPA analyses.
- Ensure that agencies consider whether proposed projects are consistent with state and tribal climate laws, plans and policies.

Joining Raoul in sending the comment letter are the attorneys general of California, Colorado, Delaware, the District of Columbia, Guam, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin; as well as Harris County, Texas; New York City; and the New York State Department of Environmental Conservation.

Today's letter is part of Attorney General Raoul's efforts to enhance the focus on environmental justice issues throughout Illinois. Recently, the Attorney General Raoul announced an initiative aimed at enhancing its focus on environmental justice issues statewide. To begin that work, Raoul's Environmental Enforcement

Division convened a virtual town hall discussion of environmental justice issues facing communities around the state, which featured presentations by the office's career attorneys, community organizers, advocates and faith leaders. Attorney General Raoul is encouraging Illinois residents to contact the Attorney General's office to highlight local environmental concerns by emailing EJ@ilag.gov.

COMMENTS OF ATTORNEYS GENERAL OF WASHINGTON, CALIFORNIA, NEW YORK, COLORADO, DISTRICT OF COLUMBIA, DELAWARE, GUAM, HARRIS COUNTY, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, NEW JERSEY, NEW MEXICO, CITY OF NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WISCONSIN, AND THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

November 22, 2021

VIA REGULATIONS.GOV
Amy B. Coyle, Deputy General Counsel
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: National Environmental Policy Act Implementing Regulations Revisions
86 Fed. Reg. 55757 (Oct. 7, 2021)
Docket No. CEQ-2021-0002

Dear Ms. Coyle:

The Attorneys General of the States of Washington, California, New York, Colorado, District Of Columbia, Delaware, Guam, Illinois, Maine, Maryland, Massachusetts, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Wisconsin, and the City of New York, Harris County, and The New York State Department Of Environmental Conservation (collectively, the States) respectfully submit these comments on the Council on Environmental Quality's (CEQ) notice of proposed rulemaking (Proposed Rule) revising the regulations implementing the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347.[1] While the Proposed Rule does not address all of the harms to the States from the current NEPA regulations, it takes important steps to undo this harm by requiring a more robust alternatives analysis, restoring the prior definition of effects, and making CEQ's regulations a floor and not a ceiling for other federal agencies' NEPA regulations. The States support these changes and urge CEQ to address all of the harms imposed by the current NEPA regulations as soon as possible through a further "Phase II" rulemaking.

I. THE 2020 RULE HARMS THE STATES' INTERESTS IN ROBUST NEPA REVIEWS AND DEPARTS FROM DECADES OF AGENCY PRACTICE

For more than 50 years NEPA has supported informed and transparent agency decision-making and meaningful public participation in developing and reviewing the environmental and

[1] Nat'l Env'tl Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55757 (Oct. 7, 2021), Docket ID No. CEQ-2021-0002.

public health impacts of proposed federal actions.[2] By requiring thorough environmental review before committing significant resources to such actions, NEPA has helped federal agencies for decades to develop projects that protect and enhance the human environment across the country, including in the States.[3]

The States have strong interests in deliberative and complete federal environmental reviews for major federal actions. States are injured in their *parens patriae* capacity when their residents suffer from environmental pollution.[4] Additionally, the States also have a quasi-sovereign interest in preventing harm to the health of their natural resources and ecosystems.[5] The NEPA process allows the States to safeguard these interests by identifying potential harms of federal actions prior to final approval. The States also rely on a robust NEPA process and the cooperative federalism approach woven into the first NEPA regulations promulgated by CEQ in 1978 (the 1978 Regulations). Indeed, the States coordinate closely with federal agencies by evaluating environmental impacts under NEPA and enforcing their own state environmental laws. Over time, many States have designed their own environmental review statutes, often referred to as "little NEPAs," to work in tandem with NEPA reviews.[6] The NEPA regulatory revisions finalized in 2020 (the 2020 Rule) harms all of these interests.[7]

Recognizing the importance of NEPA and in order to protect their interests, the States have actively participated in CEQ's rulemakings on the NEPA regulations. In 2018, a coalition of states and territories, including many of the signatories listed below, submitted comments on CEQ's Advanced Notice of Proposed Rulemaking seeking input on proposed revisions to CEQ's

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[2] U.S. Gov't Accountability Office, GAO-14-369, National Environmental Policy Act: Little Information Exists on NEPA Analyses, at 16 (2014) [hereinafter GAO Report], https://www.gao.gov/products/gao-14-369 (last visited Nov. 22, 2021),("[a]ccording to studies and agency officials, some of the qualitative benefits of NEPA include its role as a tool for encouraging transparency and public participation and in discovering and addressing the potential effects of a proposal in the early design stages to avoid problems that could end up taking more time and being more costly in the long run.").

