



September 29, 2023

The Honorable Brenda Mallory
Chair, Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

Via regulations.gov

RE: National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 FR 49924 (Docket ID No. CEQ-2023-0003)

Dear Chair Mallory:

The Center for Biological Diversity (the Center), through the undersigned, submits these comments in response to the Council on Environmental Quality's (CEQ's) proposed Phase 2 Revision to the National Environmental Policy Act's (NEPA's) Implementing Regulations. The Center's mission is to secure a future for all species, especially those hovering on the brink of extinction, and to preserve the invaluable diversity of nature by focusing on the land, water, and climate all creatures need to survive. The significance of NEPA and its approach to safeguarding informed agency decisionmaking and public engagement cannot be overstated. We write today to underline the importance of promulgating effective regulations for categorical exclusions (CEs) that will guarantee that all actions with significant effects on the environment will not be able to sidestep NEPA's mandates.

NEPA is the country's bedrock law concerning the environment. It exists to "promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. NEPA does not mandate outcomes, but rather a way of thinking through important decisions before making them and notifying the public of the potential environmental impacts of such decisions. It is, as this administration has reaffirmed, an opportunity to "look before you leap."¹

CEs exist to acknowledge the reality that not all government decisions risk significant impact of the environment. Some government activities are merely ministerial, and properly crafted and applied CEs can help ensure that time and resources are used effectively. But by their nature, they risk abuse, and without meaningful guardrails, CEs can easily become overbroad or outdated. This matters because, while use of CEs is not comprehensively tracked, estimates suggest that 95% of all NEPA analyses

¹ 87 Fed. Reg. 23453, 23454 (Apr. 20, 2022).

are CEs.² As a function of simple numbers, the business of CEs is the business of NEPA. As such, CEQ's role in this rulemaking as it relates to CEs and conformance with the goals of NEPA is critical.

We urge CEQ to guard against the risks presented by overbroad or outdated CEs. In this comment, we will briefly address the history, traditional categories of action, and expansion of CEs. We will then offer examples highlighting the risks CEs can present when they are overbroad or outdated. Finally, we will close with a series of recommendations.

We respectfully recommend that:

- (1) CEQ should centrally collect data about agency use of CEs and make that data publicly available;
- (2) CEQ should prohibit agencies to categorically exclude entire subagencies;
- (3) CEQ should require agencies to adopt a transparent process for regularly reviewing CEs every ten years from the issuance of the CE. To clarify CEQ's proposed review period of every ten years, CEQ should direct agencies to timely review their existing CEs; and,
- (4) CEQ should require that agency reviews of their CEs be subject to notice and public comment.

I. CEs have grown in scope over time and are now overwhelmingly the most common NEPA analysis. Despite their omnipresence and importance, their use is not tracked and poorly understood.

NEPA was signed into law on January 1, 1970, following several major environmental disasters, including a 250-million-gallon oil spill in Santa Barbara, California, the near-extinction of bald eagles due to pesticide use, and multiple incidents of Ohio's Cuyahoga River catching fire.³ Consequently, it includes a sweeping instruction that every "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" include a "detailed statement" addressing environmental impacts, alternatives, the value of short-term versus long-term use of the environment, and any irreversible commitments of resources.⁴ NEPA applies to all federal agencies and their subagencies.⁵ Congress took its duty to safeguard the human environment in such high regard, that it enshrined NEPA's obligations for agency compliance. In the 53 years since NEPA was signed into law, Congress has not changed NEPA's requirement that major federal actions must have an environmental impact statement, if those actions will have a significant effect in the environment.

As CEQ has explained, "NEPA recognizes that many Federal actions do not normally have significant effects on the environment. When agencies identify categories of activities that do not normally have

² See John C. Ruple & K. Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 *Env'tl. L.* 479, 485 (2020); GAO Report to Congressional Requesters, *Little Information Exists on NEPA Analyses*, <https://www.gao.gov/assets/gao-14-369.pdf> (last visited 9/20/23) (GAO CE Report).

³ See, e.g., John C. Ruple & Heather Tanana, *NEPA at 50—An Analysis of the Data in the Courts*, 66 *Rocky Mtn. Min. L. Inst.*, pp. 2-3 (2020).

⁴ 42 U.S.C. § 4332(C).

⁵ *Id.*; see also *What Is the National Environmental Policy Act?*, U.S. EPA, <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last visited 9/18/2023).

the potential for individually or cumulatively significant impacts, they may establish a categorical exclusion for those activities.”⁶ CEs are thus only appropriate for:

a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.⁷

CEs were created to “reduce paperwork and delay, so that more resources are available to assess proposed actions that are likely to have the potential to cause significant environmental effects in an Environmental Assessment or Environmental Impact Statement.”⁸ CEs are not “exemptions or waivers of NEPA review” but rather another type of NEPA review alongside Environmental Assessments and Environmental Impact Statements.⁹

In the early years following their adoption, agencies complied with the CE allowances by specifying a “list of actions” that were categorically excluded.¹⁰ CEs were understood to be appropriate for a subset of projects and tended to be highly specific.¹¹ CEs were limited to “site-specific actions,” and the actions to be excluded were “explicitly identified in the initial rule promulgation.”¹²

However, the scope of CEs has expanded significantly since then.¹³ In 1983, concerned about “the use of detailed lists of specific activities for categorical exclusions,” CEQ encouraged other agencies to consider more “broadly defined criteria.” Instead of lists of actions, agencies were to identify “types of actions” that, “based on the agency’s experience,” did not cause significant environmental effects.¹⁴ In 2003, CEQ again recommended that agencies further develop CEs “based on broadly defined criteria that will provide the agency with sufficient flexibility.”¹⁵ Over time, this had the problematic

⁶ 75 Fed. Reg. 75628, 75628.

⁷ 75 Fed. Reg. 75628, 75631 (citing 40 C.F.R. § 1507.3 [2022]); *see also* Daniel Mandelker et al., Categorical exclusions: NEPA, Law and Litig. § 7:15 (2023-2024).

⁸ 75 Fed. Reg. 75628, 75628.

⁹ 75 Fed. Reg. 75628, 75631.

¹⁰ NEPA Law and Litig. § 7:15 (2023-2024).

¹¹ *See* Kevin H. Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. Rev. 2312, 2322 (2004).

¹² Moriarty, 79 N.Y.U. L. Rev. at 2337; *see also* NEPA Law and Litig. § 7:17. Categorical exclusions—Use, abuse, and proposals for reform (2023-2024).

