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VIA E-MAIL and REGULATIONS.GOV

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Re: Notice of Proposed Rulemaking – Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020)

Docket ID No. CEQ-2019-0003

Dear Associate Director Boling:

The State of Colorado submits these comments on the proposed *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 1684 (Jan. 10, 2020), Docket ID No. CEQ-2019-0003, RIN 0331-AA03 (the Proposed Rule). Colorado appreciates the opportunity provided by the Council on Environmental Quality (CEQ) to share feedback on the Proposed Rule.

I. INTRODUCTION AND BACKGROUND

In Colorado, protecting our state's land, air, water, and people is of the utmost importance. Colorado is home to abundant natural resources, and its natural environment provides aesthetic, economic, social, and ecological value.¹ The National Environmental Policy Act (NEPA) ensures that decision makers

¹ Clean air, land, and water provide ecologically vibrant habitats that undergird the state's robust outdoor recreation economy. For instance, in Colorado, fishing and wildlife watching each contribute \$2.4 billion in economic output each year, supporting more than 30,000 jobs within the state. Hunting supports nearly 8,000 additional jobs and contributes more than \$800 million in annual economic output. The entire outdoor recreation economy, which also includes hiking, skiing, and other activities, accounts for \$62.5 billion dollars of economic output in Colorado. COLO. PARKS & WILDLIFE, THE 2017 ECONOMIC CONTRIBUTIONS OF OUTDOOR RECREATION IN COLORADO (July 2018), <https://cpw.state.co.us/Documents/Trails/SCORP/Final-Plan/SCORP-AppendixF-EconomicContributions.pdf>. Agriculture is also an important economic engine and cultural resource. As of 2019, Colorado's agricultural industry contributed \$47 billion in economic output and directly employed more than 195,000 workers. The natural environment influences all aspects of agriculture and food production in Colorado.

carefully consider, and seek to minimize, potential adverse effects on Colorado’s resources when making infrastructure and other types of decisions.

NEPA was enacted with overwhelming bipartisan support and was signed into law by President Richard Nixon on January 1, 1970. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4321 et seq.). NEPA’s procedural requirements are intended to further the nation’s environmental policy goals, recognizing “the profound impact of man’s activity on the interrelations of all components of the natural environment . . . [and] the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man.” 42 U.S.C. § 4331(a).

The Proposed Rule seeks to comprehensively alter NEPA’s regulations for the first time since they were promulgated in 1978. CEQ’s stated purpose for the Proposed Rule is to “modernize” the regulations “to facilitate more efficient, effective, and timely NEPA reviews” and to “provide greater clarity” for stakeholders including states, Tribes, localities, and the public. 85 Fed. Reg. 1685 (Jan. 10, 2020). The Proposed Rule also aims to “promote timely submission of relevant information to ensure consideration of such information by agencies” and “promote better decisions consistent with the national environmental policy set forth in section 101 of NEPA.” *Id.*

Colorado supports the stated goals of increasing collaboration among federal government agencies, reducing unnecessary duplication of work, and creating a more efficient, cost-conscious, and transparent NEPA process.² We also support ensuring environmental reviews under NEPA are informed by the best available science.

With respect to the Proposed Rule, however, Colorado strongly opposes any effort to undermine foundational components of the NEPA review process or to deemphasize NEPA’s congressional mandate of protecting and restoring the environment and supporting public health and welfare. In particular, the Proposed Rule would curtail agencies’ abilities to consider the indirect and cumulative effects of their actions, including effects on the climate and other complex ecological systems. The Proposed Rule would also limit opportunities for public engagement throughout the environmental review process, particularly at critical early stages. As a result of these changes, the Proposed Rule would make informed decision-making less likely to occur. This comment letter will explain why, for these and other reasons, Colorado does not support the Proposed Rule in its current form.

II. COLORADO’S PRIMARY INTERESTS IN THE NEPA REVIEW PROCESS

As Colorado’s population rapidly grows, the state must ensure that projects intended to serve that population also protect the natural environment for current and future generations. For example, the Colorado Department of Transportation (CDOT) prepares environmental analyses for projects involving state and interstate highways, bridges, and multi-modal transportation. Similarly, the Colorado Department of Agriculture (CDA) participates in NEPA reviews for public-land grazing permit renewals and for range improvement projects involving water distribution systems and habitat management. Colorado’s Department of Public Health and Environment (CDPHE) reviews projects for gas and oil leases, transportation, and wastewater infrastructure as part of the NEPA process. The Colorado

² However, Colorado seeks clarification to better understand the criteria for federal agencies’ added flexibility to determine whether to cooperate in state or local environmental impact statements (EISs). 85 Fed. Reg. 1685, 1704 (Jan. 10, 2020) (proposed revision to 40 CFR § 1506.2).

