

C O M M E N T S

Proposed Revisions to Improve and Modernize CEQ's NEPA Regulations

by Lance D. Wood

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When the president's Council on Environmental Quality (CEQ) produced its Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act¹ (CEQ NEPA Regulations) in 1978, those regulations were sufficiently comprehensive and of such high quality that they have received hardly any amendment or modification since 1978.² Nevertheless, because of the long period of time since the regulations were issued, and in response to President Donald Trump's call in Executive Order No. 13807³ for CEQ to enhance and modernize the federal environmental review and authorization process, in the summer of 2018, CEQ announced its intentions to revisit and revise its long-standing NEPA regulations. This took the shape of a June 2018 advanced notice of proposed rulemaking (ANPRM) soliciting the various federal agencies and the general public to provide recommendations "on potential revisions to update the regulations and ensure a more efficient, timely, and effective NEPA process consistent with the national environmental policy stated in NEPA."⁴

There are at least four very important NEPA implementation matters (three closely related) that CEQ should have addressed in 1978, and that it should address now by revising several sections of the regulations. The changes that I recommend in this Comment would address these four

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1. 40 C.F.R. pts. 1500-1508; 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209.
2. 40 C.F.R. §1502.22 was revised in 1986 to replace the "worst case analysis" with the existing provision regarding "incomplete or unavailable information."
3. Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug. 24, 2017).
4. See 83 Fed. Reg. 28591-92 (June 20, 2018) (ANPRM, citing Exec. Order No. 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects); 83 Fed. Reg. 32071 (July 11, 2018) (extension of ANPRM comment period).

serious problems that have troubled federal agencies and the federal courts ever since 1978. Adopting the recommendations and the specific changes to the CEQ NEPA Regulations set forth and explained here would go a long way to help answer the call for NEPA modernization.

I. Adverse Environmental Effects Versus Beneficial Effects, and the "Mitigated FONSI"

A. Three Related Issues

The first three important matters relating to the CEQ NEPA Regulations that should be addressed to remedy ambiguities in and omissions from the existing regulations are closely related to one another, as follows:

1. The CEQ NEPA Regulations should be revised to state clearly that a federal agency is legally required to produce an environmental impact statement (EIS) or supplemental EIS (SEIS) *only* if the proposed federal action under review presents the potential for significant *adverse* effects on the human environment, after taking into consideration all mitigation measures that will be incorporated into the proposed federal action.
2. The CEQ NEPA Regulations should be revised to state clearly that a federal agency is not legally required to produce an EIS or SEIS if the proposed federal action under review presents the potential for significant *beneficial* effects on the human environment, but no likelihood of significant *adverse* environmental effects, after taking into consideration all mitigation measures that will be incorporated into the federal action.
3. The CEQ NEPA Regulations should be revised to clearly and unambiguously adopt the "mitigated finding of no significant impact (FONSI)" principle.

That principle holds that a proposed federal action that originally would require an EIS because the action would be likely to cause significant adverse effects on the human environment, can be modified by the adoption of mitigation measures that would reduce adverse environmental effects to the “less than significant” level, and thereby justify a FONSI rather than an EIS. This mitigated FONSI principle is vital to protection of the environment and the public interest, but it appears nowhere explicitly in the text of the existing CEQ NEPA Regulations.

Those three changes to the CEQ NEPA Regulations are needed because the existing NEPA regulations are ambiguous regarding the very important test for what triggers a federal agency’s legal obligation to produce an EIS or SEIS. That ambiguity has allowed and encouraged a great deal of unproductive litigation in the federal courts, in which opponents of various federal actions have exploited the CEQ NEPA Regulations’ ambiguities to delay or kill important infrastructure projects and other activities that federal agencies are proposing to build or fund or permit.

NEPA requires a federal agency to produce an EIS or SEIS *only* if the federal agency’s proposal would have the potential to produce significant *adverse* effects on the human environment, after taking into consideration all mitigation measures that the federal agency adopts and incorporates into its proposal. If the only significant effects on the human environment that the proposed federal action can reasonably be expected to produce would be *beneficial* effects, those potential significant beneficial effects would not trigger the legal obligation to produce an EIS or SEIS.

Some of the provisions in the existing CEQ NEPA Regulations can be interpreted to embrace this approach, but other provisions might not. For example, the regulations’ definition of “effects” at 40 C.F.R. §1508.8 states the following: “Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.” That same thought is repeated in the regulations’ definition of “significantly” at 40 C.F.R. §1508.27(b): “The following should be considered in evaluating intensity: Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.” NEPA lawyers hold varying opinions regarding what those two statements mean.