¹³ Moriarty, 79 N.Y.U. L. Rev. at 2321-2325; *see also* Holly Curry, *Swallowing the Rule: Exploring Categorical Exclusions in National Forests*, 37 J. Land Use & Env't L. 101, 107-110 (2021-2022) (Forest Service trends); John C. Ruple, Jamie Pleune & Erik Heiny, *Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation*, 46 Columbia J. Env'tl. L. 273, 290 (2022).

¹⁴ Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263-01 (1983); *see also* NEPA Law and Litig. § 7:15 (2023-2024).

¹⁵ The NEPA Task Force Report to the Council on Environmental Quality: Modernizing NEPA Implementation 63 (2003); *see also* NEPA Law and Litig. 2d § 7:17 Categorical exclusions—Use, abuse, and proposals for reform (2023-2024).

effect of seemingly turning what was once considered an “exceptional situation” into “simply one of three possible avenues for assessing the environmental impact of agency actions.”¹⁶

In the present era, the overwhelming majority of NEPA reviews are CEs. In 2014, the Government Accountability Office (GAO) estimated that CEs represented 95% of all NEPA determinations, and more recent academic estimates based on available GAO and EPA data agree.¹⁷ Unfortunately, these estimates are based on limited data, rather than on a full statistical analysis, because CEQ is not comprehensively tracking all CEs and agencies are not currently obligated to track their own CE numbers.¹⁸ While some agencies voluntarily track CEs, their tracking is inconsistent, inaccurate, and/or generally opaque, and, of course, many agencies merely opt to not track CEs at all.¹⁹ For example, the 2014 GAO Report explained that the Department of Energy and Forest Service “likely underestimated [the number of CEs] in their totals” because the agencies did not “track certain categories of CEs considered ‘routine’ activities.”²⁰

CEs are not just another element of NEPA. When first created, they were limited to site-specific actions, but they have since expanded into broad, generalized categories; each excluding many individual actions beneath their umbrellas. CEs grew to become the most common NEPA analyses. Yet data on their application is scarce, and, as discussed below, their breadth created results that thwart NEPA’s purpose.

II. CEs have become overbroad or outdated and thus thwart NEPA’s purpose.

While CEs are intended to save agencies time and resources *without* risking harm to the environment, experience has shown that CEs have fallen far short of this goal.

A. USDA categorically excludes the Food Safety Inspection Service and other subagencies that regularly engage in major federal actions that have significant effects on the human environment.

A major area of concern is the broad application of CEs to entire subagencies. The United States Department of Agriculture’s (USDA’s) Food Safety Inspection Service (FSIS) is one such troubling example. FSIS is responsible for overseeing and regulating the slaughter and processing of animal products like meat, poultry, and eggs. In 1983, USDA promulgated a final rule that included a list of USDA subagencies “excluded from the requirements to prepare implementing procedures.”²¹ FSIS was one of many USDA subagencies determined to “have no individual or cumulative effect on the human environment,” and was therefore “categorically excluded from the preparation of an EA or EIS unless the agency head determines that the action may have a significant environmental effect,”

¹⁶ Moriarty, 79 N.Y.U. L. Rev. at 2315.

¹⁷ GAO CE Report, *supra* note 2; *see also* David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 ARIZ. ST. L.J. 3, 11 (2018).

¹⁸ *Id.*; *see also* Ruple & Tanana, 66 Rocky Mnt. Min. L. Inst. at *9.

¹⁹ *See* GAO CE Report, *supra* note 2.

²⁰ *Id.*

²¹ 48 Fed. Reg. 11403.

which, to commenter’s knowledge, no FSIS head has ever found.²² That CE has proven dangerously overbroad given FSIS’s oversight of the animal products industry.

There is no doubt that animal production and slaughter is an enormously, environmentally impactful activity, and its environmental impacts continue to grow as the industry expands in production while the meatpacking industry consolidates.²³ The industry has consolidated so much that now only four businesses control 80% of the cows raised for slaughter.²⁴ Slaughterhouses use “immense” amounts of water, accounting for 29% of all the water used for agriculture in the world.²⁵ They produce correspondingly immense quantities of dangerous wastewater contaminated with blood, fat, urine, feces, ammonia, nitrogen, phosphorus, oil, fecal bacteria, and pathogens.²⁶ That wastewater is often mixed with antibiotics, pesticides, and other animal drugs.²⁷ Even when slaughterhouse wastewater gets treated, it still contains “high concentrations of pollutants.”²⁸ When these pollutants get released, they can destroy marine ecosystems, creating “low oxygen dead zones that suffocate fish and other aquatic life, and turn waterways into bacteria-laden public health hazards.”²⁹

Large animal operations and slaughterhouses create a myriad of health risks for humans. Producing animal products creates vast quantities of contaminant- and chemical-laden waste products, including carcasses and solid waste. Unsurprisingly, that waste is rife with hazardous bacteria, viruses, fungi, and toxins. Air pollution is a major issue as well. Air pollution from both the facilities themselves and their supporting vehicles is capable of causing serious human health problems; those who live near such industry can find it “impossible to . . . sit outside” safely for any period of time.³⁰ This work is hugely carbon- and methane-intensive, too, contributing to climate change.³¹ And finally, animal production facilities risk exposing their own employees and Federal inspectors to highly-contagious zoonotic infections including rabies, ringworm, salmonella, and tuberculosis.³² These environmental effects increase as the scale and volume of the production increases—generally speaking, the “more animals it houses, the more it pollutes.”³³ And of course, the more animals it houses, the more animals it will

²² 48 Fed. Reg. 11404 (discussing 7 CFR § 1b.4).

²³ See, e.g., Nat’l Agric. Stat. Serv., USDA, Livestock Slaughter 2019 Summary at 4 (2020).

²⁴ MacDonald, James M., et al., *Consolidation in U.S. Meatpacking*, ECONOMIC RESEARCH SERVICE, (Feb. 2000) https://www.ers.usda.gov/webdocs/publications/41108/18011_aer785_1.pdf?v=0.

²⁵ Dani Replogle & Delcianna J. Winders, *Accelerating Catastrophe: Slaughter Line Speeds and the Environment*, 51 *Envtl. L.* 1277, 1286-87 (2021).

²⁶ *Id.* at 1287-88; see also Environmental Integrity Project, *Water Pollution from Slaughterhouses: Three Quarters of U.S. Meat Processing Plants that Discharge into Waterways Violated their Permits, 2016-2018* at 8 (2018).