[3] *See, e.g.* Comments of Attorneys General of California, Illinois, Maryland, Massachusetts, New Jersey, New York, Oregon, Vermont, and Washington, and the Secretary of the Commonwealth of Pennsylvania Department of Environmental Protections on Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 28, 591 at 12–15 (August 20, 2018) [hereinafter 2018 Comments] (attached as Ex. 1).

[4] *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 737–38 (1981).

[5] *Massachusetts v. EPA*, 549 U.S. 497, 51922 (2007).

[6] *See* Comments of Attorneys General of Washington, California , New York, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, and Vermont; the District of Columbia; the Commonwealths of Massachusetts and Pennsylvania, and the Territory of Guam on Notice of Proposed Rulemaking, 85 Fed. Reg. 1684 (March 10, 2020), (Attached as Ex. 2) [hereinafter 2020 Comments] at 7173.

[7] *See* First Amended Complaint for Declaratory and Injunctive Relief, Nov. 23, 2020, (attached as Ex. 3) (Complaint) at 54–60. This litigation is stayed through the end of February, 2022. *See* Order Ext. Stay, Dkt. 96 (Oct. 2, 2021). These flaws have sparked other lawsuits around the country. *See Alaska Cmty. Action on Toxics v. CEQ*, No. 20-cv-05199 (N.D. Cal., filed July 29, 2020); *Wild Virginia v. CEQ*, No. 20-cv-0005 (W.D. Va., filed July 29, 2020); *Envtl. Justice Health All. v. CEQ*, No. 20-cv-6143 (S.D.N.Y., filed Aug. 6, 2020); *Iowa Citizens for Cmty. Improvement v. CEQ*, No. 20-cv-2715 (D.D.C., filed Sept. 23, 2020).

NEPA regulations.[8] The coalition's comments explained the value of NEPA and the successful ways the 1978 Regulations implemented the statute's requirements and upheld its purposes.[9] When CEQ proposed the 2020 Rule, the States again provided comments detailing extensive legal, procedural and policy concerns.[10] The States fully incorporate into this letter those comments, which are attached as Exhibits 1 and 2.

When CEQ finalized the 2020 Rule, a coalition of States and territories challenged the 2020 Rule in court.[11] As detailed in the lawsuit, the 2020 Rule is arbitrary, capricious, and contrary to law, exceeds CEQ's statutory authority, and was promulgated without observance of procedure required by law.[12] The 2020 Rule undermines NEPA's plain language and purpose, discards decades of informed decision-making that protected the human environment, and results in myriad harms to the States. In particular, the 2020 Rule puts environmental justice communities, including low-income communities and communities of color, at increased risk of harm through a lack of consideration of cumulative and indirect effects.[13]

Additionally, due to the 2020 Rule's inconsistency with NEPA and decades of case law interpreting the statute and the 1978 Regulations, State and federal agencies have struggled to implement the 2020 Rule, as there is no guidance as to how to apply it or harmonize it with state-level reviews. The 2020 Rule has also caused additional confusion and inefficiency by forcing federal agencies to depart from decades of practice and by preventing them from tailoring their NEPA rules to their unique missions and context.[14] The 2020 Rule has also disrupted decades of coordination between state and federal agencies, particularly where states have their own rules for environmental reviews.[15] As a result of the 2020 Rule, States bear the burden of this disruption: they must spend additional resources on state-level reviews to compensate for the weakened federal process.

The States supported CEQ's first effort to triage the harms from the 2020 Rule through extending the deadline for federal agencies to update their own NEPA procedures to comply with the 2020 Rule.[16] Now, the States strongly support CEQ's return to the 1978 Regulations for

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[8] Advanced Notice of Proposed Rulemaking – Update to the Regulations for implementing the procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28591 (June 20, 2018) Docket ID No. CEQ-2018-0001.

[9] *See* 2018 Comments.

[10] *See* 2020 Comments at 71–73.

[11] *See* First Amended Complaint for Declaratory & Injunctive Relief; *California v. Council on Envtl. Quality*, Case No. 3:20-cv-06057-RS, Doc. 75 (filed Nov. 23, 2020).