Perhaps those two provisions from the CEQ NEPA Regulations were intended to signify that if a proposed federal action would produce significant adverse environmental effects as well as beneficial effects, even after incorporation of all feasible mitigation measures into the proposed action, then the federal agency might still have to produce an EIS to address those significant adverse environmental effects, notwithstanding the fact that the proposed action would produce beneficial effects as well. I agree with that principle. But the two provisions from the existing regulations quoted above can also be interpreted to contradict

the mitigated FONSI principle, which has evolved over the years since 1978 to be well-accepted by federal agencies and by the federal courts.⁵

Other provisions in the existing CEQ NEPA Regulations seem to imply, but never actually state, that the legal requirement for having to produce an EIS or SEIS is the potential for significant adverse effects on the human environment, not significant beneficial effects. For example, the regulations’ definition of “significantly” at 40 C.F.R. §1508.27(b) states: “*Intensity*: This refers to the severity of impact.” Because common English usage refers to severely adverse effects, not to “severely beneficial effects,” that language seems to support the view that I am advocating.

That same definition of “significantly” at 40 C.F.R. §1508.27(b) refers to “[t]he degree to which the action may *adversely* affect [historic properties],” and “[t]he degree to which the action may *adversely* affect an endangered or threatened species or its habitat. . . .”⁶ Nevertheless, because the CEQ NEPA Regulations never clearly and explicitly addressed the important question of what triggers the legal requirement for a federal agency to produce an EIS or SEIS, the federal courts have produced conflicting decisions on this subject, some of which are very troublesome.

B. Adverse Case Law: The Fifth and Eleventh Circuits

The decision of the U.S. Court of Appeals for the Fifth Circuit in *Environmental Defense Fund v. Marsh*⁷ demonstrates some of the problems caused by the ambiguity of the existing CEQ NEPA Regulations regarding this important issue. In that decision, the Fifth Circuit ruled that construction of the Tennessee-Tombigbee Waterway (TTW), a massive infrastructure project that the U.S. Army Corps of Engineers (the Corps) was building in Alabama, Mississippi, and Tennessee in 1981, should be enjoined until an SEIS had been produced to address changes that the Corps had made in the design of the project after completion of the original EIS for the project in 1971.⁸ The Corps had prepared and filed the original EIS for the TTW project in 1971, which EIS had been challenged in the federal courts by a coalition of plaintiffs. The federal district court and the Fifth Circuit determined that the 1971 EIS was legally adequate and fully satisfied the requirements of NEPA.⁹

5. See, e.g., *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 12 ELR 21058 (D.C. Cir. 1982); *Louisiana v. Lee*, 758 F.2d 1081, 1083, 15 ELR 20609 (5th Cir. 1985); *Spiller v. White*, 352 F.3d 235 (5th Cir. 2003).

6. 40 C.F.R. §1508.27(b)(8)-(9) (emphasis added).

7. 651 F.2d 983, 11 ELR 21012 (5th Cir. 1981).

8. A reader who does not have extensive knowledge of the history of the TTW project can get a misleading impression of the post-1971 changes that the Corps made to the waterway’s design, and what the environmental effects of those design changes would be, if one reads only the Fifth Circuit’s 1981 decision. One can get a broader and more accurate understanding of the facts from reading the district court’s decision that was upheld in part and reversed in part by the Fifth Circuit in 1981. See *Environmental Def. Fund v. Alexander*, 501 F. Supp. 742, 11 ELR 20242 (N.D. Miss. 1980).

9. See *Environmental Def. Fund v. Corps of Eng’rs of U.S. Army*, 348 F. Supp. 916, 2 ELR 20536 (N.D. Miss. 1972), *aff’d*, 492 F.2d 1123, 4 ELR 20329 (5th Cir. 1974).

However, after producing the original project EIS for the TTW project, the Corps created the Chief of Engineers' Environmental Advisory Board (EAB), consisting of distinguished professors of biology, ecology, environmental engineering, and so forth, from major universities. The Corps then asked the EAB to recommend improvements for the design of the TTW waterway, to enhance the environmental benefits that the waterway would provide, and to mitigate for any potential adverse environmental effects that might be caused by either the construction or operation of the project. Many of the EAB's recommendations were adopted by the Corps and incorporated into the waterway's evolving design, while the project was undergoing advanced engineering and design improvements after 1971.

The Corps determined that every change made in the waterway's design and functioning after completion of the original 1971 project EIS would produce no significant *adverse* environmental effects, but would produce significant environmental and aesthetic *benefits*. Extensive documentation for the Corps' conclusions regarding those project changes were incorporated into 18 volumes of supplemental environmental reports (SERs), all of which were filed with CEQ at the time that the SERs were completed.¹⁰

Even though the Corps determined that the post-1971 changes in the design of the TTW would have significant beneficial effects on the environment and no significant adverse effects, those changes in project design were used by plaintiffs in their second lawsuit against the TTW to ask the federal courts to enjoin the ongoing construction of the waterway project until the Corps had produced an SEIS to address all of the changes to project design that had not been discussed in the original project EIS. The plaintiffs did not object to the changes in project design per se, but instead used those changes as a basis for seeking an injunction to stop construction of the entire project, hoping that the great costs of shutting down the large-scale, ongoing project construction would kill the project as a whole. The Fifth Circuit agreed with the plaintiffs and instructed the district court to enjoin project construction until an SEIS had been completed.