²⁷ Replogle & Winders, 51 *Envtl. L.* at 1288.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Delcianna J. Winders & Elan Abrell, *Slaughterhouse Workers, Animals, and the Environment*, 23 *Health Human Rights* 21, 24-25 (2021); see also Replogle & Winders, 51 *Envtl. L.* at 1290-91.

³¹ Claudia S. Dunkley, *Global Warming: How Does It Relate to Poultry?*, UGA Extension Bulletin 1382, 3 (2014).

³² McDaniel CJ et al., *Humans and cattle: a review of bovine zoonoses*, 14 *Vector Borne Zoonotic Diseases* 1, 4 (2014) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3880910/>; Kevin D. Pelzer & Nancy Currin, *Zoonotic Diseases of Cattle* at 4 (2009) https://www.wyandotte.k-state.edu/program_areas/4-h/zoommeetings/documents/ZoonoticDiseases.pdf.

³³ *Assoc. Irrigated Residents v. EPA*, 494 F.3d 1027, 1028 (D.C. Cir 2007) (considering AFO compliance with the Comprehensive Environmental Response Compensation, and Liability Act (CERCLA), the Emergency

slaughter, resulting in even more pollution from the process of slaughtering and shipping the end products.

FSIS plays a direct role in that environmental impact equation through its decisions regarding slaughterhouse line speeds. Initially, it permitted 1,106 pigs killed per hour, 390 cattle killed per hour, 140 chickens killed per minute, and 55 turkeys killed per minute.³⁴ In 1997, FSIS began a pilot program increasing kill speeds by granting waivers to select slaughterhouses. Then in 2019, FSIS adopted a Final Rule that entirely revoked speed limits for killing pigs.³⁵ The comments submitted overwhelmingly opposed the change, and comments asked FSIS to evaluate the environmental impacts of permitting a large increase in slaughter. FSIS refused, citing its CE exemptions that relied on the entire subagency being subject to a CE.³⁶ FSIS had previously taken a similar tack with 2012 and 2014 proposals to increase the kill speed for chickens from 140 killed per minute to 175 killed per minute; these were ultimately abandoned.³⁷

In 2018, FSIS granted more waivers for kill speed limits in chicken slaughterhouses, which more than doubled the number of higher-speed slaughterhouses; all without engaging in an EA or EIS.³⁸ In 2020, FSIS approved the first such waiver for a cattle slaughterhouse, but, once again, without any meaningful NEPA review.³⁹ It intends to move forward with rulemaking on that issue, just as it did with chickens.⁴⁰

In plain language, FSIS regulates how much pollution slaughterhouses and factory farms will generate by determining how fast slaughter can occur and thereby influencing how many animals are produced. A slaughterhouse will generate more pollution as their line speeds increase because the number of animals they slaughter each day will increase the amount of processing that occurs. When line speeds increase the number of animals slaughtered, this increases the waste generated by slaughterhouses. Typical slaughterhouse waste, such as blood, feces, urine, oil, and grease, are often directly discharged into waterways.⁴¹ Wastewater from slaughterhouses often contains high levels of phosphorous and

Planning and Community Right-to-Know Act (EPCRA), and the Clean Air Act (CAA), rather than NEPA); *see also* Dani Replogle & Delcianna J. Winders, *Accelerating Catastrophe: Slaughter Line Speeds and the Environment*, 51 *Envtl. L.* 1277, 1286 (2021).

³⁴ Replogle & Winders, 51 *Envtl. L.* at 1279.

³⁵ Modernization of Swine Slaughter Inspection, 84 *Fed. Reg.* 52,300 (Oct. 1, 2019) (codified at 9 C.F.R. pts. 301, 309, 310).

³⁶ *Id.* at 52,317.

³⁷ Modernization of Poultry Slaughter Inspection, 77 *Fed. Reg.* 4408, 4438 n.16 (proposed Jan. 27, 2012); Modernization of Poultry Slaughter Inspection, 79 *Fed. Reg.* 49,566, 49,570, 49,577 (Aug. 21, 2014).

³⁸ FSIS, *FSIS' Criteria for Consideration of Waiver Requests from Young Chicken Slaughter Establishments to Operate at Line Speeds Up to 175 Birds Per Minute*, 21 *FSIS Constituent Update* at 1 (Feb. 2018); *see also* Petition to Permit Waivers of Maximum Line Speeds for Young Chicken Establishments Operating Under the New Poultry Inspection System; *Criteria for Consideration of Waiver Requests for Young Chicken Establishments To Operate at Line Speeds of Up to 175 Birds per Minute*, 83 *Fed. Reg.* 49,048 (Sept. 28, 2018).

³⁹ Replogle & Winders, 51 *Envtl. L.* at 1282.

⁴⁰ Bernard Shire, *Trial by Fire*, MEAT + POULTRY (Sept. 16, 2020), <https://perma.cc/4823-74PE> (last visited 9/18/23).

⁴¹ Complaint at 36, *Farm Sanctuary v. USDA*, 545 F. Supp. 3d 50 (D. W.D. NY 2021) (No. 6:19-CV-06910), 2021 LEXIS 120110, at *52.

nitrogen as well.⁴² Slaughterhouses also use tremendous amounts of water in their processes, which will continue to increase as their line speeds increase.⁴³

As slaughterhouse line speeds increase to meet demands, so will the number of animals raised on factory farms increase to meet demands created by the slaughterhouse. As factory farms increase the number of animals they house to meet the demand created by increased line speeds, the pollution and health hazards they produce will also increase. Factory farms often release ammonia, hydrogen sulfide, volatile organic compounds, methane, and nitrous oxide.⁴⁴ The release of these types of chemicals into the air causes “respiratory illness, irritation to the eyes, nose, and throat, anxiety, depression, memory loss, and heart disease.”⁴⁵ These health risks follow the same chain: these health risks in humans will increase as factory farms increase the number of animals they house to meet the demand generated by FSIS’s increase in line speeds. Factory farms also contribute to the effects of climate change because they release methane and nitrous oxide into the air, exacerbating the threat of climate change.⁴⁶ With FSIS’s increase to line speeds, they are directly increasing significant, negative impacts on the human environment.

The foreseeable outcome of increasing or removing line speed limits is that slaughterhouses will kill more animals in a shorter period.⁴⁷ That is why industry wants those limits increased. Indeed, FSIS repeatedly justifies its speed increase on the basis that it would increase production of the underlying animal products and increase industry profits.⁴⁸ And the plainly foreseeable outcome of allowing increased production is intensified environmental impacts. Yet, despite having its hand on this important, environmentally impactful dial, FSIS does not ask itself about those effects. Instead, FSIS hides the environmental impacts its decisions create under an overbroad, 30-year-old CE.

