TURNING A BLIND EYE TO THE ENVIRONMENT: WHY ELIMINATING THE CUMULATIVE EFFECTS ANALYSIS IS NOT ENTITLED TO *CHEVRON* DEFERENCE

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Note

INTRODUCTION

On July 16, 2020, the Council on Environmental Quality (CEQ) issued a rulemaking that comprehensively changed the regulations implementing the National Environmental Policy Act (NEPA).[1] CEQ made these changes in response to Executive Order 13,807, which directed CEQ to "ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible."[2] In other words, the Executive Order directed CEQ to use its statutory authority to interpret NEPA in a way that simplifies and accelerates NEPA review. To simplify and accelerate NEPA review, the 2020 regulations shrink the scope of an environmental impact statement (EIS) by omitting the cumulative effects analysis despite over forty years of case law expressing that NEPA unambiguously requires the cumulative effects analysis in EISs.[3]

Cumulative effects are effects on the environment "which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[4] When analyzing cumulative effects in EISs, agencies have to consider how multiple actions, federal or not, will have collective impacts on things like the surrounding wildlife and air quality.[5] The cumulative effects analysis also requires agencies to consider how a proposed action, along with other past, present, and foreseeable future actions, will affect environmental justice, suburban sprawl, climate change, and population density.[6] However, under the 2020 CEQ regulations, agencies only have to consider direct, immediate impacts of a proposed action.[7] Under the 2020

1. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (stating the regulations become effective September 14, 2020).

2. Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 15, 2017), *revoked by* Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021).

3. 40 C.F.R. § 1501.9(e)(3) (2020); *see* discussion *infra* Part III.

4. 40 C.F.R. § 1508.7 (2012).

5. *See* discussion *infra* Part I.A.

6. *See* discussion *infra* Part I.A.

7. 40 C.F.R. § 1508.1(g) (2020) ("Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain.").

regulations, agencies do not consider environmental justice, incremental harm on air pollution and wildlife, climate change, or any broader environmental effects.[8] This myopic view of effects on the environment leads to ill-informed decisions, inhibits the public's opportunity to comment on the environmental consequences of proposed actions, and is contrary to NEPA.[9]

The 2020 regulations have been challenged in four suits across the country.[10] *Wild Virginia v. Council of Environmental Quality* is the only one that has been briefed on the merits.[11] In *Wild Virginia*, the court first denied the plaintiffs' motion for a preliminary injunction on the regulations because the plaintiffs did not make a clear showing that they were likely to succeed on the merits of the case.[12] After the court denied the motion for preliminary injunction on the 2020 CEQ rules, both Wild Virginia and CEQ filed motions for summary judgment before President Biden took office.[13] However, in light of the Biden Administration's goals to combat climate change,[14] CEQ filed a motion to remand the rule to the agency because CEQ is already reconsidering the 2020 regulations.[15] While reconsidering the 2020 rules will achieve the Biden Administration's goals to combat climate change, the 2020 rules will still remain effective for the next several years while the agency conducts a new rulemaking.[16] Federal agencies can push projects through NEPA review without analyzing cumulative effects in EISs, and agencies can make decisions without considering cumulative effects as long as the 2020 rules remain effective.[17] Moreover, reconsidering the rules over the next few years creates confusion for agencies because the Biden Administration is issuing orders that conflict with the 2020 CEQ regulations.[18] Ultimately, the district court

8. *See* discussion *infra* Part I.B.

9. *See* discussion *infra* Part I.B.

10. Wild Va. v. Council on Env't Quality, No. 3:20-CV-00045, 2020 U.S. Dist. LEXIS 166622 (W.D. Va. Sept. 11, 2020); Env't Just. Health All. v. Council on Env't Quality, No. 1:20-CV-06143-CM (S.D.N.Y. filed Aug. 6, 2020); Alaska Cmty. Action on Toxics v. Council on Env't Quality, No. 3:20-CV-05199-RS (N.D. Cal. filed July 29, 2020); California v. Council on Env't Quality, No. 3:20-CV-06057 (N.D. Cal. filed Aug. 28, 2020).

11. *Wild Va.*, 2020 U.S. Dist. LEXIS 166622, at *2 n.1, *11 n.3.

12. *Id.* at *10.

13. Plaintiffs' Motion for Summary Judgment, *Wild Va.*, No. 3:20-CV-00045, 2021 U.S. Dist. LEXIS 114616 (W.D. Va. June 21, 2021) (No. 105); Cross Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment, *Wild Va.*, 2021 U.S. Dist. LEXIS 114616 (No. 129).

14. Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021) (making it the Biden Administration's policy to improve public health and the environment, ensure access to clean air and water, and to prioritize environmental justice through immediate review of agency actions taken during the Trump Administration); Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Jan. 27, 2021) (making climate change "the center of United States foreign policy and national security").

15. Defendants' Motion for Remand Without Vacatur, *Wild Va.*, 2021 U.S. Dist. LEXIS 114616 (No. 145).

16. *See* Plaintiffs' Opposition to Federal Defendants' Motion for Remand Without Vacatur, *Wild Va.*, 2021 U.S. Dist. LEXIS 114616, at *2, *9 (No. 147).

17. *Id.*

18. *Id.* at *8.

concluded *Wild Virginia* lacked ripeness and standing and dismissed the case without prejudice.[19] Wild Virginia has appealed the district court's ruling to the Fourth Circuit Court of Appeals.[20]

It is true that if a reviewing court were to strike down the new CEQ rules under the Administrative Procedure Act or under a *Chevron* analysis,[21] it would circumvent the rulemaking process under the Administrative Procedure Act.[22] However, both the Administrative Procedure Act and the *Chevron* analysis still direct courts to strike down unlawful rules like this one.[23] Thus, a court could hold the new rules unlawful or unreasonable under *Chevron*. Then, to prevent harm to the environment and reduce agency confusion, a court could reinstate the original CEQ regulations that require the cumulative effects analysis.