The Corps' conclusion regarding the post-1971 changes in project design was summed up in a memorandum signed on May 12, 1975, by a senior Corps official, Irwin Reisler, as follows: "The facts to date clearly show, however, that no significant deviations have been discovered or actions taken which were not in the best interest of the natural environment in the project area. Therefore, no new EIS or supplemental statements need be prepared. . . ."¹¹ The Fifth Circuit's response to that Corps memo was "that is simply

the wrong standard. NEPA requires the discussion of all significant environmental impacts, not just adverse ones."¹²

In the TTW decision, the Fifth Circuit held that "even if the Corps was correct in deciding that the new land use will be beneficial in impact, a beneficial impact must nevertheless be discussed in an EIS, so long as it is significant. NEPA is concerned with all *significant* environmental effects, not merely adverse ones."¹³ Thus, in the 1981 *Environmental Defense Fund v. Marsh* decision, the Fifth Circuit held that significant *beneficial* effects on the environment trigger the legal requirement for a federal agency to produce an EIS or SEIS, just as significant adverse environmental effects would, and that failure to produce such an EIS or SEIS should result in an injunction against the project as a whole until the EIS or SEIS had been completed.

In 1983 the U.S. Court of Appeals for the Eleventh Circuit relied on the Fifth Circuit's *Environmental Defense Fund v. Marsh* precedent to justify an even more troublesome decision in *National Wildlife Federation v. Marsh*.¹⁴ That decision held that the Corps could not grant permits for the addition of mitigation features known as "green tree reservoirs" around the proposed Lake Alma project without first producing an SEIS, precisely, and only, because those proposed mitigation features would have significant beneficial effects on the environment. As the Eleventh Circuit stated: "appellants have shown that the Mitigation Plan involves a number of proposed project changes that are likely to have a significant, though beneficial, impact on the environment in and around the proposed lake."¹⁵ For that reason alone, the Eleventh Circuit required production of an SEIS addressing the green tree reservoir mitigation measures.

As in the TTW case, the environmental plaintiffs in the Lake Alma litigation had no objection to the adding of the environmentally beneficial green tree reservoirs as mitigation features for the Lake Alma project. The plaintiffs merely used their demand for an SEIS that would address those mitigation measures as a means to kill the Lake Alma project as a whole, through the high costs and delays required to produce an SEIS.

In my opinion, the interpretation of NEPA and of the CEQ NEPA Regulations adopted by the Fifth and Eleventh Circuits¹⁶ is mistaken, and would produce several pernicious effects that run contrary to the purposes of NEPA and environmental protection.

First, and most obviously, the rule of law adopted by the Fifth and Eleventh Circuits would require that, in the case of projects that have significant beneficial effects on the environment, but no significant adverse environmental effects, federal agencies would have to waste very

10. The SER was an official form of NEPA documentation authorized under the Corps' NEPA regulations in effect at that time. See 33 C.F.R. §209.410(g) (3). Interestingly, the U.S. Supreme Court recognized and commended the SER as a useful and appropriate form of agency NEPA documentation in the Elk Creek decision, *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 19 ELR 20749 (1989).

11. *Environmental Def. Fund*, 651 F.2d at 996-97.

12. *Id.* at 997.

13. *Id.* at 993.

14. 721 F.2d 767, 14 ELR 20172 (11th Cir. 1983).

15. *Id.* at 783.

16. The legal position adopted by the Fifth and Eleventh Circuits received support in dictum from the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit in *Natural Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1431, 15 ELR 20781 (D.C. Cir. 1985).

large amounts of money, time, and resources to produce unnecessary EISs and SEISs. Because producing an EIS or SEIS takes a great deal of time and money, production of unnecessary EISs and SEISs would delay unnecessarily many infrastructure projects and other important projects and federal actions, by requiring the production of EISs and SEISs that would serve no useful purpose. The large amounts of money required to produce unnecessary EISs and SEISs must be provided by either the federal agency itself or by some nonfederal entity through third-party contracting. The considerable expense and delays inherent in requiring an EIS or SEIS cannot be justified unless an EIS or SEIS is necessary to evaluate potential significant adverse environmental effects.

Second, the rule of law adopted by the Fifth and Eleventh Circuits creates serious legal vulnerabilities for federal agencies and for nonfederal entities that need federal permits, licenses, or funding, which vulnerabilities can be and are exploited by litigants that want to delay or stop necessary projects and actions. Those litigation risks are exemplified by the TTW and Lake Alma cases, cited above.