Similar to FSIS, USDA has created another entire subagency CE for the Food and Nutrition Service (FNS),⁴⁹ which implements the National School Lunch Program (NSLP).⁵⁰ USDA regulations for CEs are supposed to be limited to “administrative, funding, research, education, legal, and market-development activities.”⁵¹ In USDA’s implementation of the NSLP, FNS must set national nutritional standards, offer assistance and training to states, reimburses states, take food orders, purchase food, and monitor distribution of food to the states.⁵² The federal government has a budget of \$13 billion

⁴² *Id.* at 37.

⁴³ *Id.*

⁴⁴ *Id.* at 38.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Replogle & Winders, 51 *Envtl. L.* at 1285-86.

⁴⁸ *Id.* at 1282-83.

⁴⁹ Animal and Plant Health Inspection Service, *Environmental NEPA Act*, USDA, https://www.aphis.usda.gov/aphis/resources/lawsandregs/Environmental_Compliance/Statutes/Environmental_nepa_act.

⁵⁰ McCarthy, Julia, *Article: Greening Eggs and Ham: Using the National Environmental Policy Act to Assess Animal-Agricultural Pollution from the National School Lunch Program*, 19 *Vt. J. Env'tl. L.* 191, 198 (2018).

⁵¹ *Id.* at 210-11.

⁵² *Id.*

for FNS to carry out the NSLP.⁵³ FNS purchases food that it then sends to all 50 states for use in schools, hospitals, prisons, daycares, nursing homes, and employee breakrooms.⁵⁴ With FNS spending such an enormous amount of money to purchase and distribute food all over the country, it is quite unimaginable that USDA would claim there is no environmental impact or no extraordinary circumstances that would trigger environmental review.

USDA's CE covering entire subagencies should be considered unlawful under NEPA.

But even further, USDA has garnered a reputation for its general non-compliance with NEPA. Even in instances where actions are not categorically excluded, there have been numerous instances where USDA has sidestepped its NEPA obligations.

USDA's approach to its Climate Smart Program is one such example of the agency's questionable approach to NEPA. Under the "Partnerships for Climate-Smart Commodities" program, approximately \$3 billion will be distributed to fund farming, ranching, and forestry projects.⁵⁵ California dairy producers have already received \$85 million to adopt manure management practices for cow manure lagoons, which will incentivize industrialized agriculture practices resulting in increased animal production and increased associated environmental harms.⁵⁶ Despite significant foreseeable environmental effects, in a rush to approve these projects, USDA pushed out a Programmatic Environmental Assessment or "PEA," not even an EIS, of the program after giving the public only 14 days to comment on the draft PEA.⁵⁷ When asked for the comment period to be reopened, USDA denied the request. Despite significant changes and expansion to the program since the PEA was published, upon information and belief USDA has yet to revise and supplement the PEA or prepare any additional NEPA analyses related to this program.⁵⁸

These examples demonstrate the need for clearer standards from CEQ, especially on USDA's use of CEs. Even in the context where no CE applies, USDA is quick to paper over meaningful NEPA review.

USDA's misuse of CEs, coupled with its overall failure to adhere to NEPA guidelines, highlights a critical need for reform and increased oversight. It is essential that CEQ closely examines USDA's application of CEs and takes appropriate measures to address any discrepancies and ensure

⁵³ *Id.* at 197.

⁵⁴ *Id.* at 196-97.

⁵⁵ USDA, *Biden-Harris Administration Announces Historic Investment in Partnerships for 70 Climate-Smart Commodities and Rural Projects* (Sept. 14, 2022), <https://www.usda.gov/media/press-releases/2022/09/14/biden-harris-administration-announces-historic-investment> (last visited 9/22/23).

⁵⁶ USDA, *Active Partnerships for Climate-Smart Commodities Projects*, California Dairy Research Foundation, <https://tinyurl.com/3a8s935x> (last visited 9/22/23); Phoebe Gittelson, Danielle Diamond, Lynn Henning, Maria Payan, Lynn Utesch, and Nancy Utesch, *The False Promises of Biogas: Why Biogas Is an Environmental Justice Issue*, *Env'tl. Justice*, 352-361 (Dec 2022), <http://doi.org/10.1089/env.2021.0025>.

⁵⁷ Notice of Availability of the Draft Programmatic Environmental Assessment for the Partnerships for Climate-Smart Commodities Funding Opportunity, 87 Fed. Reg. 47690 (Aug. 4, 2022).

⁵⁸ *1-Year Anniversary of Partnerships for Climate-Smart Commodities*, USDA (Sept. 13, 2023), <https://www.youtube.com/watch?v=Z12AXYa5qg8> (last visited 9/27/23).

compliance with NEPA. By doing so, we can work towards fostering a more accountable and environmentally responsible approach to NEPA and agency decision-making.

B. FDA categorically excludes the major federal action of approving new animal drug combinations that have significant impacts on the human environment.

The Food and Drug Administration’s (FDA’s) categorical exclusions applicable to new animal drugs (NADs) are another example of a problematically overbroad CE. In 1938, Congress passed the Federal Food, Drug, and Cosmetic Act (FDCA) in response to public outcry over unsafe drugs on the market. It sought to protect public health and safety by preventing harmful, adulterated, or misbranded drugs, both human and animal drugs, from entering interstate commerce. Drugs are defined broadly as “articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals” and as “articles (other than food) intended to affect the structure or any function of the body of man or other animals.”⁵⁹ The FDCA requires premarket approval for all new animal drugs, requiring manufacturers to demonstrate their safety before FDA may approve the drug. FDA’s Center for Veterinary Medicine approves, reviews, and regulates new animal drugs.⁶⁰

FDA has categorically excluded any new animal drug approval from further NEPA review if it “does not increase the use of the drug.”⁶¹ Although this sounds narrow, examples of where that CE has applied, per FDA, include:

- action on a new animal drug “to be marketed under the same conditions of approval as a previously approved animal drug,”
- on a new “combination of previously approved animal drugs,”
- on a “new premix or other formulation of a previously approved animal drug,” and
- on a previously approved animal drug “to be contained in medicated feed blocks . . . or as liquid feed supplement.”⁶²

FDA meant this to sweep broadly: its NEPA implementing regulations claim that FDA engages in “no categories of agency actions that routinely significantly affect the quality of the human environment and that therefore ordinarily require the preparation of an EIS.”⁶³ FDA also interprets NEPA’s concerns narrowly in practice. It “has almost never taken an action that identified environmental effects outside the risks of [human] health as an important consideration.”⁶⁴

Under FDA regulations, an animal drug’s sponsor is responsible for claiming that the use qualifies for a CE, for citing the applicable CE, and for claiming that no extraordinary circumstances exist. FDA

⁵⁹ Ashely Monti, *FDA, Just Say No: Why Using Beta-Agonist Drugs in Animals for Consumption Requires New FDA Regulations*, 41 Vt. L. Rev. 155, 158-60 (2021).