Throughout the *Wild Virginia* litigation, one of the main arguments that the plaintiffs made is that the new regulations are not entitled to *Chevron* deference because eliminating the cumulative effects analysis conflicts with the "unambiguously expressed intent of Congress" and eliminating the analysis is unreasonable.[24] Courts apply the *Chevron* analysis when Congress has delegated authority to an agency to implement a statute, and the court has to review an agency's interpretation of the statute it administers.[25] Courts are ultimately trying to determine whether the agency's regulations are reasonable, but the *Chevron* analysis requires two steps.[26] The first step determines if Congress has addressed the issue, and if Congress has spoken on the issue, the court must give effect to the unambiguous intent of Congress.[27] If Congress has not addressed the issue and the statute is ambiguous, then the court determines if the regulations are based on a permissible construction of the statute.[28] If the regulations are based on a permissible construction of a statute and reasonable, then the reviewing court upholds the agency's regulations.[29]

No court or scholarship has addressed whether eliminating the cumulative effects analysis in the CEQ regulations is entitled to *Chevron* deference. Moreover, if the rules are remanded to CEQ, then the court will never reach the *Chevron* question in the *Wild Virginia* litigation. Thus, this Note argues that

19. *Wild Va.*, 2021 U.S. Dist. LEXIS 114616, at *30–31, *33 (suggesting that the 2020 rules should be challenged as they relate to a particular project proposal because it is uncertain how agencies will implement their own NEPA procedures).

20. Plaintiffs' Notice of Appeal, *Wild Va.*, 2021 U.S. Dist. LEXIS 114616 (No. 157).

21. *See* discussion *infra* Part III.

22. *See* 5 U.S.C. § 553.

23. *See id.* § 706(2)(A); *see* discussion *infra* Part III.

24. Wild Va. v. Council on Env't Quality, No. 3:20-CV-00045, 2020 U.S. Dist. LEXIS 166622 (W.D. Va. Sept. 11, 2020).

25. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

26. *Id.*

27. *Id.*

28. *Id.* at 843.

29. *Id.* at 843–45.

the elimination of the cumulative effects analysis should not be upheld under *Chevron* in a reviewing court. First, the plain text of NEPA, NEPA's purpose, and NEPA's legislative history show that Congress clearly intended for the cumulative effects analysis to be in EISs.[30] Moreover, over forty years of NEPA case law confirms that the cumulative effects analysis flows directly from the statutory language in NEPA itself.[31] Thus, the elimination of the cumulative effects analysis should not survive step one of *Chevron*. Second, even if the regulations eliminating the cumulative effects analysis did survive step one of *Chevron*, the regulations are based on an impermissible construction of NEPA because agencies will ignore pertinent environmental effects that are crucial to making the informed decisions required by NEPA.[32] Over forty years of case law confirms that the cumulative effects analysis is necessary to achieve well-informed environmental decision-making, one of NEPA's purposes.[33] Thus, the elimination of the cumulative effects analysis should not survive a *Chevron* analysis.

Before this Note provides a detailed *Chevron* analysis in Part III, Part I of this Note describes the cumulative effects analysis generally and explains the harmful implications of eliminating the cumulative effects analysis in EISs. Then, Part II of this Note highlights case law confirming that NEPA unambiguously requires the cumulative effects analysis. Finally, Part III explores whether the 2020 regulations' elimination of the cumulative effects analysis will survive a *Chevron* analysis in a reviewing court. Part III ultimately concludes that the elimination of the cumulative effects analysis is not entitled to *Chevron* deference.

I. IMPLICATIONS OF ELIMINATING THE CUMULATIVE EFFECTS ANALYSIS

A. Overview of the Cumulative Effects Analysis

NEPA makes it the policy of the federal government to use all practicable means to create and maintain conditions under which man and nature can exist in productive harmony.[34] To fulfill this purpose, NEPA requires all federal agencies to prepare an EIS for major federal actions significantly affecting the quality of the human environment.[35] Principally, an EIS must include a detailed statement of environmental impacts of the proposed action.[36] The old regulations required the EIS to include direct, indirect, and cumulative effects

30. *See* discussion *infra* Part III.A.
31. *See* discussion *infra* Part II.
32. *See* discussion *infra* Part III.B.
33. *See* discussion *infra* Part II.
34. 42 U.S.C. § 4331(a).
35. *Id.* § 4332(2)(C).
36. *Id.*

of the proposed action.[37] Consideration of direct, indirect, and cumulative effects helps protect the environment by ensuring decision-makers and the public have access to all relevant environmental information before a decision is made.[38]

A cumulative effect, or impact, is the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions."[39] For example, the effects of a forest road and timber sales in the same area must be considered in the same EIS.[40] Considered individually, these actions have much less significant impacts on the environment, but when considered together in a single EIS, the agency can see how the timber sales, which requires building the road, will destroy grey wolf habitat and deposit sediments into the Salmon River harming fish populations.[41] The purpose behind including the cumulative effects of the forest road and the timber sales in an EIS is to prevent the agency from segmenting the projects into individual actions or ignoring other actions that individually have no significant impact but collectively have a substantial impact.[42] Consideration of cumulative effects provides agencies and the public with information about broad environmental consequences before environmental resources are committed.

Cumulative impacts generally result from individually minor but collectively significant actions taking place over a period of time. For example, an agency needs to consider the impact that drilling thousands of new natural gas wells in a region would have on air quality, even though there are not yet specific plans for each individual well.[43] Over time, each new well would have a small incremental effect on air pollution.[44] Thus, the cumulative effects of all foreseeable wells need to be considered in a single EIS to prevent segmentation of individually minor but collectively significant actions.[45] Admittedly, CEQ regulations allow for supplementing and tiering an EIS for long-term projects because it is unreasonable to expect agencies to foresee all future actions and consequences.[46] However, the idea with the cumulative effects analysis is not for agencies to foresee all future actions and consequences but to prevent

37. 40 C.F.R. § 1508.25(c) (1996).

38. *Id.* § 1500.1(c).

39. *Id.* § 1508.7 (2012).