Third, the notion that if an agency proposes to require mitigation measures to reduce the adverse effects of some proposed project or other federal action, or to enhance that project's environmental benefits, those mitigation features in and of themselves would require the production of an EIS or SEIS, is contradicted by, and is irreconcilable with, the well-established rule of NEPA law known as the mitigated FONSI principle. That is, if a proposed federal action without mitigation would produce significant adverse environmental effects, but where those adverse effects can be avoided, minimized, or otherwise "mitigated" so that the net adverse effects on the environment would be less than significant, then that proposed federal action can be covered by a FONSI rather than in an EIS or SEIS. That rule of NEPA law has been adopted by numerous decisions of the federal courts.¹⁷

If the rule of NEPA law adopted by the Fifth and Eleventh Circuits were correct, then for any proposed federal action where the original proposal would produce significant adverse environmental effects without mitigation, but where adopted mitigation measures would produce significant beneficial effects and thereby reduce the net adverse effects to less than significant, the federal agency would be required twice over to produce an EIS or SEIS, or to produce two EISs rather than one: one EIS to address the original, unmitigated proposal and its potential significant adverse effects, and another EIS to address the significant beneficial effects of the mitigation measures that the agency was requiring. That approach makes no sense, and would render impossible the mitigated FONSI.

The mitigated FONSI principle was disparaged rather than accepted by CEQ in its "Forty Most Asked Questions

Concerning CEQ's National Policy Act Regulations"¹⁸ in 1981, but federal action agencies such as the Corps have over time embraced and used mitigated FONSI extensively, and the mitigated FONSI principle has been upheld by a number of federal court decisions.¹⁹ As a result, in 2011, CEQ reversed its earlier position and endorsed the mitigated FONSI principle as legally and practically appropriate and useful, in a CEQ guidance memo signed by the CEQ chair entitled "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact."²⁰ So now the CEQ NEPA Regulations should be changed to explicitly adopt the mitigated FONSI principle that was belatedly embraced by CEQ's informal guidance.

Fourth, the rule of NEPA law adopted by the Fifth and Eleventh Circuits would produce perverse results that would be contrary to the public interest and would prevent or greatly delay federal actions needed to protect the environment. For example, for any proposed federal action where, like the TTW or the Lake Alma project, the federal agency had produced a legally sufficient EIS for the original design of a project, the agency would be strongly discouraged from later making any changes to that project's design or functioning to protect environmental quality, to save public funds, to conserve energy, and so on; because if any of those changes might result in significant beneficial effects on the human environment, then adopting those changes would render the project legally vulnerable to a NEPA lawsuit seeking to kill the overall project by requiring preparation of an SEIS, as happened in the TTW and Lake Alma cases.

Fifth, a misguided rule of law holding that no federal agency can propose or implement any action that might produce a significant beneficial effect on the human environment unless that proposal or action was preceded by and covered by an EIS or SEIS would prevent federal agencies from carrying out innumerable, important day-to-day functions that protect the environment, agriculture, food supply, and people of the United States. For example, every time federal officers at U.S. ports of entry prevent the importation into this country of exotic insect pests, plant diseases, noxious invasive weeds, vectors of human diseases, and so on, that action has a significant beneficial effect on the human environment of the United States. Yet, not one of those interventions to protect our country, its environment, and our human population is preceded by an activity-specific EIS or SEIS addressing the significant beneficial environmental effects that each one of those actions produces, nor can such important actions be delayed while EISs or SEISs are being produced. As a result, every action taken or authorized by a federal agency that would have significant beneficial effects on the human environment

17. See, e.g., *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 12 ELR 21058 (D.C. Cir. 1982); *Louisiana v. Lee*, 758 F.2d 1081, 1083, 15 ELR 20609 (5th Cir. 1985); *Spiller v. White*, 352 F.3d 235 (5th Cir. 2003).

18. 46 Fed. Reg. 18026 (Mar. 23, 1981) (question number 40).

19. See, e.g., *Cabinet Mountains Wilderness*, 685 F.2d 678; *Lee*, 758 F.2d at 1083; *Spiller*, 352 F.3d 235.

20. Memorandum From Nancy H. Sutley, Chair, CEQ, to Heads of Federal Departments and Agencies (Jan. 14, 2011).

would be in violation of NEPA, and thus subject to legal challenge, under the rule of law adopted by the Fifth and Eleventh Circuits.

It is worth noting that many important federal government programs could not operate effectively and successfully if they had to comply with the mistaken approach to NEPA law adopted in the TTW and Lake Alma decisions. For example, the Corps' large-scale regulatory program that implements §§9 and 10 of the Rivers and Harbors Act of 1899²¹ and Clean Water Act (CWA)²² §404 could not function successfully if that regulatory program had to follow the rule of NEPA law adopted by the Fifth and Eleventh Circuits, because that regulatory program depends on the concept of the "mitigated FONSI" to operate efficiently and to protect the environment.