⁶⁰ *Id.*

⁶¹ 25 CFR 25.33(a).

⁶² *Id.*

⁶³ 25 CFR 25.22(a).

⁶⁴ Susan A. Schneider, *Beyond the Food We Eat: Animal Drugs in Livestock Production*, 25 Duke Env’tl. L. & Policy F. 227, 271 (2015).

will then review that claim.⁶⁵ Much of this happens behind closed doors, hidden from the public due to trade secret protections.⁶⁶ After approving an application for a new animal drug, FDA will make limited safety information available, but testing and study protocols are specifically flagged as potential trade secrets, and therefore not made available for public review.⁶⁷ FDA also limits public availability of information relating to manufacturing methods and quality control procedures; manufacturing methods and processes, data regarding production, sales, or distribution; and “[q]uantitative or semiquantitative formulas.”⁶⁸

The overbreadth of the CEs for animal drugs, as well as FDA’s narrow understanding of NEPA’s reach, are exemplified by the ongoing dispute over FDA’s approval of new animal drug mixes including ractopamine, a powerful beta-agonist and growth promoter. Because of the CE on new animal drug approval—a CE based on an allegedly unlawful EA, FDA did not engage in any meaningful NEPA review regarding the drug or new mixes of ractopamine.⁶⁹ Ractopamine is a controversial food additive banned or restricted in most countries including European Union nations.⁷⁰ Even Russia, and China have banned ractopamine use, but the US continues to allow it.⁷¹ It is a nontherapeutic drug used to boost growth rates in cattle, pigs, and turkeys, and it is usually administered to an entire herd of animals at once through their feed.⁷² Ractopamine speeds up heart rates, increases aggression, raises stress hormones, and causes behavioral changes like hyperactivity.⁷³ It can cause animals to break their limbs, become unable to walk, have difficulty breathing, and in some cases, die.⁷⁴ FDA approved ractopamine based on a single human health study consisting of just six young, healthy men.⁷⁵ One of those men withdrew from the study early because his heart began racing and pounding abnormally.⁷⁶ The drug was approved in 1999 for use in pigs, and as of 2014, it was being fed to between 60 and 80% of all pigs, cattle, and turkeys raised in the United States.⁷⁷

⁶⁵ FDA Approval of New Animal Drugs for Minor Uses and For Minor Species, Food Drug Cosm. L. Rep. P 340053, ¶ 340053 (2023).

⁶⁶ 25 CFR 20.61.

⁶⁷ 25 CFR 514.11(e)(3).

⁶⁸ *Id.* 514.11(g).

⁶⁹ See Compl., *Ctr. for Food Safety, Ctr. for Biological Diversity, and Sierra Club v. Hamburg et al.*, Case No. 3:14-cv-4932 (N.D. Cal. Nov. 6, 2014), available https://www.biologicaldiversity.org/campaigns/toxics_and_endangered_species/pdfs/2014-11-6_Ractopamine_Complaint.pdf.

⁷⁰ Abbas, Kumail, et al., *Ractopamine at the Center of Decades-Long Scientific and Legal Disputes: A Lesson on Benefits, Safety Issues, and Conflicts*, NAT’L LIBR. OF MED, (Sept. 21, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9599871/>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Susan A. Schneider, *Symposium: Carrots and Sticks: Moving the U.S. National Food System Toward a Sustainable Future: Article: Beyond the Food We Eat: Animal Drugs in Livestock Production*, 25 DUKE ENV’T L. & POL’Y 227, 250 (2015).

⁷⁴ Monti, 41 Vt. L. Rev. at 155-56, 166-69; Schneider, 25 Duke Envtl. L. & Policy F. at 248-52; Compl., *HSUS et al. v. Hamburg*, No. 14CV04933, 2014 WL 10970784 (N.D. Cal., Nov. 4, 2014) (HSUS Compl.).

⁷⁵ Compl. at 9, *Ctr. for Food Safety v. Margaret A. Hamburg, Comm’r United States Food & Drug Admin.*, No. 3:14-cv-4932, (N.D. Cal. Nov. 6, 2014), *supra* note 69.

⁷⁶ *Id.*

⁷⁷ HSUS Compl., *supra* note 74, at paras. 27-32.

Ractopamine significantly increases the number of injured or ill animals and has been associated with more adverse impacts in pigs than any other animal drug.⁷⁸ Ractopamine causes animals to collapse or injure themselves, and animals in such conditions are much more likely to contract *E. coli*, *Salmonella*, and *Campylobacter*.⁷⁹ And because slaughterhouse workers must be in more direct contact with injured and collapsed animals, they too are more likely to be at risk of infection.⁸⁰

FDA has repeatedly applied its broad CE for approving a “combination of previously approved animal drugs” to new mixes of ractopamine.⁸¹ FDA approved mixing ractopamine with tylosin, an antimicrobial and growth-inducing drug currently banned for growth promotion uses in the European Union.⁸² Tylosin was approved before NEPA’s passage.⁸³ It is expelled in waste and is linked to many adverse health impacts in pigs, as well as to the development of antibiotic-resistant bacteria.⁸⁴ FDA also approved mixing ractopamine with monensin, a cattle antibiotic often fed to dairy cows.⁸⁵ Monensin comes out in animal waste, and it has direct toxic effects on soil organisms and on the zooplankton on which fish stocks feed.⁸⁶ FDA approved mixing ractopamine with melengestrol, a synthetic steroid fed to cattle.⁸⁷ The American Public Health Association and the Endocrine Society consider melengestrol an “Endocrine Disrupting Compound” that poses a significant risk to human health, especially to the health of fetuses, infants, and children.⁸⁸

FDA’s approval of these drugs will increase the use of ractopamine, tylosin, monensin, and melengestrol by making them more readily available, easier to use, and more marketable.⁸⁹ Increasing the use of those drugs risks increasing the total amount of those drugs entering the environment through animal waste excretion or other means. FDA has nevertheless relied on a CE for combining previously approved animal drugs,⁹⁰ even though that CE is theoretically supposed to be limited to actions that will not increase the use of a drug.