[12] *See* Complaint.

[13] *See* 2020 Comments at 42–50, Complaint at 57–58.

[14]Nat'l Env'tl Policy Act Implementing Regulations Revisions, 86 Fed. Reg. at 55759.

[15] *See* 2020 Rule Comments at 71–73.

[16] Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34154 (June 29, 2021) Docket ID No.CEQ-2021-0001; Comments of Attorneys General of Washington, California, New York, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Wisconsin; the Commonwealths of Massachusetts and

three harmful provisions of the 2020 Rule. These revisions will help restore decades of agency practice and judicial interpretations of the provisions, increase agency efficiency, promote state-federal cooperation, and result in more comprehensive environmental reviews. As such, the Proposed Rule will help to fulfill the federal government's duty to act "in cooperation with States and local governments" to evaluate environmental impacts.[17] The States urge CEQ to quickly address the remaining provisions of the 2020 Rule, which will continue to cause harm to the States until they are addressed through further rulemaking or through repeal of the 2020 Rule in its entirety.

II. THE PROPOSED RULE MAKES THREE IMPORTANT CHANGES TO SUPPORT MEANINGFUL ENVIRONMENTAL REVIEW

The States have consistently expressed the need to repeal the 2020 Rule as quickly and completely as possible, and the States support this rulemaking as meaningful progress toward that goal. While the Proposed Rule does not address all of the harms of the 2020 Rule, it takes important steps in the right direction by requiring more robust alternatives analysis, restoring the prior definition of "effects," and making CEQ's NEPA regulations a floor, rather than a ceiling, for other federal agencies' NEPA regulations.

A. The Proposed Rule's revisions to the "purpose and need" statement are a positive first step to ensure that federal agencies fully consider all reasonable alternatives

CEQ proposes removing language from the 2020 Rule that directs agencies to base the "purpose and need" for agency action on the goals of the applicant and restoring the definition of "purpose and need" from the 1978 NEPA regulations.[18] The States support this change. Federal agencies must evaluate a broad range of interests, not just those of project applicants, and should design and approve their actions based on factors such as the public interest, environmental outcomes, and local needs, in addition to the goals of a project applicant. By focusing the "purpose and need" analysis required under NEPA almost entirely on the goals of a project applicant, the 2020 Rule unlawfully limits the alternatives that may be considered to only those that meet an applicant's goals, in clear contravention of NEPA's statutory text and purpose. The Proposed Rule helps to address this conflict.

As the States previously commented, decision-makers and the public cannot evaluate the environmental impact of a decision without the disclosure and consideration of all reasonable alternatives.[19] Indeed, courts interpreting NEPA and its implementing regulations have long recognized that alternatives analysis is the "heart" of an Environmental Impact Statement

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Pennsylvania; the Territory of Guam; the District of Columbia; Harris County, Texas; the City of New York; and the New York State Department of Environmental Conservation on the Interim Final Rule, 86 Fed. Reg. 34154 (July 29, 2021).

[17] 42 U.S.C. § 4331(a).

[18] *See* 40 C.F.R. § 1502.12; Phase One Proposed Rule at 55760.

[19] *See* 2020 Comments at 38–41.

(EIS).[20] CEQ has also recognized the importance of considering appropriate alternatives to "meet the policies and responsibilities set forth in NEPA."[21] A NEPA review that fails to consider reasonable alternatives wastes taxpayer dollars, risks increased litigation and delays, and – most importantly – ignores creative, efficient, and beneficial alternatives to a proposed action.[22] The Proposed Rule makes important progress toward restoring this central part of the environmental review process.

While the States support the Proposed Rule's change to the definition of purpose and need, CEQ must also revise other provisions in the 2020 Rule that prevent agencies from adequately studying reasonable alternatives.[23] Specifically, CEQ should restore the directives for agencies to: (1) present alternatives in comparative form in order to "sharply" define the issues and provide a clear choice among options by the decision-maker and the public; (2) "[r]igorously explore and objectively evaluate" all reasonable alternatives to the proposed action; and (3) "[d]evote substantial treatment to each alternative."[24]