Every year the Corps regulatory program has to authorize by permit approximately 56,000 separate and distinct projects,²³ many of which, as originally proposed by permit applicants, would cause significant adverse effects on the human environment. Yet, the Corps on average produces approximately only five to 10 EISs each year, while complying with NEPA for all of those 56,000 projects. The reason is that the Corps' regulatory process requires permit applicants to change and reformulate their projects to reduce the adverse environmental effects of their projects through avoidance and minimization of wetland fills and other adverse effects, and by requiring compensatory mitigation for all unavoidable adverse effects.²⁴

The large-scale mitigation measures that the Corps requires often provide significant beneficial environmental effects, because they reduce the potential adverse effects of a proposed project to a less-than-significant level. When the permit applicant adopts those mitigation measures, the applicant thereby avoids having to have his or her project delayed for years while the applicant spends large sums of money producing an EIS through third-party contracting. The mitigation measures that the permit applicant is required to adopt and implement justify a mitigated FONSI rather than an EIS. That fact provides a great incentive for the permit applicant to adopt and pay for the required mitigation measures that justified the FONSI. If the rule of NEPA law from the Fifth and Eleventh Circuits were followed, permit applicants would have little or no incentive to agree to the mitigation measures that the Corps requires, because they would have to produce EISs

whether or not they agreed to and implemented the mitigation measures.

C. Proposed Solution: Codify the Sixth Circuit's Rule

When it revises its NEPA regulations, CEQ should adopt clearly and unambiguously the interpretation of NEPA reflected in the U.S. Court of Appeals for the Sixth Circuit's decision in *Friends of the Fiery Gizzard v. Farmers Home Administration*.²⁵ In the *Fiery Gizzard* decision, the Sixth Circuit quite correctly held that NEPA mandates the preparation of an EIS or SEIS only for a proposed action that would produce significant *adverse* effects on the human environment; and that significant beneficial effects would never, by themselves, trigger the need to produce an EIS or SEIS.²⁶ The *Fiery Gizzard* decision makes reference to some of the provisions in the existing CEQ NEPA Regulations that support the court's interpretation of NEPA, and explains persuasively why practical, "real-world" considerations make that interpretation of NEPA necessary and preferable.

The U.S. Court of Appeals for the Seventh Circuit likewise produced a well-reasoned decision that supports the principle that only significant adverse effects trigger the requirement to produce an EIS or SEIS, in *River Road Alliance, Inc. v. Corps of Engineers of U.S. Army*.²⁷

The U.S. Court of Appeals for the Ninth Circuit's decision in *Preservation Coalition, Inc. v. Pierce*²⁸ stated the legal test for when a federal agency must prepare an EIS as follows:

NEPA requires Federal agencies to make detailed reports on "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2) (C). We have held this standard met whenever substantial questions are raised as to whether a project may significantly *degrade* some human environmental factor. If an agency determines not to file an EIS, the reviewing court must consider whether the agency has reasonably concluded that the project will have no significant *adverse* environmental consequences.²⁹

However, in *Humane Society of the United States v. Locke*,³⁰ the Ninth Circuit noted a split in the circuits regarding whether significant beneficial environmental effects might trigger the need for an EIS, and found it unnecessary to take a position on that question in the *Locke* decision.

It is noteworthy that a thoughtful footnote in a 2002 decision from the Eleventh Circuit seemed to express uncertainty regarding the continued viability and wisdom of the Eleventh Circuit's 1983 Lake Alma decision, *National Wildlife Federation v. Marsh*, which I discussed

21. 33 U.S.C. §§401, 403.

22. 33 U.S.C. §§1251-1387; ELR STAT. FWPCA §§101-607.

23. U.S. Army Corps of Engineers, *Regulatory Program Fiscal Year 2018 Statistics* (2018) (Corps document).

24. For example, in fiscal year 2016, the Corps granted permits authorizing the filling of approximately 15,000 acres of wetlands, and the Corps required the permittees to create, restore, or preserve about 31,000 acres of wetlands as compensatory mitigation for the permitted projects. The compensatory mitigation by itself produces significant beneficial effects on the environment, to say nothing about the very large amount of wetlands and other aquatic resources that the Corps preserves and protects by requiring permit applicants to avoid and minimize adverse effects of their proposals. But the Corps never concludes that the significant beneficial effects on the environment produced by those mitigation measures triggers a legal obligation to produce one or more EISs.

25. 61 F.3d 501, 25 ELR 21536 (6th Cir. 1995).

26. *Id.*

27. 764 F.2d 445, 451, 15 ELR 20518 (7th Cir. 1985).

28. 667 F.2d 851, 12 ELR 20410 (9th Cir. 1982).

29. *Id.* at 855 (emphasis added).

30. 626 F.3d 1040 n.9, 40 ELR 20025 (9th Cir. 2010).

above.³¹ In that footnote, the Eleventh Circuit panel noted that the NEPA holding of *National Wildlife Federation v. Marsh* had been “dictated” by the early Fifth Circuit cases, and that “other circuits have questioned our decision.”³² The Eleventh Circuit’s footnote also cited the “growing awareness that routinely requiring such statements would use up resources better spent in careful study of actions likely to harm the environment substantially.”³³

To address the problems discussed above, the following provisions of the CEQ NEPA Regulations should be changed by incorporating the revisions indicated below in italics into the existing regulations. All section references are to Title 40 of the *Code of Federal Regulations* (C.F.R.).