When groups tried to challenge FDA’s approval of these NADs considering its failure to comply with its NEPA obligations the court refused to take up review and instead instructed plaintiffs to petition the FDA to evaluate for itself whether its actions were unlawful under NEPA.⁹¹ This is the equivalent of asking the fox to guard the hen house.

⁷⁸ *Id.* at para. 41.

⁷⁹ *Ctr. for Food Safety*, *supra* note 69, at 11.

⁸⁰ HSUS Compl., *supra* note 74, at paras. 38-54.

⁸¹ *See, e.g., Ctr. for Food Safety*, *supra* note 69, at 19-20, ¶¶ 119-121.

⁸² *Id.* at 14.

⁸³ *Id.*

⁸⁴ HSUS Compl., *supra* note 74, at paras. 73-84; Schneider, 25 Duke Env’tl. L. & Policy F. at 241-46.

⁸⁵ *Ctr. for Food Safety*, *supra* note 69, at 16.

⁸⁶ HSUS Compl., *supra* note 74, at paras. 85-94.; Schneider, 25 Duke Env’tl. L. & Policy F. at 241-46.

⁸⁷ *Ctr. for Food Safety*, *supra* note 69, at 17.

⁸⁸ HSUS Compl., *supra* note 74, at paras. 95-103; Schneider, 25 Duke Env’tl. L. & Policy F. at 246-47.

⁸⁹ HSUS Compl., *supra* note 74, at paras. 83, 93, 102.

⁹⁰ *Id.* at para. 5.

⁹¹ *Ctr. for Food Safety v. Margaret A. Hamburg*, *Comm’r United States Food & Drug Admin.*, Case No. 15-17510, 696 Fed.Appx. 302 (Mem) (9th Cir., Aug. 22, 2017).

C. FCC categorically excludes satellite activity which is a major federal action with significant impacts on the human environment.

CEs also risk abuse because they can easily become outdated. Exemplifying this issue is the Federal Communications Commission's (FCC's) CE for satellite activity.⁹² Federal law, implementing international treaties, requires private entities to obtain licenses for communications to a satellite from the United States, from a satellite to the United States, or to and from any United States satellite. Congress vested FCC with the authority to grant those licenses and to otherwise regulate commercial satellites.⁹³ FCC, however, considers all its actions subject to a CE.⁹⁴ There are three exceptions: siting communications facilities in specific terrestrial locations, using high-intensity lighting near residential areas, or exposing humans to radiofrequency radiation above safety standards.⁹⁵ None apply to satellites,⁹⁶ leading FCC to invoke CEs when licensing large satellite constellations.⁹⁷

Satellites have provided important services since the 1950s, but the last decade has seen the beginning of a massive increase in their use. Nearly 5,500 active satellites were in orbit in the Spring of 2022.⁹⁸ Experts predict that an *additional 58,000* satellites will join them by 2030—a ten-fold growth in less than ten years.⁹⁹ Most of those new satellites are expected to operate in low Earth orbit (LEO).¹⁰⁰ The quintessential example is SpaceX's Starlink constellation, providing broadband internet through thousands of small satellites in LEO.¹⁰¹

Launching and operating tens of thousands of satellites, particularly to LEO, presents a host of potentially significant environmental impacts. Every satellite must be physically launched to space, and launch vehicles emit gases and particles that “affect the Earth's temperature and deplete ozone.”¹⁰² Troublingly, as GAO reports, the “significance of these effects as the number of launches increases is largely unknown due to either no or limited observational data.”¹⁰³ Communications satellites use radiofrequency signals, and in large numbers, those signals can interfere with radio astronomy of deep-space objects.¹⁰⁴ Sunlight reflects from the thousands of LEO satellites, interfering with earthbound optical telescopes, in particular wild-field imaging telescopes.¹⁰⁵ Thousands of new satellites create

⁹² Ramon J. Ryan, *The Fault in Our Stars: Challenging the FCC's Treatment of Commercial Satellites as Categorically Excluded from Review Under the National Environmental Policy Act*, 22 Vand. J. Env't. & Tech. L. 923, 930 (2020); 47 U.S.C. § 301 (2018); § 303(r).

⁹³ *Id.*

⁹⁴ 47 CFR 1.1306.

⁹⁵ *Id.*

⁹⁶ Ryan, 22 Vand. J. Env'tl. & Tech. L. at 930.

⁹⁷ GAO Report to Congressional Requesters, *Satellite Licensing: FCC Should Reexamine Its Environmental Review Process for Large Constellations of Satellites* (November 2022), <https://www.gao.gov/assets/gao-23-105005.pdf>.

⁹⁸ *Large Constellation of Satellites*, GAO, (Sept. 2022), <https://www.gao.gov/assets/gao-22-105166-highlights.pdf>.

⁹⁹ *Id.*

¹⁰⁰ GAO Report to Congressional Requesters, *supra* note 97, at 5.

¹⁰¹ Morgan Armstrong, *A Sky Full of Stars: Should Viasat, Inc. v. FCC Change the Agency's Treatment of Satellites as a Categorical Exclusion Under the National Environmental Policy Act?*, 101 Neb. L. Rev. 1101, 1101-02 (2022).

¹⁰² GAO Report to Congressional Requesters, *supra* note 97, at 5.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 6.

potential future orbital debris, with the risk of and danger from orbital debris increasing as the number, size, and speed of satellites does.¹⁰⁶ Satellites break apart upon reentry into our atmosphere, creating small risks to people and property that increase as the number of deorbiting satellites does.¹⁰⁷ Finally, the expected, natural night sky is important to both animal navigation and to human culture in complex and diffuse ways that are threatened by significant changes.¹⁰⁸

Due in large part to concerns about the understood impacts these launches have on the human environment, GAO concluded in a recent report that FCC needs to review whether it is proper for CEs to still apply to these approvals.¹⁰⁹ In response, FCC said that it would accept the GAO's recommendations *but would wait until CEQ issued updated regulations for implementing NEPA*.¹¹⁰

D. FSA categorically excludes the major federal decision of commodity subsidies which have a significant impact on the human environment.