B. Removing the ceiling provision, while beneficial, may reduce, but will not eliminate, the harms of the 2020 Rule

CEQ also proposes to remove the "ceiling" provision that prevents federal agencies from "impos[ing] additional procedures or requirements beyond those set forth in [CEQ's] regulations."[25] The States support this proposed return to the regulatory structure of the 1978 Regulations, which would again allow federal agencies to tailor their NEPA procedures to their unique mandates. But, because some federal agencies lack their own regulations implementing NEPA and removal of the ceiling provision does not repeal the 2020 Rule, this change will not remediate all harms from the 2020 Rule. The provisions of the 2020 Rule not addressed in this Phase I Rulemaking will still apply to all major federal actions proposed after September 14, 2020.[26]

Moreover, while many federal agencies have their own detailed regulations for conducting environmental reviews under NEPA, these regulations were developed in reference to, and to coordinate with, CEQ's 1978 Regulations. Agency regulations and internal guidance may fill gaps for agency-specific practice, but they cannot supplant CEQ's regulations. State agencies also rely on CEQ's regulations for guidance when they are charged with administering NEPA or with implementing their little NEPAs.[27] As long as the 2020 Rule remains in effect,

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[20] *See, e.g., Wildearth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1226 (10th Cir. 2017) (citing 40 C.F.R. § 1502.14); *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1054 (9th Cir. 2007) (same).

[21] Nat'l Env'tl Policy Act Implementing Regulations Revisions, 86 Fed. Reg.at 55760.

[22] *See* 2020 Comments at 38–41.

[23] *See id*.

[24] *Compare* 40 C.F.R. § 1502.14, *with* former 40 C.F.R. § 1502.14 (1978).

[25] 40 C.F.R. § 1507.3(b).

[26] *See* 40 C.F.R. § 1506.13.

[27] *See* 2020 Comments at 71–73.

even as a floor rather than a ceiling, agencies will need to rely on it to implement NEPA. CEQ should therefore expeditiously complete its Phase II rulemaking and, in that rulemaking, repeal the 2020 Rule in its entirety.

C. The States support CEQ's proposed definition of "effects" to ensure federal agencies evaluate direct, indirect, and cumulative effects of proposed agency actions

The States strongly support CEQ's proposal to redefine "effects" analyzed during the NEPA environmental review process to include all reasonably foreseeable effects of a proposed action, explicitly including direct, indirect, and cumulative effects.[28] The 2020 Rule's deletion of indirect and cumulative impacts from the definition of "effects" blinds federal agencies to some of the most serious environmental consequences of their actions and obscures these impacts from public scrutiny. As CEQ previously recognized, these are often the most substantial effects of an agency action and "may often be even more substantial than the primary effects of the original action itself."[29]

NEPA requires consideration of indirect and cumulative effects and this analysis is integral to effective environmental review. The statute requires agencies to consider "*any* adverse environmental effects" of a proposed action.[30] Identifying and analyzing only direct effects that are close in time and geography to the proposed federal action ignores the true nature of most environmental problems, which Congress recognized as "worldwide and long-range" in character.[31]

Consideration of indirect and cumulative effects is also vital to addressing environmental injustice and climate change.[32] For example, studying cumulative impacts is essential to preventing further harm to low-income or minority communities already burdened with the effects of disproportionately high levels of pollution. Agencies simply cannot know the full impact of a project on a community without considering its existing levels of pollution and the cumulative impacts of adding another pollution source. Similarly, without considering existing burdens, agencies cannot identify meaningful alternatives or mitigation measures to reduce or avoid harms to impacted communities. By reinstating the prior definition of effects to include indirect and cumulative effects, it will help address and prevent disproportionate burdens.

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[28] *See* Nat'l Env'tl Policy Act Implementing Regulations Revisions, 86 Fed. Reg. at 55762.

[29] Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20550, 20553 (Aug. 1, 1973).

[30] *See* 2020 Comments at 43–46; 42 U.S.C. § 4332(2)(C)(ii) (emphasis added).

[31] 42 U.S.C. § 4332(2)(F); *see also* S. Rep. No. 91-296, at 5 (Senate report stating "[i]mportant decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.").

[32] *See* 2020 Comments at 50–53.