40. *See* Thomas v. Peterson, 753 F.2d 754, 759 (9th Cir. 1985).

41. *Id.*

42. *See id.* at 758.

43. *See* Dine Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 853–54 (10th Cir. 2019).

44. *See id.* at 842–43 (recognizing that the plaintiffs had a valid injury due to air pollution from the individual wells).

45. *See id.* at 854.

46. 40 C.F.R. § 1502.20 (2012).

agencies from making blind decisions.[47] The cumulative effects analysis forces agencies to look beyond the immediate effects of an individual action and to understand how a particular action will affect the environment within the context of other actions, regardless of who commits the other action.[48]

Though *Thomas* and *Dine Citizens* dealt primarily with cumulative actions that caused the cumulative effects, it is important to understand that cumulative actions are not a prerequisite for a cumulative effects analysis in an EIS.[49] Cumulative actions are other proposed actions by that particular agency that will have cumulatively significant impacts.[50] Cumulative effects, however, can be caused by *any* reasonably foreseeable action.[51] While not the focus of this Note, it is worth knowing that the 2020 regulations also eliminate the consideration of cumulative actions in EISs.[52] Cumulative actions and cumulative effects are closely related concepts, but both are necessary to fulfill NEPA's purpose of gathering all relevant environmental information before making a decision or taking action that affects the environment.[53]

B. The Elimination of the Cumulative Effects Analysis

Returning to cumulative effects specifically, the 2020 regulations eliminate the cumulative effects analysis from the scope of EISs.[54] Consistent with Executive Order 13,807, the regulations stress that NEPA is strictly procedural and that NEPA's purpose is achieved if agencies have considered environmental information and the public has been informed.[55] Using a strictly procedural interpretation of NEPA and stressing the need for efficient environmental review, the 2020 regulations only require the consideration of impacts.[56] Impacts are "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action . . . ."[57] The 2020 regulations

47. *See Thomas*, 753 F.2d at 760–61.

48. Courtney A. Schultz, *History of the Cumulative Effects Analysis Requirement Under NEPA and Its Interpretation in U.S. Forest Service Case Law*, 27 J. ENV'T L. & LITIG. 125, 133 (2012).

49. *See* 40 C.F.R. § 1508.25 (1996) (separating cumulative actions and cumulative effects as two distinct categories of analysis).

50. *Id.* § 1508.25(a).

51. *Id.* § 1508.7 (2012).

52. *Id.* § 1501.9(e)(1) (2020) (requiring the consideration of the unconnected single action and connected actions).

53. Schultz, *supra* note 48, at 139–40.

54. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,343–44 (July 16, 2020).

55. 40 C.F.R. § 1500.1 (2020).

56. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,343–44; 40 C.F.R. § 1501.9(e)(3).

57. 40 C.F.R. § 1508.1(g) (2020).

only require consideration of the direct consequences of the proposed action, eliminating all consideration of cumulative effects.[58]

Under the 2020 regulations, the effects that the forest road and timber sales would have on the river and wolf habitat in *Thomas* would not have been considered. Similarly, in *Dine Citizens*, the effects that all foreseeable wells would have on air pollution would not have been considered in an EIS. Under the 2020 regulations, neither the agency nor the public has access to the information regarding the broader environmental consequences of proposed federal actions, like climate change, suburban sprawl, effects on wildlife, and population density.[59] Though NEPA is an information-forcing statute and does not directly alter substantive decisions, the 2020 regulations dramatically reduce the amount of information agencies are required to produce, which leads to careless and ill-informed decision-making.

Not only does forgoing the cumulative effects analysis lead to unsound environmental decisions, it also harms already disadvantaged environmental justice advocates and communities. Environmental justice is the idea that people should not be subject to disproportionate environmental impacts based on where they live.[60] For example, an agency adequately considered environmental justice in an EIS for a pipeline project by analyzing the effects that three new natural gas pipelines would have on communities with populations disproportionately below the poverty line and populations disproportionately belonging to minority groups.[61] The EIS for this pipeline project shows that producing the most important information for environmental justice advocates and communities requires analyzing the demographics of the area in which proposed actions will occur and the various sources of pollution that harm and will harm the low-income, minority communities. Thus, considering environmental justice in EISs requires looking beyond the immediate impact of a proposed action, which is achieved through the cumulative effects analysis.

Moreover, pollutants themselves often have cumulative effects on environmental justice communities because pollutants do not just disappear once emitted, and pollutants come from a variety of sources that are typically concentrated in low-income areas.[62] Thus, the most pertinent information for environmental justice communities and advocates comes from an analysis of

58. *Id.* § 1508.1(g)(2) ("Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain.").

59. *See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Wild Va. v. Council on Env't Quality, No. 3:20-CV-00045, 2020 U.S. Dist. LEXIS 166622, at *31 (W.D. Va. Sept. 11, 2020) (No. 105-1) [hereinafter Memorandum] (noting that eliminating the cumulative effects analysis imposes a blinkered approach to evaluating environmental impacts).

60. *See* Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

61. Sierra Club v. Fed. Energy Regul. Comm'n, 867 F.3d 1357, 1368–71 (D.C. Cir. 2017).

62. Raoul S. Liévanos, *Retooling CalEnviroScreen: Cumulative Pollution Burden and Race-Based Environmental Health Vulnerabilities in California*, 15 INT'L J. ENV'T RSCH. & PUB. HEALTH 762, 762 (2018).

how the impacts caused by past, present, and reasonably foreseeable future pollution affects the already marginalized communities.[63] Without the cumulative effects analysis requirement, agencies no longer consider environmental justice in EISs, so the disadvantaged environmental justice communities and advocates are no longer informed of and do not have a meaningful opportunity to comment on the consequences of federal actions.[64]

The concerns about the elimination of the cumulative effects analysis leading to ill-informed decision-making and harming environmental justice communities are grounded in the fact that NEPA has been a huge success since its enactment.[65] NEPA has actually increased public engagement with agency decision-making by providing the public, other agencies, and the private sector with enough information in EISs so that everyone has a meaningful opportunity to comment on proposed actions.[66] This commenting and collaborating has greatly improved agency decisions and even prevented environmental damage.[67] Significantly, NEPA has deterred agencies from proposing projects that could not withstand public scrutiny and debate.[68] Eliminating the cumulative effects analysis reduces the public's access to information and opportunity to comment, which is what made NEPA successful to begin with.