Another overbroad CE is the Farm Service Agency's (FSA's) exclusion for its commodity subsidies program. These subsidies are largely directed by the Farm Bill, but FSA has immense discretion in managing these funds. The Agriculture Act, also known as the Farm Bill, involves in part the distribution of subsidies to various agricultural entities to help stabilize food prices.¹¹¹ These subsidies come in the form of crop insurance, price balancing, and direct payments.¹¹² The amount of money and crops involved are huge. Feed crops for meat and dairy cattle are a major target of the Farm Bill, with farmers who grow those crops receiving around \$38 billion in annual subsidies.¹¹³ Those subsidized cattle feed crops—corn and soy, mostly—represent 70% of all the crops grown in America.¹¹⁴ FSA, however, has a sweeping CE in place for these programs to “supplement income, manage the supply of agricultural commodities, or influence the cost and supply of such commodities . . . (that is, price support programs).”¹¹⁵

Quite to the contrary of what the CE implies, the effects of FSA's subsidy decisions are immensely environmentally significant. Farms that receive commodity subsidies control 80% of America's cropland and about 50% of all the country's agricultural land.¹¹⁶ Subsidies influence which and how many crops farmers grow, pushing them toward higher yields of subsidized crops and encouraging

¹⁰⁶ *Id.* at 6-7.

¹⁰⁷ *Id.* at 5-7.

¹⁰⁸ Sean Dunne, *Rage Against the Dying of the Light: Regulation of Light Pollution from Satellites*, 2023 U. Ill. L. Rev. 1021, 1029-32 (2023).

¹⁰⁹ See generally GAO Report to Congressional Requesters, *supra* note 97.

¹¹⁰ Jeff Foust, *What is the Environmental Impact of a Supercharged Space Industry?*, The Space Review (Feb. 6, 2023), <https://www.thespacereview.com/article/4527/1> (last visited 9/22/23).

¹¹¹ Matthew Gruneberg, *Farm Bill Subsidies Violate Environmental Justice Principles Without Recourse*, 24 VT. J. OF ENVTL. L. 327, 330 (2023).

¹¹² *Id.* at 331.

¹¹³ *Id.*

¹¹⁴ *Id.* at 331-23.

¹¹⁵ 7 CFR 799.31(b)(6)(iii).

¹¹⁶ Gruneberg, *supra* note 111, at 332.

them to convert grassland into cropland.¹¹⁷ Commodity subsidies also encourage intensive monoculture, resulting in greater need for pesticides due to reduced crop diversity.¹¹⁸ FSA's subsidies encourage the expansion of cropland and more intensive monoculture, which also increases the negative environmental impacts of farming. Generally, some negative environmental impacts of farming include toxic pesticide and herbicide runoff, fertilizer runoff damaging aquatic ecosystems, soil erosion, and long-term soil degradation.¹¹⁹

FSA's subsidy decisions also directly promote the making of animal-based food over plant-based food. FSA chooses to promote crops to feed livestock but generally does not subsidize edible plants that humans consume.¹²⁰ This encourages growth of the animal agricultural industry, which as discussed above, is environmentally destructive and raises environmental justice concerns.¹²¹

FSA's decision to prioritize animal-based food over plant-based food, despite the massive and well documented environmental concerns associated with largescale animal-based food production, is also apparent in its promulgation of Phase 2 of the Emergency Livestock Relief Program (ELRP).¹²² Phase 2 of ELRP allows farmers who raise livestock to receive subsidies for grazing losses due to severe droughts or wildfires.¹²³ The number of severe droughts and wildfires are being fueled by climate change, which is in part fueled by the negative environmental impacts of industrialized farming. Therefore, FSA is paying livestock producers for the environmental damages the producers help to create. NEPA demands review of these circular environmental harms that are being promoted by this major federal action by FSA. Yet, no hard look at the environmental impacts of these subsidies has been conducted because of FSA's CE.

The Farm Bill's commodity subsidies are one of the federal government's most powerful levers for determining what American agriculture looks like. USDA has vast influence and control over the allocation and implementation of these subsidies through FSA's commodity subsidies program. Therefore, FSA's decisions on who to dole out commodity subsidies has obvious and immense environmental impacts. Nevertheless, holding to its CE, FSA chooses to leap before it looks.

III. Recommendations

Many of the problematic examples discussed could be ameliorated by improving oversight and narrowing the allowable scope of CEs. CEQ can improve transparency and accountability by collecting data on all agency use of CEs, not allow agencies to CE whole subagencies, review existing CEs within a timely period, and require reviews to go through notice and comment rulemaking. Below

¹¹⁷ *Id.* at 332-33.

¹¹⁸ Jennifer Hoffpauir, *The Environmental Impact of Commodity Subsidies: NEPA and the Farm Bill*, 20 Fordham Envtl. L. Rev. 233, 244-47 (2009).

¹¹⁹ *Id.* at 248-56.

¹²⁰ Gruneberg, *supra* note 111.

¹²¹ *Id.* at 335-36.

¹²² 88 C.F.R. § 66366 (2023).

¹²³ *Id.*

are the steps we recommend that CEQ take to improve the systematic and extensive abuse of CEs. These steps will improve the CE landscape and better effectuate NEPA's purpose.

CEQ should additionally do away with proposed section 1501.4(c). CEQ is attempting to adopt the same process whereby CEs are currently adopted by agencies. As per our comments, this current system is rife with abuse, and CEQ should not stick with the current process even when they wrap it up in a new bow.

A. CEQ should centrally collect data about agency use of CEs and make that data publicly available.

GAO summed the problem up accurately when it noted that there is little data on the number and type of most NEPA analyses, that many agencies do not track CEs or do so poorly, and that nobody centrally compiles statistics on CE use governmentwide.¹²⁴

The issue is obvious, particularly in the NEPA context: making decisions without all the facts. NEPA requires any major actions that will significantly impact the human environment to have an environmental assessment. However, agencies are excluding actions without accurate and transparent information on how the agency came to that conclusion, and how often the agency reaches that conclusion regarding an action. Agencies are not tracking CEs, and even if an agency does confirm a CE is in place, that information is not made readily available to the public, and the CE is not regularly reevaluated as new data and technology becomes available. Beyond limited and inconsistent information, we do not actually know how many NEPA analyses are done through CEs. We do not know with certainty how the percentage of NEPA analyses done through CEs has changed over time, how that percentage varies by agency, or what kinds of CEs are most often invoked. It is possible to squint and see trends—it is clear the number of CEs used has greatly increased over time. But this is insufficient. Any discussion on CEs should have a strong quantitative component, and the proposed rule currently lacks that quantitative component.

CEQ can remedy this gap. We respectfully propose that CEQ adopt processes to centrally track agency NEPA decisions, including CEs. CEQ should require agencies, subject to NEPA, to maintain records sufficient to track CE usage and require that those agencies meet a set of minimum best practices for accurate data collection. Those agencies should be required to regularly report that data in full to CEQ. CEQ should, in turn, compile that data and make it publicly available on a regular basis.