§1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant *adverse* effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§1508.13).

§1500.5 Reducing delay.

Agencies shall reduce delay by:

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant *adverse* effect on the human environment (§1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

....

(c) The agency shall prepare an environmental impact statement, based on the environmental assessment (*if one is prepared*), and *if it determines that the proposed major Federal action will cause significant adverse effects on the human environment, after taking into account all mitigation measures that have been incorporated into the proposed action. If the proposed major Federal action would otherwise cause significant adverse effects on the human environment, but proposed and implementable mitigation measures would be incorporated into the proposal that would reduce those adverse effects to less than significant level, a finding of no significant impact (§1508.13) would be sufficient, and an environmental impact statement is not required. If a proposed major Federal action will cause significant beneficial effects on the human environment, those beneficial effects would not by themselves trigger the requirement to produce an environmental impact statement.*

31. See *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209 n.17, 32 ELR 20823 (11th Cir. 2002).

32. *Id.*

33. *Id.* (quoting *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army*, 764 F.2d 445, 451, 15 ELR 20518 (7th Cir. 1985)).

§1502.9 Draft, final, and supplemental statements.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action *that will cause significant adverse effects on the human environment, after taking into account any relevant mitigation measures that would be adopted to address those potential adverse effects*; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, *which new circumstances or information will cause significant adverse effects on the human environment.*

§1508.8 Effects.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. An effect may be adverse, or beneficial, or both. *An adverse effect on the human environment should be described and analyzed in a NEPA document, taking into account all relevant mitigation measures, even if the Federal agency believes that on balance the proposed Federal action would be beneficial.*

§1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant *adverse* effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

If an agency relies on mitigation measures to reduce potentially significant adverse effects of a proposed action until they are no longer significant, then the agency may comply with NEPA by preparing an environmental assessment instead of an environmental impact statement, even if the adverse effects of the unmitigated action would have been significant. In such a case, the FONSI should include a discussion of mitigation measures.

§1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

....

(b) *Intensity*. This refers to the severity of an *adverse* effect. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) An effect may be adverse, or beneficial, or both. *A significant adverse effect on the human environment should be described and analyzed in a NEPA document, taking into account relevant mitigation measures.*

II. Resolving the “Small Federal Handle” Problem

A. The Issue

Turning to another important problem of NEPA law, the CEQ NEPA Regulations should be revised to state clearly that a federal agency has the legal right and responsibility to determine the scope of analysis for its NEPA document, so that the NEPA document will address only those activities, or component parts of activities, over which the federal agency has legal authority, control, and responsibility.

In the case of the Corps’ regulatory program, the specific activity requiring authorization by a Corps permit (e.g., the discharge of dredged or fill material into a water of the United States, or the placement of a pier, pipe, or outfall structure in a navigable water) may, at times, be merely one component part of a much larger project involving upland activities that take place beyond the limits of the jurisdictional water body, and beyond the legal authority and practical ability of the Corps to control (e.g., mountaintop removal coal mining, or construction of an upland electric generating plant). In such circumstances, the question arises as to what activities and their environmental effects the Corps must address in its NEPA document. In other words, what should be the “scope of analysis” that the Corps must adopt to govern its NEPA review of the proposal?

The existing CEQ NEPA Regulations do not address this issue squarely, and the current definition of “effects” at 40 C.F.R. §1508.8 can cause confusion. The regulations define the “effects” that must be addressed in a NEPA document as follows, in relevant part: “Effects include: (a) Direct effects, which are *caused by the action* and occur at the same time and place. (b) Indirect effects, which are *caused by the action* and are later in time or further removed in distance, but are still reasonably foreseeable.”³⁴

All effects on the human environment that are actually and physically caused by the federal action should be addressed in the NEPA document, even when those effects are caused by the action indirectly. For example, in *Riverside Irrigation District v. Andrews*,³⁵ the Corps considered the indirect effects that a proposed dam on a small tributary stream of the Platt River would have on whooping crane habitat in the Platt River many miles downstream. In that case, there was no doubt that the upstream dam would physically cause reduced water levels many miles downstream.

The problem arises when NEPA litigants allege that the granting of a Corps permit for some small, component part (e.g., a pier or outfall pipe) of a much larger upland activity (e.g., a chemical manufacturing plant or an oil refinery) produces “but for” or “legal enablement” causation of the larger upland activity, because “but for” the granting of the Corps permit for the pier or outfall pipe, the larger upland activity could not be built, or could not function successfully or efficiently. A clear distinction must be drawn between actual, physical causation versus “but for” or “legal enablement” causation.

Consequently, the CEQ NEPA Regulations should be revised to make it clear that the definition of the term “effects” refers to situations where a federal action actually or physically causes a certain effect, either directly or indirectly, and that “indirect effects” do not include mere “but for” or “legal enablement” causation.