Basically, the 2020 regulations dramatically reduce the scope of an EIS to simplify and accelerate NEPA review, but the regulations do this by eliminating the consideration of broad environmental consequences. Shrinking the scope of EISs inhibits informed agency decision-making, reduces the public's knowledge of environmental consequences, and diminishes the public's opportunity to comment on federal actions—three purposes of NEPA.[69] Eliminating the cumulative impacts analysis also reduces the amount of information agencies are required to produce under NEPA, further undermining administrative accountability.[70] Notably, the 2020 CEQ regulations eliminate the cumulative effects analysis despite over forty years of

63. *See* Eileen Gauna et al., *CPR Perspective: Environmental Justice at Stake*, CTR. FOR PROGRESSIVE REFORM, http://progressivereform.net/perspenvironJustice.cfm (last visited Oct. 1, 2021).

64. *See id.* (noting the importance of public participation and access to information for environmental justice advocates who often lack the resources to effectively participate in technical decision-making).

65. Robert G. Dreher, *NEPA Under Siege: The Political Assault on the National Environmental Policy Act*, GEO. ENV'T L. & POL'Y INST. 1, 6 (2005).

66. *Id.*

67. *Id.*

68. *Id.*

69. Lynton K. Caldwell, *The National Environmental Policy Act: Retrospect and Prospect*, 6 ENV'T L. REP. 50030, 50030 (1976); William L. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L.J. 205, 207 (1989); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

70. Lynton Caldwell notes that EISs have been influenced by a desire to "reinforce administrative accountability through disclosure of considerations entering into public decisions by government agencies . . . ." Lynton K. Caldwell, *Environmental Impact Analysis (EIA): Origins, Evolution, and Future Directions*, 6 IMPACT ASSESSMENT 75, 75 (1988).

case law holding that NEPA requires analyzing cumulative environmental impacts.[71]

II. CUMULATIVE EFFECTS ANALYSIS IN CASE LAW

A Supreme Court case highlighting the importance of the interrelated concepts of cumulative actions and cumulative effects is *Kleppe v. Sierra Club*. In *Kleppe*, the Sierra Club argued that the Department of Interior needed to prepare a programmatic EIS for the development of coal reserves in the Northern Great Plains region before further development.[72] The Court held that the Department of Interior did not have to prepare a programmatic EIS for the region because there was no regionwide plan for development of coal reserves.[73] However, NEPA may require a comprehensive EIS when several proposed actions that will have a cumulative impact are pending at the same time before an agency.[74] Importantly, the programmatic EIS sought by the Sierra Club dealt with the cumulative actions of all the coal reserves in the region, not necessarily the cumulative effects of the reserves.[75] The cumulative effects of the coal reserves, however, could have been considered in a single EIS for one of the proposed coal reserves.[76] Distinguishing between cumulative actions and effects is important for technical reasons, but the distinction does not detract from the importance of the cumulative effects analysis.

In fact, in *Kleppe*, the Court recognized the importance of analyzing cumulative effects to fulfill NEPA's purpose.[77] NEPA is both action-forcing and information-forcing because it requires the early consideration of environmental impacts by federal agencies.[78] The cumulative effects analysis requires agencies to produce information that will notify decision-makers and the public of broad environmental consequences before federal actions are taken.[79] Still though, the agency has the power to determine the scope of a programmatic EIS regarding cumulative actions based on geography.[80] While the Court in *Kleppe* deferred to the agency's determination to not prepare a programmatic EIS for the Northern Great Plains region, the Court still held that cumulative environmental effects must be evaluated to inform decision-

71. Barbara Kerrane, *Cumulative Effects Analysis Under NEPA Proposed 2020 Regulations*, LEWIS & CLARK L. SCH.: ENV'T, NAT. RES., & ENERGY L. BLOG (Aug. 19, 2020), https://law.lclark.edu/live/blogs/135-cumulative-effects-analysis-under-nepa-proposed; 40 C.F.R. § 1508.1(g)(3) (2020).

72. Kleppe v. Sierra Club, 427 U.S. 390, 394 (1976).

73. *Id.* at 414–15.

74. *Id.* at 409–10.

75. Schultz, *supra* note 48, at 139.

76. *Id.* at 140.

77. *Kleppe*, 427 U.S. at 409–10.

78. *Id.* at 409.

79. Schultz, *supra* note 48, at 151.

80. *Kleppe*, 427 U.S. at 414.

makers and the public about environmental consequences of proposed actions.[81]

Similarly, the Supreme Court emphasized the strong precatory language of NEPA in *Robertson v. Methow Valley Citizens Council*.[82] The goal of an EIS is to provide detailed information to decision-makers and the public to ensure environmental effects are not overlooked before resources are committed.[83] Though NEPA does not mandate substantive results, the early consideration of environmental impacts may influence decisions regarding proposed actions.[84] To illustrate, in *Thomas*, consideration of the effects of the forest road and timber sales provided the agency with detailed information about the environmental effects that the forest road and timber sales would have on the grey wolf habitat and Salmon River.[85] The agency was not prevented from building the road or selling the timber because of the environmental consequences, but the agency did not overlook the environmental consequences of the road and timber sales before the resources were committed.[86]

The litigation of *Oregon Natural Resource Council v. Marsh* specifically shows that courts require and enforce the cumulative effects analysis in EISs.[87] In *Marsh*, the Ninth Circuit held that the Army Corps of Engineers failed to consider the cumulative impacts on water quality of three dams, two of which were built prior to the dam at issue, in a single EIS.[88] The Supreme Court reversed the Ninth Circuit's decision because a supplemental EIS was not needed.[89] However, on remand, the Ninth Circuit again held that the Army Corps of Engineers' consideration of cumulative effects of all three dams on water quality was inadequate.[90] The *Marsh* litigation confirms that case law requires consideration of broad environmental consequences in EISs through the cumulative effects analysis.