Similarly, with regard to climate change, an agency cannot evaluate a project's future climate impacts without addressing the cumulative impact of greenhouse gas emissions.[33] Those impacts cannot be meaningfully assessed through a narrow analysis of direct effects from an individual proposed action. Considering the emissions from a federal agency action in addition to existing and future emissions from other projects are precisely the sort of information a NEPA analysis should robustly analyze. As such, the States support the proposed definition of effects to better protect the climate and redress environmental injustice. But, as discussed in the next section, the States urge CEQ to increase that protection by codifying the required analysis of environmental justice concerns and climate change impacts.[34]

III. CEQ SHOULD REPEAL THE 2020 RULE IN ITS ENTIRETY AND CODIFY SPECIFIC GUIDANCE ON ANALYZING THE EFFECTS FROM GREENHOUSE GAS EMISSIONS AND EFFECTS ON ENVIRONMENTAL JUSTICE COMMUNITIES

The Proposed Rule is an important step towards repealing the 2020 Rule, but further revisions to the 2020 Rule are necessary. CEQ should act swiftly to complete the work of reviewing and revising NEPA's implementing regulations in their entirety. As explained above, in the States' prior comments, and in several lawsuits, the 2020 Rule was adopted with numerous substantive and procedural flaws, most of which are not addressed in the Proposed Rule.[35] Until the 2020 Rule is fully repealed and new regulations that are consistent with NEPA are adopted, the harms from the 2020 Rule will remain, to the detriment of the States, their residents, their resources, and the environment. The States encourage CEQ to expeditiously promulgate the additional revisions to the 2020 Rule described below.

A. Repeal the 2020 Rule

CEQ should repeal each of the illegal provisions of the 2020 Rule identified in the 2020 Comments and the States' lawsuit.[36] These include, among many others, the improper expansion of categorical exclusions, imposition of additional NEPA threshold considerations, redefinition of "a major federal action," a weakened significance determination, a restricted alternatives analysis, constraints on meaningful public participation, and reduced judicial review.

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[33] *See* CEQ, FINAL GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON CONSIDERATION OF GREENHOUSE GAS EMISSIONS AND THE EFFECTS OF CLIMATE CHANGE IN NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS (Aug. 1, 2016), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf (GHG Guidance) ("Climate change results from the incremental addition of GHG emissions from millions of individual sources, which collectively have a large impact on a global scale").

[34] *See* Nat'l Env'tl Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55767 (requesting comment on whether the Council should provide specific rules for agencies to analyze certain categories of effects).

[35] *See* 2020 Comments at 12–70, Complaint at 60–73.

[36] *See* Complaint at 57–60.

B. Public Participation

CEQ must take action to ensure robust and diverse participation in public hearings for the Phase II rulemaking. For example, CEQ should hold public hearings at a variety of times, including outside of normal business hours, to allow interested members of the public, including those with demanding work schedules, to provide input. CEQ should also adopt a system to ensure every participant has an opportunity to speak, including those who were unable to make a prior reservation to do so.

C. Climate Change

As CEQ has recognized, agencies would benefit from more "clarity and consistency" in how to address climate change in environmental review under NEPA.[37] CEQ's regulations should expressly require agencies to consider climate change in their NEPA analysis. Agencies must consider both a project's effects on climate change (including through emissions of greenhouse gases) and the effects of climate change on the project (such as future sea level rise or more severe weather events). CEQ can draw on state-level environmental review laws and regulations for examples in crafting appropriate regulations for federal environmental reviews.[38]

For example, California's little NEPA, the California Environmental Quality Act (CEQA)[39], requires public agencies to disclose and analyze impacts of greenhouse gas emissions from proposed projects and its implementing regulations provide agencies with guidance for determining the significance of such impacts.[40] Where a CEQA lead agency determines that a proposed project's impacts from greenhouse gas emissions are significant, the agency is required to adopt all feasible mitigation measures to substantially lessen those impacts prior to approving the project.[41] Under CEQA, California's Office of Planning and Research (OPR) and Natural Resources Agency has promulgated guidelines for the mitigation of greenhouse gas emissions and related impacts of said emissions.[42] OPR has also published a guidebook for state agencies looking to prepare for climate change and issued a draft advisory on CEQA and climate change.[43]

Moreover, when considering a project's climate change effects, the regulations should specify that the full lifecycle (upstream and downstream) of a project's greenhouse gas emissions

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[37] *See* GHG Guidance at 2.

[38] *See, e.g.*, 6 NYCRR § 617.9(b)(5)(iii)(*i*).

[39] Cal. Pub. Res. Code, § 21000 *et seq*.

[40] Cal. Code Regs., tit. 14, § 15064.4.

[41] *Id*. at § 15021(a)(3); Cal. Pub. Res. Code, § 21002.

[42] Cal. Pub. Res. Code, §§ 21083, 21083.05; Cal. Code Regs., tit. 14, § 15064.4.