NEPA requires federal agencies to analyze the environmental impacts of “Federal actions” and to prepare an EIS for any major federal action “significantly affecting the quality of the human environment.”³⁶ For purposes of the Corps regulatory program, I believe that the definition of the NEPA “Federal action” should be considered in a relatively straightforward manner. The category in the CEQ NEPA Regulations pertaining to the approval of specific projects states that “[p]rojects include actions approved by permit.”³⁷ Thus, for purposes of the Corps regulatory program, I understand the Corps’ NEPA “Federal action” to be the action taken by the Corps in either issuing or denying the permit pursuant to one of the Corps’ regulatory authorities.

This determination of what is the appropriate scope of analysis to govern the Corps’ permit review and decision is guided by the Corps’ NEPA regulations for the regulatory program.³⁸ Appendix B of the Corps’ Civil Works NEPA regulation directs agency personnel to include within a NEPA document’s scope of analysis the “specific activity requiring a [Corps] permit and those portions of the entire project over which the Government has sufficient control and responsibility to warrant Federal review.”³⁹ As a general rule, the Corps extends its scope of analysis beyond the jurisdictional waters only where the environmental consequences of a larger project may be considered the products of either the Corps permit action, or of the Corps permit action in conjunction with other federal involvement with the proposed project or activity.

The Corps tries to define and utilize a scope of analysis for every NEPA review that will align the Corps’ NEPA responsibilities with the Corps’ legal authorities, areas of competence and expertise, and available regulatory resources. For example, the Corps often is asked to authorize by permit some small component part (e.g., a pier,

36. See 42 U.S.C. §4332(2)(C).

37. See 40 C.F.R. §1508.18(b)(4). The Corps’ Civil Works NEPA regulation confirms this fact, referring to “the proposed Federal action (permit issuance).” See 33 C.F.R. app. B, ¶ 9(b)(5)(a).

38. See 33 C.F.R. pt. 325, app. B.

39. *Id.* ¶ 7.b.(1).

34. 40 C.F.R. §1508.8 (emphasis added).

35. 758 F.2d 508, 15 ELR 20333 (10th Cir. 1985).

pipe, or outfall structure) of a large-scale upland facility like an electric power plant, oil refinery, or chemical factory. Because the Corps has no legal authority over, or expertise or competence regarding, the large upland undertaking, the Corps usually tries to limit its NEPA scope of analysis to those components of the project proposed for the jurisdictional waters that are subject to the Corps' legal authority.

The majority of federal court decisions addressing this subject have affirmed the right and responsibility of a federal agency (such as the Corps) to determine the appropriate "scope of analysis" for every agency NEPA document. In court decisions involving the Corps, the federal courts have usually upheld the Corps' understanding of the proper scope of its NEPA analysis, determining that the Corps has struck an acceptable balance between the needs of NEPA analysis and the Corps' jurisdictional limitations.⁴⁰

However, upon occasion, plaintiffs have challenged the adequacy of the Corps' NEPA documentation underlying its permit decisions, asserting that the scope of analysis undertaken by the Corps was impermissibly narrow. These challenges typically have contended that the Corps must expand its NEPA review to evaluate the effects of portions of the overall project that lie outside the waters that are subject to the Corps' legal jurisdiction. Sometimes it is argued that the Corps' NEPA analysis must address the effects of the entire upland activity, notwithstanding the fact that the Corps' involvement in the entire project is limited to the approval by permit of some relatively small component part of, or some small activity associated with, the larger project, and occurring in jurisdictional waters.⁴¹ Such arguments are often made by plaintiff groups that oppose large infrastructure projects that have only a small federal regulatory component or "handle," as those plaintiffs seek to enjoin the construction of those larger, upland projects, through a favorable court ruling regarding the NEPA scope of analysis issue.

In one exceptional case, the Corps deviated from its usual practice, and expanded its NEPA scope of analysis to address social and environmental effects far removed from the jurisdictional waters and the activities in those waters that the Corps had legal authority to regulate. In *Mall Properties, Inc. v. Marsh*,⁴² the Corps denied a permit for a proposed shopping mall in North Haven, Connecticut. The Corps adopted a broad scope of analysis for its NEPA review of that permit application, and produced an EIS to address all direct and indirect effects that might result from

building and operating the shopping mall. The primary reason the Corps relied on for denying the permit for the shopping mall was that the new shopping mall, if built and operated, would cause serious economic and social harm to the nearby city of New Haven, Connecticut, by diverting business from the city's retail stores to the new shopping mall.

As the district court stated:

As the ROD [record of decision] states, the factor "weighing most heavily" in the Corps' decision to deny the Mall Properties a permit was the "concern for the socio-economic impacts this project would have on the City of New Haven." ROD at 46. The record reveals that these impacts would not result from any effect the mall would have on the physical environment generally or wetlands particularly. Rather, it is the economic competition for New Haven which would result from the mere existence of a mall anywhere in North Haven which was the most significant factor in the Corps' decision to deny the permit.⁴³

The district court's decision held that the Corps had exceeded its authority, so the court overturned the Corps' permit denial and remanded the case to the Corps for further action. The district court cited "proximate causation" principles to reject the idea that the Corps can expand its NEPA scope of analysis to address indirect effects far from the jurisdictional waters over which the Corps has legal authority, and base a permit denial on those effects.