Even more, courts have required the consideration of effects of state or private actions within the cumulative effects analysis in EISs. In fact, the Ninth Circuit has specifically emphasized the importance of considering the effects of

81. *Id.* at 409–10 ("[W]hen several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.").

82. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

83. *Id.*

84. *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980).

85. Thomas v. Peterson, 753 F.2d 754, 760–61 (9th Cir. 1985).

86. *Id.*

87. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 938 (8th ed. 2018).

88. Oregon Nat. Res. Council v. Marsh, 832 F.2d 1489, 1497–98 (9th Cir. 1987), *aff'd in part, rev'd in part*, 490 U.S. 360 (1989).

89. *Marsh*, 490 U.S. at 384–85.

90. Oregon Nat. Res. Council v. Marsh, 52 F.3d 1485, 1490–91 (9th Cir. 1995).

nonfederal actions within the cumulative effects analysis.[91] In *Resources Limited v. Robertson*, plaintiffs asserted that the EIS for a forest conservation plan must consider the effects nonfederal actions, such as logging, will have on grizzly bear habitat.[92] Though the U.S. Forest Service argued that it does not need to consider nonfederal actions because it cannot control them, the Ninth Circuit disagreed and held that CEQ regulations mandated the consideration of impacts of nonfederal actions in the EIS for the conservation plan.[93] Subsequently, the Eighth Circuit agreed with *Resources Limited* and held that the regulations expressly require the consideration of nonfederal actions within the cumulative effects analysis.[94]

In a narrower interpretation of NEPA, *Public Citizen* held that an agency need not prepare an EIS for an effect the agency has no ability to prevent due to limited statutory authority over the pertinent action.[95] In *Public Citizen*, the Federal Motor Carrier Safety Administration (FMCSA) issued new safety and application regulations for Mexican motor carriers entering the United States.[96] FMCSA prepared an environmental assessment that concluded the regulations would have no significant impact on the environment, but FMCSA did not consider the broad environmental impacts of the President lifting the moratorium on Mexican trucks.[97] Though FMCSA did not have to consider the effects of the President lifting the moratorium because it violated NEPA's "rule of reason" and did not serve NEPA's purpose of informing decision-makers, the Court still confirmed FMCSA's use of the cumulative effects analysis in the environmental assessment.[98] The cumulative effects analysis only required FMCSA to consider the incremental effects of the new application and safety regulations within the context of the President lifting the moratorium, which FMCSA did in the environmental assessment.[99] While *Public Citizen* interprets NEPA narrowly, it is still reconcilable with other cases requiring the cumulative effects analysis.

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91. Res. Ltd. v. Robertson, 35 F.3d 1300, 1305–06 (9th Cir. 1993).

92. *Id.* at 1305.

93. *Id.* at 1306. Importantly, the regulations codified early NEPA case law, such as *Kleppe*. Schultz, *supra* note 48, at 133, 137–38.

94. Sierra Club v. U.S. Forest Serv., 46 F.3d 835, 839 (8th Cir. 1995) (holding that the environmental assessment's consideration of cumulative effects caused by actions on private land was sufficient).

95. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 770 (2004).

96. *Id.* at 761.

97. *Id.* at 762.

98. *Id.* at 768–70. The rule of reason is the principle that agencies decide the scope of an EIS based on the usefulness of potential information. *Id.* at 767. It would not be useful for FMCSA to perform an analysis of an action it could not prevent. *Id.* at 769. Moreover, FMCSA had no decision-making power over lifting the moratorium, so producing an EIS for it would not inform any relevant decision FMCSA would make. *Id.*

99. *Id.* at 769–70. The Court includes the discussion of the cumulative effects analysis to show that the cumulative effects requirement does not affect the reasoning not to produce a full-blown EIS for lifting the moratorium. *Id.* FMCSA already satisfied the cumulative effects requirement. *Id.*

In sum, case law indicates that courts have interpreted NEPA to unambiguously require consideration of cumulative effects in EISs for over forty years. Case law repeatedly confirms that the purpose of NEPA is to ensure early consideration of environmental consequences, which can best be achieved through a detailed analysis of broad environmental effects. Though case law affords agencies discretion in determining when to prepare a programmatic EIS, holds that NEPA does not mandate substantive results, and enforces NEPA's rule of reason, case law still confirms that NEPA requires the cumulative effects analysis to ensure that agencies do not overlook important environmental consequences before environmental resources are committed.

III. JUDICIAL DEFERENCE TO THE ELIMINATION OF THE CUMULATIVE EFFECTS ANALYSIS

A. Chevron *Deference*

Given that courts have interpreted NEPA to require the cumulative effects analysis for over forty years, it is pertinent to consider whether a reviewing court will defer to CEQ's determination that eliminating the cumulative effects analysis is consistent with NEPA. When Congress delegates authority to a particular agency to implement a statute, as Congress has delegated authority to CEQ to implement NEPA,[100] and the agency's regulations that implement the statute are challenged, courts apply the *Chevron* analysis to determine if the agency's interpretation of the statute is reasonable.[101] If the agency's interpretation of the statute is reasonable, the reviewing court will defer to the agency's interpretation.[102]

The *Chevron* analysis requires two steps. In step one, the reviewing court asks "whether Congress has directly spoken to the precise question at issue."[103] If Congress has spoken to the precise question at issue, then the court "must give effect to the unambiguously expressed intent of Congress."[104] If Congress has not directly addressed the issue and the statute is ambiguous, *Chevron* step two requires the reviewing court to ask whether the agency's interpretation is based on a permissible construction of the statute.[105] If the agency's

100. 42 U.S.C. §§ 4342, 4344.

101. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984); United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (noting that an agency must have authority to issue binding legal rules for *Chevron* to apply).