B. CEQ should no longer permit agencies to categorically exclude entire subagencies.

One of the more potentially pernicious forms of CEs are those applied to entire subagencies. USDA, for example, excludes many of its subagencies despite USDA's oversight role intersecting with the environment in innumerable significant ways.¹²⁵ FSIS is one of those subagencies categorically excluded from NEPA review, and it exemplifies the problem. FSIS's total exclusion continues to be

¹²⁴ See generally GAO CE Report, *supra* note 2.

¹²⁵ 7 C.F.R. § 1b.4.

applied even where FSIS's decisions will directly and foreseeably cause negative environmental impacts. FSIS is ensuring, through its regulations, that more animals will be slaughtered at faster rates, which will plainly increase the negative environmental impacts of that industry—the two variables are tied together. That USDA seeks to exclude not only that decision, but all of FSIS's decisions, from NEPA review is directly at odds with NEPA's goals.

Such effects are foreseeable results of CEs sweeping so broadly as to encompass entire subagencies. If there was ever a time that FSIS's entire remit could be said to have no environmental impacts, that is no longer the case. But that kind of abuse is predictable when one puts into place a broad and total exclusion for an entire subagency. It functions as a statement and a presumption that nothing that subagency does is environmentally significant enough to warrant meaningful NEPA review. It shapes and colors the thinking of the whole subagency. A CE for a specific category of actions always implies the possibility of eventually expanding or shrinking that category, of negotiating its boundaries, and of the expectation that one might do so. An *ex-ante* instruction that nothing a subagency does is likely to matter to NEPA carries the opposite implication.

This is not ideal. NEPA review must be flexible, capable of adapting, and growing with changing needs and understandings. CEs for entire subagencies stand in the way of that goal. We respectfully recommend that CEQ no longer permit agencies to categorically exclude whole subagencies.

In the alternative, if CEQ finds that there is some reason to allow the CE of whole subagencies, then we request these subagency CEs meet a heightened standard of review and approval. As discussed above, many of these subagencies do not fit within CEQ's traditional definition of an action or category of actions that is subject to a CE. The traditional definition allows for administrative actions like filing documents and staff changes.

A heightened standard for categorically excluding entire subagencies, would allow for notice and public comments, transparent review and timely analysis of those public comments, and release of research and studies that support why an entire subagency should (or should not) have a CE.

C. CEQ should require agencies to review their CEs on a regular basis and require timely review of their existing CEs following the passage of the Phase 2 Revisions.

CEQ has proposed requiring agency procedures implementing NEPA to include “a process for reviewing the agency's categorical exclusions at least every 10 years.”¹²⁶ Making it mandatory for agencies to review CEs on a regular basis is needed, and this 10-year timeline should start at the time the CE was issued. Requiring a review deadline and process would be a step in the right direction, and we wholeheartedly encourage CEQ to take this step.

Another troubling issue with CEs is their tendency to become outdated and thus frustrate accurate environmental review. The FCC's CE for satellite activity is a good example. For a long time, satellite activity was a smaller industry, thus it had a smaller footprint. But times have changed, and the industry

¹²⁶ Proposed NEPA Implementing Regulations Revisions Phase 2.

is primed for a boom, driven by new technology. It is hardly alone; the pace of social and technological change, particularly in arenas like telecommunications or the emerging space economy, does not appear to be abating. This presents a specific problem for CEs.

CEQ has recognized this problem and recommended that agencies regularly review their old CEs on a fixed timeframe. In its 2010 memorandum on establishing, applying, and revising CEs under NEPA, CEQ suggested a seven-year cycle to review CEs on a rolling basis and encouraged agencies to review CEs that have not recently undergone review to do so “as soon as possible.”¹²⁷ Agencies were supposed to identify and fix those CEs that are “outdated and no longer appropriate” given evolving experience, conditions, and technology.¹²⁸ That recommendation was not binding.

CEQ’s concerns about outdated and inappropriate CEs are warranted. To further address those concerns, CEQ should take the additional step of requiring agencies to comprehensively review all their existing CEs within a timely period following the Phase 2 revisions. Despite the lack of data, it seems a thick forest of ever-broader and ever-more-widely-applied CEs has grown since CEQ first authorized their use. Agencies should be instructed to take a holistic and comprehensive look at their current CE landscape in a reasonable timeframe to determine whether any changes are necessary.

This would supplement regular reviews of CEs on a rolling and individual basis. However, a comprehensive review of all an agency’s CEs offers advantages that rolling individual review does not. Intersections between CEs, gaps in their coverage, and trends and patterns in their use are all more easily seen through taking a single comprehensive look at an agency’s entire CE landscape. Such a look allows you to see the forest rather than just the trees.

D. CEQ should require that agency reviews of their CEs be subject to notice and public comment.

Agency reviews of their existing CEs should be subject to public input in the form of notice and comment. This should occur both when agencies comprehensively review their CE landscapes in a timely period, as we propose, and when agencies review CEs on a rolling basis. Part of NEPA’s role is to encourage public participation in the regulatory process.¹²⁹ Formal public participation and the administrative record they help create are “central elements of sunshine laws because they promote government accountability and create a basis for subsequent litigation.”¹³⁰ An increase in the use of CEs over time, however, has caused a “decline in the important area of public participation.”¹³¹

Public participation through notice and comment will be vital during reviews of existing CEs. As discussed above, there are numerous examples of agency myopia around the environmental impacts

¹²⁷ Nancy H. Sutley, CEQ Memorandum, *Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act* at 15-18 (Nov. 23, 2010), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf (last visited 9/20/23).

¹²⁸ *Id.*

¹²⁹ GAO CE Report, *supra* note 2, at 1; Moriarty, 79 N.Y.U. L. Rev. at 2316-17.

¹³⁰ Moriarty, 79 N.Y.U. L. Rev. at 2317.

¹³¹ *Id.*

of their activities. Public comments—and in particular the requirement that agencies consider and respond to comments—can help ensure those agencies have the full picture.

IV. Conclusion

In summary, CEs have grown from lists of site-specific actions to broad and generalized categories. Consequently, the vast majority of all NEPA analyses now go through CEs. But because data on CEs is not being centrally tracked, we lack a full quantitative understanding of their application. What is clear however is that CEs can easily become overbroad, outdated, or abused, and thereby frustrate NEPA's ultimate objective. CEQ should strengthen the regulations surrounding CEs. In doing so, CEQ can help guarantee that NEPA functions as it was meant to by ensuring that federal agencies are thinking through their decisions with all the important facts at hand.

We thank CEQ for its time and attention to this matter.

Respectfully submitted,

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