[43] Planning and Investing for a Resilient California – A Guidebook for State Agencies (2018), https://opr.ca.gov/docs/20180313-Building_a_Resilient_CA.pdf; CEQA and Climate Change Advisory, Discussion Draft (2018), https://opr.ca.gov/docs/20181228-Discussion_Draft_Climate_Change_Adivsory.pdf.

must be considered.[44] In addition, where agencies evaluate project alternatives with varying levels of associated greenhouse gas emissions, agencies should incorporate the Social Cost of Carbon to understand the full effects of increased emissions.[45] Agencies should also consider and, where appropriate, adopt mitigation measures to reduce climate impacts.

D. State and Tribal Climate Policies

Since CEQ issued its greenhouse gas guidance in 2016, many states have promulgated or strengthened laws and policies to reduce emissions. For example, New York's Climate Leadership and Community Protection Act (NY Climate Act) sets aggressive greenhouse gas reduction requirements and requires state agency actions to be consistent with achieving the emissions limits set for 2030 and 2050.[46] Under the NY Climate Act, New York agencies may use a state-specific social cost of carbon established by the Department of Environmental Conservation to determine the value of economic damages avoided through the reduction of greenhouse gas emissions, which ensures that less-emitting alternatives are adequately considered in the decision-making process.[47] In instances where a carbon-emitting option is justified, alternatives and greenhouse gas mitigation measures must be included, setting a clear path for ensuring the emissions reductions are achieved.[48] Other states have also adopted similar laws and policies.[49]

CEQ should ensure that NEPA reviews discuss the consistency of a proposed action with state or tribal climate laws, plans, and policies, including where state law requires consideration and mitigation of greenhouse gas emissions and climate change impacts. This important consideration is already built into California's little NEPA which directs state agencies to consider, among other factors, the extent to which a proposed project "complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or

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[44] *See, e.g., Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 735 (9th Cir. 2020); *see also* N.Y. St. Dep't of Envtl. Conserv., *DEC Policy: Assessing Energy Use & Greenhouse Gas Emissions in Envtl. Impact Statements*, at 5-10 (Jul. 15, 2009), https://www.dec.ny.gov/docs/administration_pdf/eisghgpolicy.pdf (last visited Nov. 22, 2021).

[45] *See* GHG Guidance at 33, n.86.

[46] N.Y. Envtl. Conserv. L. § 75-0107, Ch. 106 of the Laws of 2019 (NY Climate Act) § 7(2).

[47] N.Y. Envtl. Conserv. L. § 75-0113; N.Y. Dep't of Envtl. Conserv.,Value of Carbon Guidance, https://www.dec.ny.gov/docs/administration_pdf/vocguidrev.pdf (last visited Nov. 22, 2021).

[48] NY Climate Act § 7(2).

[49] Hawaii: Food and Energy Security Act, 2010 Haw. Laws 73 (H.B. 2421) (codified in part at HRS § 196-10.5); Maine: Act To Promote Clean Energy Jobs and To Establish the Maine Climate Council, 2019 Me. Legis. Serv. Ch. 476 (S.P. 550) (L.D. 1679) (West) (codified in scattered sections of Me. Rev. Code tits. 5, 35-A, 38; Massachusetts: Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, 2021 Mass. Acts. Ch. 8, sec. 8 (codified in scattered sections of Mass. Rev. Code Chs. 21N, 23J, 25, 29, 30, 59, 62, 143, 164); Michigan: Executive Directive No. 2020-10 (Mich. 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90704-540278--,00.html; New Jersey: Global Warming Response Act, N.J. Stat. Ann. §§ 26:2C-37 to -68; Oregon: Executive Order No. 20-04 (Or. 2020), https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf. Washington: Climate Commitment Act, Ch. 316, 2021 Wash. Sess. Laws 2606 (codified as amended in scattered sections of Wash. Rev. Code tits. 43, 70A).

mitigation of greenhouse gas emissions."[50] When considering alternatives, agencies should specifically discuss the impact different alternatives will have on achieving relevant adopted federal, state, or tribal greenhouse gas reduction goals and resiliency standards.