102. *Chevron*, 467 U.S. at 844.

103. *Id.* at 842.

104. *Id.* at 842–43.

105. *Id.* at 843.

interpretation is based on a permissible construction of a statute and is reasonable, then the reviewing court defers to the agency's interpretation.[106]

However, if a statute is ambiguous under *Chevron* step one, then merely reversing a long-standing policy like the cumulative effects analysis requirement is not invalidating.[107] Though a contrary judicial interpretation from an ambiguous statute does not prevent an agency from reversing a policy, when courts believe that a statute is not ambiguous, agencies cannot ignore prior court decisions.[108] The remainder of this Note will analyze CEQ's definition of impacts in the 2020 regulations, which eliminates consideration of cumulative effects, within the *Chevron* framework and additional rules regarding prior court decisions interpreting the same statute.

B. Chevron *Step One*

Courts use common statutory interpretation methods in step one of the *Chevron* analysis to determine if a statute is ambiguous. First, courts look to the plain meaning of the statute to determine if Congress has addressed the problem at issue.[109] If the plain meaning of the statutory language is unclear, courts determine if Congress has clearly spoken on an issue by interpreting the specific provision in the context of the object and purpose of the statute.[110] Lastly, courts do not defer to agency interpretation if legislative history shows contrary congressional intent.[111] NEPA's plain meaning, object and purpose, and legislative history clearly show that Congress endorsed the cumulative effects analysis, but CEQ still claims that elimination of cumulative effects should survive the first step of *Chevron* because NEPA is ambiguous.[112]

First, the plain meaning of NEPA shows that Congress intended for cumulative effects to be considered in EISs.[113] NEPA mandates:

> *[T]o the fullest extent possible* . . . all agencies of the Federal Government shall . . . include . . . a detailed statement by the responsible official on[] (i) the environmental impact of the proposed action, (ii) *any* adverse environmental effects . . . (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term

106. *Id.*

107. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (quoting *Chevron*, 467 U.S. at 863) ("An initial agency interpretation is not instantly carved in stone.").

108. *Id.* at 982–83; United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 488–89 (2012).

109. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

110. Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990).

111. Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc., 470 U.S. 116, 126 (1985).

112. Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction at 11–14, Wild Va. v. Council on Env't Quality, No. 3:20-CV-00045 (W.D. Va. Sept. 11, 2020) [hereinafter Defendants' Opposition].

113. Plaintiffs' Reply in Support of Motion for Preliminary Injunction or Stay at 17, Wild Va. v. Council on Env't Quality, No. 3:20-CV-00045 (W.D. Va. Sept. 11, 2020) [hereinafter Plaintiffs' Reply].

> productivity, and (v) *any* irreversible and irretrievable commitments of resources . . . .[114]

Providing a detailed statement on the environmental impacts to the fullest extent possible requires a cumulative effects analysis. Only considering the short-term, immediate effects of an action when an agency can easily consider the broader environmental context surely does not mean that the agency has complied with NEPA to the fullest extent possible. NEPA's broad and aspirational language clearly requires consideration of effects beyond the effects of immediate actions. Because NEPA requires agencies to comply with the procedural duties of NEPA to the fullest extent possible, CEQ's elimination of the cumulative effects analysis conflicts with the clear statutory mandate.[115]

Moreover, agencies are supposed to evaluate any adverse environmental impact and any irretrievable commitment of resources.[116] Any adverse impact or irretrievable commitment of resources surely encompasses cumulative effects.[117] Not only is the broad language of the statute evidence that Congress intended for cumulative effects to be considered, the requirement to consider the relationship between short-term uses and maintenance of the long-term productivity of the environment also implies the cumulative effects analysis.[118] For example, in *Thomas*, analyzing the short-term uses of the forest road or the timber sales alone would have ignored the effects on the long-term productivity of the river and wolf habitat.[119] Analyzing cumulative effects and actions is essentially the same as analyzing the relationship between the short-term uses and long-term productivity.[120] Therefore, the plain text of NEPA shows that Congress intended the cumulative effects analysis to be included in EISs even though Congress did not use the phrase cumulative effects.

If a reviewing court finds the plain meaning of NEPA unclear, NEPA's purpose, as confirmed by forty years of case law, further shows that Congress endorsed the cumulative effects analysis in the statutory text. NEPA's purpose is:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation . . . .[121]

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114. 42 U.S.C. § 4332(1), (2)(C) (emphasis added).
115. Plaintiffs' Reply, *supra* note 113.
116. 42 U.S.C. § 4332(2)(C).
117. Plaintiffs' Reply, *supra* note 113, at 18.
118. Schultz, *supra* note 48.
119. Thomas v. Peterson, 753 F.2d 754, 759 (9th Cir. 1985).
120. *See* Schultz, *supra* note 48.
121. 42 U.S.C. § 4321.

Preventing damage to the environment and enriching the understanding of ecological systems and natural resources requires detailed analysis of broad environmental effects.[122] As noted in *Kleppe*, *Methow Valley*, and *Strycker's Bay*, analyzing cumulative effects helps prevent damage to the environment by informing decision-makers and the public of environmental effects before resources are committed.[123] Environmental damage cannot be prevented if knowledge of the potential damage is never made available to the public or decision-makers do not understand the ecological systems affected by their decisions. The cumulative effects analysis ensures that all environmental information has been considered by both the agency and the public before the environment is damaged.[124] When interpreted in light of NEPA's object and purpose, NEPA's statutory text surely requires the cumulative effects analysis.

Last, NEPA's legislative history confirms that Congress intended the cumulative effects analysis to be included in EISs and that the cumulative effects analysis helps achieve NEPA's purpose. Though the phrase cumulative effects is not expressed in the legislative history, Congress clearly stated that a purpose of NEPA is to address long-range and nonimmediate environmental effects of federal actions.[125] Congress also expressed desire to avoid environmental crises through detailed analyses of environmental effects on existing and future land uses.[126] Moreover, Congress stressed that NEPA deals with environmental problems "on a preventive and an anticipatory basis."[127] The cumulative effects analysis, therefore, represents Congress's intent for consideration of long-term and broad environmental effects to prevent environmental disasters. The legislative history confirms that Congress intended for federal agencies to analyze cumulative environmental effects in EISs.[128] Therefore, elimination of the cumulative effects analysis should not survive *Chevron* step one.