The U.S. Supreme Court has established a controlling precedent addressing this general area of NEPA law in *Department of Transportation v. Public Citizen*.⁴⁴ There, the Court held that even if the project could not proceed as planned without the federal permit, and the permitted activities would not occur without the overall project, that degree of connection—in and of itself—does not mandate expansion of the NEPA scope of analysis.

B. Proposed Solution

When revising its NEPA regulations, CEQ should amend its definition of "Federal action" to affirm the right and responsibility of every federal agency to determine the appropriate "scope of analysis" that will govern every agency NEPA document, based on that agency's understanding of its legal authorities and areas of responsibility and control. The CEQ regulations should make it clear that a federal agency is not legally required to expand its NEPA scope of analysis to cover activities outside of the agency's legal authorities, responsibilities, and control, merely because "but for" the agency's permit for some component part of a larger project that lies outside of the agency's legal jurisdiction, that larger project might not be built or operated.

To address the problems discussed above, the following provisions of the CEQ NEPA Regulations should be changed by incorporating the revisions to the existing regulations indi-

40. See, e.g., *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 399, 19 ELR 20652 (9th Cir. 1989); *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1115-18, 31 ELR 20051 (9th Cir. 2000), cert. denied, 534 U.S. 815 (2001); *Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269, 272-74, 10 ELR 20243 (8th Cir. 1980); *Save the Bay, Inc. v. U.S. Army Corps of Eng'rs*, 610 F.2d 322, 323-25, 10 ELR 20185 (5th Cir. 1980); *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 557 F.3d 177, 196 (4th Cir. 2008).

41. See, e.g., *Save our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005); *White Tanks Concerned Citizens v. Strock*, 563 F.3d 1033, 1039-41, 39 ELR 20096 (9th Cir. 2009).

42. 672 F. Supp. 561, 18 ELR 20135 (D. Mass. 1987).

43. *Id.* at 565.

44. 541 U.S. 752, 767-68 (2004).

cated below in italics. As noted, all section references are to C.F.R. Title 40.

§1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects are those that are actually or physically caused by the major Federal action, either directly or indirectly. "Causation" for purposes of this definition does not include mere "legal enablement causation," as in a situation where an effect would not arise "but for" the granting of a Federal permit, license, or similar authorization.

§1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control, responsibility, and legal authority. A Federal agency has the responsibility to define the major Federal action that will be addressed in its NEPA document by determining the scope of analysis for that NEPA document. A Federal agency's NEPA document is only required to address those activities, or component parts of activities, over which the Federal agency has control, responsibility, and legal authority. A Federal agency may address other activities in its NEPA document if in its discretion it voluntarily chooses to do so.

§1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28), as well as the limits of the agency's legal authority. The scope is only required to include those activities, or component parts of activities, over which the Federal agency has control, responsibility, and legal authority.

III. Smaller Fixes to the NEPA Regulations Based on Agency Experience

In addition to the important modifications to the CEQ NEPA Regulations described above, no doubt there are other changes to those regulations that the experience of many federal agencies since 1978 would justify. To cite one example, the existing regulations at 40 C.F.R. §1501.4 seem to presume that for federal actions not covered by a categorical exclusion and not identified in the agency's NEPA regulations as normally requiring an EIS, the

federal agency would always produce an environmental assessment (EA) in order to decide whether it should then proceed to produce an EIS.

Even though preparation of an EA can certainly be useful in some circumstances to help an agency decide whether or not preparing an EIS would be appropriate, in many cases the agency decides to produce an EIS without having to devote the time and resources to first produce an unnecessary EA. Consequently, I recommend the following modification to the CEQ NEPA Regulations:

§1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in §1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§1508.9), unless the agency decides to prepare an environmental impact statement without having prepared an environmental assessment. The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by §1508.9(a)(1).

IV. Conclusion

Some people may disagree with the recommendations for revising the CEQ NEPA Regulations that I have made in this Comment; certainly, reasonable attorneys hold differing opinions regarding the issues that I have addressed. Moreover, some may assert that CEQ should not attempt to provide "substantive legal guidance" regarding how NEPA should be interpreted and implemented, but instead should limit itself to purely "procedural" regulations.

However, the existing CEQ NEPA Regulations have been cited, construed, and argued about with respect to the issues that I have addressed in this Comment ever since the regulations were promulgated in 1978. In one way or another, the CEQ NEPA Regulations really cannot avoid addressing these issues. CEQ has already addressed these issues in the existing NEPA regulations and in CEQ's informal guidance documents, albeit in an ambiguous and at times contradictory manner. So, now that CEQ has announced its intentions to revisit and revise its 1978 regulations, I hope that CEQ will consider and adopt the recommendations that I have provided here to improve and modernize the CEQ NEPA Regulations.