E. Environmental Justice

CEQ should also use this opportunity to explicitly incorporate consideration of environmental justice concerns into its NEPA rulemaking, as required by Executive Order 12898.[51] The States encourage CEQ to codify existing guidance on incorporating environmental justice issues into NEPA review.[52] These regulatory provisions should direct agencies to consider whether communities of color, low-income residents, or Native American tribes are affected by the proposed project and, if so, whether there are disproportionately adverse human health and environmental effects on those groups; whether unique characteristics of these populations may amplify the effects of the proposed action; and ways to ensure effective public participation and community representation.[53]

F. Environmental Review of Regulations

The States appreciate CEQ's efforts to assess the environmental impacts of the Proposed Rule through a Special Environmental Assessment.[54] The States urge CEQ to ensure it assesses these potential environmental impacts consistent with the mandate of NEPA and the Endangered Species Act, and in fulfillment of NEPA's broad purposes of informed, rational, and transparent agency decision-making. CEQ asserts that it is not subject to its own NEPA regulations when it promulgates regulations such as the Proposed Rule.[55] However, NEPA requires federal agencies, including CEQ, to evaluate the environmental impacts of major federal actions, such as the promulgation of regulations.[56] CEQ should perform an environmental assessment of the Proposed Rule in compliance with its own NEPA regulations and with the intent of NEPA itself and engage in consultation in compliance with the Endangered Species Act.

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[50] *Id*. at § 15064.4(3).

[51] Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994) (as amended).

[52] CEQ, ENVIRONMENTAL JUSTICE GUIDANCE (1997), https://www.epa.gov/sites/default/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf.

[53] *Id*. at 9.

[54] *See* CEQ Special Environmental Assessment Phase 1 NEPA Regulations Revision (Oct. 6, 2021), https://www.regulations.gov/document/CEQ-2021-0002-0003.

[55] See Nat'l Env'tl Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55757, at 55767.

[56] See 42 U.S.C. § 4332(2)(C).

IV. CONCLUSION

For all the reasons stated above and the reasons stated in the States' previous comments, the undersigned states support CEQ's Proposed Rule. The States further urge CEQ to move forward as soon as possible with a comprehensive rulemaking to ensure NEPA's implementing regulations are consistent with the purpose and requirements of the statute through the full repeal or revision of the 2020 Rule.

Sincerely,

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

By: /s/ Megan Sallomi_____
MEGAN SALLOMI
ELIZABETH M. HARRIS
Assistant Attorneys General
Counsel for Environmental Protection
800 5th Ave., Suite 2000, TB-14
Seattle, WA 98104-3188
(206) 233-3391
megan.sallomi@atg.wa.gov
elizabeth.harris@atg.wa.gov

FOR THE STATE OF CALIFORNIA

ROB BONTA
Attorney General

By: /s/ Sarah Morrison
SARAH MORRISON
Supervising Deputy Attorney General
LANI M. MAHER
Deputy Attorney General
California Department of Justice
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
(213) 269-6328
Sarah.Morrison@doj.ca.gov
Lani.Maher@doj.ca.gov

FOR THE STATE OF COLORADO

PHILIP J. WEISER
Attorney General, State of Colorado

By: /s/ Scott Steinbrecher
SCOTT STEINBRECHER
Colorado Department of Law
1300 Broadway, 10th Floor
Denver, CO 80203
(720) 508-628
Scott.Steinbrecher@coag.gov

FOR THE STATE OF NEW YORK
AND THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION

LETITIA JAMES
Attorney General

By: /s/Claiborne E. Walthall
CLAIBORNE E. WALTHALL
Assistant Attorney General
MICHAEL J. MYERS
Senior Counsel
Environmental Protection Bureau
Office of the Attorney General
State Capitol
Albany, NY 12224
(518) 776-2380
claiborne.walthall@ag.ny.gov

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General for the District of Columbia

By: /s/ Wesley Rosenfeld
WESLEY ROSENFELD
Social Justice Section
Office of the Attorney General
for the District of Columbia
400 6th St. NW
Washington, D.C. 20001
(202) 774-0874
Email: Wesley.Rosenfeld1@dc.gov

FOR THE STATE OF DELAWARE

KATHLEEN JENNINGS
Attorney General

By:/s/ Jameson A.L. Tweedie
JAMESON A.L. TWEEDIE
Deputy Attorney General
CHRISTIAN DOUGLAS WRIGHT
Director of Impact Litigation
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 683-8899
Christian.Wright@delaware.gov
Jameson.Tweedie@delaware.gov