Despite textual, purposive, and historical evidence that clearly shows the cumulative effects analysis is required and over forty years of case law confirming that Congress intended the cumulative effects analysis to be included in EISs, CEQ asserts that the 2020 regulations should still survive step

122. *See* Memorandum, *supra* note 59.

123. Schultz, *supra* note 48, at 128–29.

124. Caldwell, *supra* note 70 (noting that the drafters of NEPA understood the concept of the environment to be broad).

125. S. REP. NO. 91-296, at 8–9 (1969). ("S. 1075 is also designed to deal with the long-range implications of many of the critical environmental problems . . . . These threats—whether in the form of pollution, crowding, ugliness, or in some other form—were not achieved intentionally. They were the . . . unanticipated consequences which resulted from the pursuit of narrower, more immediate goals.").

126. 115 CONG. REC. 29,053 (1969) ("[T]hrough development of standards-setting procedures at the local level, through careful analysis of existing and future land uses, we can begin to order our progress without environmental chaos.").

127. 115 CONG. REC. 40,416 (1969).

128. Schultz, *supra* note 48, at 127.

one of the *Chevron* analysis.[129] CEQ's argument that NEPA is ambiguous stems from NEPA containing aspirational and vague language and failing to define environmental effects specifically.[130] The vague language and failure to define environmental effects presents gaps for CEQ to fill with regulations.[131] Thus, following this line of reasoning, over forty years of case law confirming the cumulative effects analysis is based on an interpretation of an ambiguous statute and cannot prevent CEQ from eliminating the cumulative effects analysis in the 2020 regulations.[132]

However, while the statute does not define environmental effects specifically, it still calls for consideration of any adverse effects and consideration of the relationship between short-term uses and long-term productivity to the fullest extent possible.[133] The cumulative effects analysis, though not specifically mentioned in the statute, follows directly from this broad language in NEPA itself.[134] Analyzing any adverse impact and effects on long-term productivity to the fullest extent possible requires consideration of an action's incremental impact on the environment in relation to past, present, and reasonably foreseeable future actions.[135] Moreover, in light of NEPA's purpose and legislative history, it is clear that Congress intended agencies to consider cumulative effects in EISs to prevent and anticipate future environmental disasters. Failing to define environmental effects specifically in the statute does not mean that Congress did not endorse the cumulative effects analysis, especially when considering the statutory text in light of NEPA's purpose and legislative history.

Above all, early NEPA cases espousing the cumulative effects analysis, such as *Kleppe*, were decided years before CEQ issued regulations containing the cumulative effects analysis.[136] Thus, because CEQ regulations codified early NEPA cases, such as *Kleppe*, courts believe that Congress has spoken directly on the cumulative effects analysis requirement in EISs.[137] On top of that, the elimination of the cumulative effects analysis clearly ignores over forty years of case law that confirms the cumulative effects analysis follows directly from the language of NEPA.[138] Therefore, the 2020 regulations ignore a large swath of

129. Defendants' Opposition, *supra* note 112, at 13.

130. *Id.*

131. *Id.*

132. *Id.*

133. Schultz, *supra* note 48, at 132–32.

134. *Id.*

135. *See* Memorandum, *supra* note 59, at 36.

136. Schultz, *supra* note 48, at 133, 137–38 (noting that the cumulative effects analysis was a codification of NEPA common law).

137. *See* Hanly v. Kleindienst, 471 F.2d 823, 831 (2d Cir. 1972) ("One more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel.").

138. *See* discussion *infra* Part II.

case law that confirms NEPA is not ambiguous on the point of cumulative effects, and thus the regulations should not survive *Chevron* step one.

C. Chevron *Step Two*

Even though the 2020 regulations should not survive *Chevron* step one, a reviewing court may find that NEPA is ambiguous regarding the cumulative effects analysis. If a reviewing court finds that Congress has not directly spoken on whether the cumulative effects analysis is required in EISs, then the next question is whether the elimination of the cumulative effects analysis is based on a permissible construction of the statute.[139] In other words, if a reviewing court finds NEPA's statutory text ambiguous, the court will ask if elimination of the cumulative effects analysis was a reasonable policy decision.[140] Given that eliminating the cumulative effects analysis is contrary to NEPA and will allow agencies to ignore pertinent environmental effects that are crucial to make well-informed decisions required by NEPA, elimination of the cumulative effects analysis is unreasonable and is not entitled to *Chevron* deference.[141]

First and foremost, elimination of the cumulative effects analysis is unreasonable because it is contrary to NEPA. The plain language of NEPA clearly indicates that agencies are to evaluate any adverse environmental effects to the fullest extent possible.[142] It is common sense that evaluating any adverse environmental effects to the fullest extent possible requires considering cumulative effects, such as environmental justice impacts, suburban sprawl, and climate change.[143] Moreover, this portion of the statute endorsing the consideration of any environmental effects to the fullest extent possible would have no meaning if agencies were only required to evaluate direct effects of actions.[144] To give effect to the broad language of NEPA, agencies must evaluate cumulative effects in EISs. Failing to evaluate cumulative effects is based on an impermissible construction of NEPA, and the regulations are not entitled to *Chevron* deference.

Nevertheless, CEQ claims that the elimination of the cumulative effects analysis is lawful and necessary for efficient environmental review.[145] Defining effects to have a reasonably close causal relationship to the action still serves NEPA's purpose of informed decision-making because it actually serves no purpose to speculate about possible distant effects.[146] Basically, CEQ asserts

139. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
140. *Id.*
141. Memorandum, *supra* note 59, at 32.
142. 42 U.S.C. § 4332(2)(C).
143. Memorandum, *supra* note 59, at 34.
144. *Id.* at 36.
145. Defendants' Opposition, *supra* note 112, at 18.
146. *Id.* at 20.

that the cumulative effects analysis is unworkable and ineffective, producing vast amounts of paperwork and doing little to improve agency decisions.[147] Relying on *Public Citizen*, NEPA's rule of reason, and the procedural nature of NEPA, CEQ asserts that eliminating the cumulative effects analysis is consistent with NEPA because it is impracticable for agencies to consider distant effects that they may not be able to control.[148]

However, CEQ's rationale for eliminating the cumulative effects analysis is unreasonable because CEQ ignores the statutory language in NEPA itself, the usefulness of producing information about cumulative effects, and NEPA's functional requirements. First, as discussed above, the plain meaning of NEPA shows that Congress intended for agencies to consider cumulative effects. To reiterate, over forty years of court decisions also confirm that the cumulative effects analysis follows directly from the statutory mandate in NEPA and is necessary to effectuate Congress's intent.[149] Despite construing NEPA narrowly, *Public Citizen* even confirms the cumulative effects analysis.[150] While CEQ asserts that the cumulative effects analysis is unworkable, CEQ cannot eliminate the cumulative effects analysis because it is clearly contrary to NEPA as confirmed by over forty years of case law.

Second, it is useful for agencies to consider cumulative effects in EISs because NEPA is meant to inform the public, the private sector, and even other agencies of environmental effects, not just the agency making the decision.[151] Informing the wider audience of environmental consequences benefits everyone because outside actors might have expertise that will assist agency decisions and outside actors need to know how agency decisions will affect them.[152] Informing a wide audience about cumulative effects on the environment allows various actors to work together to prevent environmental disasters. Similarly, consideration of cumulative effects is particularly important for environmental justice communities and advocates who have fewer resources to access technical information about environmental consequences.[153] The cumulative effects analysis provides disadvantaged communities with another tool to protect their homes and neighborhoods. Thus, it is useful and reasonable for agencies to consider cumulative effects in EISs because it helps prevent environmental disasters by allowing various actors to work together, and it improves agency decisions by giving

147. *Id.* at 18.

148. *Id.* at 20–21.

149. Memorandum, *supra* note 59, at 34.

150. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 769–70 (2004).

151. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989); Caldwell, *supra* note 70, at 77.

152. *See generally* Robert L. Glicksman, *Shuttered Government*, 62 ARIZ. L. REV. 573 (2020).

153. *See* Gauna et al., *supra* note 63.

disadvantaged members of the public opportunity to comment on proposed actions.[154]

Third, EISs are not strictly procedural because NEPA has the substantive goal of improving the environment.[155] Achieving NEPA's substantive goals demands EISs be useful and meaningful informational tools.[156] To make EISs useful and meaningful informational tools, NEPA requires agencies to provide detailed analysis of environmental effects of proposed actions to ensure early consideration of any environmental consequences.[157] Producing information about broad environmental consequences makes EISs useful because the information influences the decision-making process and gives the public a meaningful opportunity to comment on proposed actions.[158] Moreover, there must be sufficient information in an EIS for a reviewing court to ensure the agency has adequately considered the environmental consequences and complied with NEPA.[159] Consideration of cumulative effects is necessary to make NEPA useful because it requires agencies to gather, publish, and adequately consider crucial environmental information before making an irretrievable commitment of environmental resources.[160]

Last, CEQ reasons that elimination of the cumulative effects analysis will foster efficient environmental review.[161] While NEPA's rule of reason does address efficiency concerns by providing a principle of when to stop gathering new information, efficient environmental review is never mentioned in NEPA.[162] Rather than fostering efficient environmental review, NEPA focuses agency and public attention on environmental consequences by forcing agencies to produce information regarding the environmental effects of other reasonably foreseeable actions.[163] The cumulative effects analysis produces crucial information about environmental effects to bring attention to these consequences and foster well-informed decisions.[164] Because efficient environmental review is not a purpose of NEPA, eliminating the cumulative

154. Dreher, *supra* note 65; *see also Methow Valley*, 490 U.S. at 349 (explaining EISs provide a springboard for public comment).

155. Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."); Caldwell, *supra* note 70, at 83 (noting that EISs are more than just technical processes).

156. Memorandum, *supra* note 59, at 34.

157. *Methow Valley*, 490 U.S. at 349.

158. Dreher, *supra* note 65; *see* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980).

159. *Strycker's Bay*, 444 U.S. at 227–28; *see* Caldwell, *supra* note 70.

160. *See Methow Valley*, 490 U.S. at 349.

161. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,310 (July 16, 2020); 40 C.F.R. § 1501.9(e)(3) (2020).

162. *See* 42 U.S.C. §§ 4321–4370.

163. Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 371 (1989).

164. Memorandum, *supra* note 59, at 32.

effects analysis to achieve efficient environmental review is unreasonable and based on an impermissible construction of NEPA.

The 2020 regulations are based on an impermissible construction of NEPA and are not entitled to *Chevron* deference. Eliminating the cumulative effects analysis ignores broad language in NEPA that calls for consideration of any adverse environmental effects to the fullest extent possible. Moreover, eliminating the cumulative effects analysis does not fulfill NEPA's purpose to produce information to prevent harm to the environment, and it ignores over forty years of case law confirming that NEPA is unambiguous on the point of analyzing cumulative effects. Thus, the elimination of the cumulative effects analysis is not entitled to *Chevron* deference.

CONCLUSION

In conclusion, the 2020 CEQ regulations' elimination of the cumulative effects analysis from EISs is contrary to over forty years of case law and NEPA itself. Eliminating the cumulative effects analysis leads to ill-informed decisions because broad environmental consequences like climate change, suburban sprawl, population density, and environmental justice are no longer considered in agency decision-making processes. Because eliminating the cumulative effects analysis conflicts with the unambiguous statutory mandate in NEPA confirmed by over forty years of case law, a reviewing court should not uphold the elimination of the cumulative effects analysis under *Chevron* and should reinstate the cumulative effects analysis.

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