FOR THE TERRITORY OF GUAM

LEEVIN TAITANO CAMACHO
Attorney General

By: /s/ Joseph A. Perez
JOSEPH A. PEREZ
Assistant Attorney General
Consumer Protection Division
590 South Marine Corps Drive,
Suite 901, ITC Building
Tamuning, Guam 96913 ▪ USA
(671) 475-3324
jperez@oagguam.org

FOR HARRIS COUNTY, TEXAS

CHRISTIAN D. MENEFEE
Harris County Attorney

By: /s/ Sarah Jane Utley___
SARAH JANE UTLEY
Environment Division Director
1019 Congress, 15th Floor
Houston, Texas 77002
(713) 274-5124
Sarah.Utley@cao.hctx.net

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

By: /s/ Jason E. James_____
JASON E. JAMES
Assistant Attorney General
MATTHEW J. DUNN
Chief, Environmental Enforcement/
Asbestos Litigation Division
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0660
Jason.james@ilag.gov

FOR THE STATE OF MAINE

AARON M. FREY
Attorney General

By: /s/ Margaret A. Bensinger
MARGARET A. BENSINGER
Assistant Attorney General
Maine State Bar No. 3003
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
207-626-8800
peggy.bensinger@maine.gov

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General

By: /s/ Steven J. Goldstein
STEVEN J. GOLDSTEIN
Special Assistant Attorney General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, MD 21202
(410) 576-6414
sgoldstein@oag.state.md.us

FOR THE COMMONWEALTH OF
MASSACHUSETTS

MAURA HEALEY
Attorney General

By: /s/ Matthew Ireland
MATTHEW IRELAND
Assistant Attorney General
TURNER H. SMITH,
Assistant Attorney General and Deputy Chief
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108-1598
(617) 727-2200
matthew.ireland@mass.gov

FOR THE STATE OF NEW JERSEY

ANDREW J. BRUCK
Acting Attorney General of New Jersey

By: /s/ Matthew Novak
MATTHEW NOVAK
Deputy Attorneys General
Environmental Permitting and Counseling
R.J. Hughes Justice Complex
P.O. Box 093
Trenton, NJ 08625
(609) 376-2804

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
Attorney General of New Mexico

By: /s/ William Grantham
WILLIAM GRANTHAM
Assistant Attorney General
State of New Mexico Office of the Attorney General
Consumer & Environmental Protection Division
201 Third Street NW, Suite 300
Albuquerque, NM 87102
(505) 717-3520
wgrantham@nmag.gov

FOR THE CITY OF NEW YORK

GEORGIA M. PESTANA
Corporation Counsel of the City of New York

By: /s/ Hilary Meltzer
HILARY MELTZER
Chief, Environmental Law Division
New York City Law Department
100 Church Street
New York, NY 10007
212-356-2070
hmeltzer@law.nyc.gov

FOR THE STATE OF NORTH CAROLINA

JOSHUA H. STEIN
Attorney General

By: /s/ Asher P. Spiller
ASHER SPILLER
ELIZABETH S. YOUNG
Assistant Attorneys General
North Carolina Department of Justice
114 W. Edenton Street
Raleigh, NC 27603
(919) 716-6977
Aspiller@ncdoj.gov
Esyoung@ncdoj.gov

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General

By: /s/ Steve Novick
STEVE NOVICK
Special Assistant Attorney General
Natural resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593
Paul.garrahan@doj.state.or.us
Steve.Novick@doj.state.or.us

FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO
Attorney General of Pennsylvania
MICHAEL J. FISCHER
Chief Deputy Attorney General

By: /s/ Ann Johnston
ANN JOHNSTON
Senior Deputy Attorney General
Office of Attorney General
Strawberry Square, 14th Floor
Harrisburg, Pennsylvania 17120
(717) 705-6938
ajohnston@attorneygeneral.gov

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General

By: /s/ Alison B. Hoffman
ALISON B. HOFFMAN
Special Assistant Attorney General
Rhode Island Office of the Attorney General
150 South Main Street
Providence, Rhode Island 02903
Telephone: (401) 274-4400 ext 2116
ahoffmanf@riag.ri.gov

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General

By: /s/ Nicholas F. Persampieri
NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-6902
nick.persampieri@vermont.gov

FOR THE STATE OF WISCONSIN

JOSHUA L. KAUL
Attorney General

By: /s/ Tressie K. Kamp
TRESSIE K. KAMP
Assistant Attorney General
Wisconsin Department of Justice
17 W. Main Street
Madison, WI 53707-7857
(608) 266-9595
KampTK@doj.state.wi.us