Department of Natural Resources (CDNR) utilizes and participates in NEPA processes for land use and water planning, disaster preparedness, and fish and wildlife protection.

Through early and meaningful involvement in the NEPA process, state agencies help ensure that NEPA reviews are informed by accurate technical and scientific analyses and preserve important natural, historic, and cultural resources in Colorado communities. To this end, Colorado agencies regularly consider direct, indirect, and cumulative impacts on the natural environment and general welfare.³

III. IF FINALIZED, THE PROPOSED RULE WILL LIKELY THREATEN COLORADO'S NATURAL ENVIRONMENT, PUBLIC HEALTH, AND GENERAL WELFARE

Colorado supports making NEPA review more efficient and streamlined. Colorado also supports the Proposed Rule's efforts to clarify language and modernize procedures to the extent that the 1978 regulations do not account for the use of modern technology in regulatory processes.⁴ Colorado appreciates the clarification between tiers to direct an appropriate level of attention and funds to project and plan development processes, as some Colorado endangered fish recovery programs already utilize tiered EISs and environmental assessments (EAs). 85 Fed. Reg. 1685, 1717-18 (Jan. 10, 2020) (proposed revision to 40 CFR §§ 1502.4(d), 1501.11).

Colorado is concerned, however, that various aspects of the Proposed Rule would, if finalized, undermine foundational components of NEPA and threaten Colorado's health, economy and way of life. Specifically, by limiting analysis of indirect and cumulative environmental effects and by narrowing requirements to analyze alternatives, the Proposed Rule will restrict Colorado's ability to protect the natural environment and human welfare in the face of interconnected, large-scale challenges such as climate change. By limiting public disclosures and opportunities for public participation early in the review process, the Proposed Rule will also result in a framework inconsistent with the intentions of the NEPA statute. Therefore, Colorado urges CEQ to withdraw the Proposed Rule and replace it on one that advances the worthy goal behind this initiative without undermining valuable purposes of NEPA.

a. Proposed changes to the meaning of "effects."

The Proposed Rule would redefine "effects" to eliminate explicit requirements to evaluate indirect and cumulative effects or impacts. 85 Fed. Reg. 1707-08 (Jan. 10, 2020). CEQ's current regulations define "cumulative impact" as "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 (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 CFR § 1508.7. The current definition of effects includes "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 CFR § 1508.8 (b).

³ See, e.g., CDOT, NATIONAL ENVIRONMENTAL POLICY ACT MANUAL ch. 9 (Aug. 2017), <https://www.codot.gov/programs/environmental/nepa-program/nepa-manual/ch-9-resource-considerations/view> (highlighting the need to consider indirect and cumulative impacts of multiple projects on various aspects of the environment, including air quality and climate as well as key wildlife areas, such as migration corridors and roost or nesting sites).

⁴ See 85 Fed. Reg. 1692, 1701, 1703, 1705, 1710, 1721, 1722.

CEQ's Proposed Rule strikes these definitions, declaring that "[a]nalysis of cumulative effects is not required," and proposing a new definition of effects would include only effects that "have a reasonably close causal relationship to the proposed actions or alternatives." 85 Fed. Reg. 1728-29 (Jan. 10, 2020). The Proposed Rule also states that "[e]ffects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain." *Id.* at 1729. The Proposed Rule proposes to strike the terms "direct" and "indirect" to "focus agency time and resources." *Id.* at 1708.

The Proposed Rule's new definition will limit analysis and disclosure of cumulative impacts and certain indirect impacts, such as upstream and downstream emissions and the effects of greenhouse gas (GHG) emissions on climate change. The result of these proposed changes is contrary to the policy goals of NEPA, which are based on Congress's recognition of "the profound impact of man's activity on the interrelations of all components of the natural environment . . . [and] the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man." 42 U.S.C. § 4331. Furthermore, these proposed changes contradict federal court precedent. Courts have routinely recognized that analysis of cumulative and indirect effects is essential to fulfilling NEPA's goal of guiding informed decision making in cases involving agency requirements to consider the effects of their actions on greenhouse gas emissions,⁵ water use and quality,⁶ and other aspects of the environment.⁷

i. Air Quality GHG Emissions

Redefining "effects" to eliminate explicit requirements to evaluate indirect and cumulative impacts will deprive agencies and the public of the ability to evaluate the impacts of an action on GHG emissions. Climate change impacts spurred by GHG emissions are inherently cumulative⁸—the critical factor is the

⁵ See, e.g., *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008) ("The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."); *Wilderness Workshop v. U.S. Bureau of Land Management*, 342 F. Supp. 3d 1145, 1155-56 (D. Colo. 2018) ("BLM acted in an arbitrary and capricious manner and violated NEPA by not taking a hard look at the indirect effects resulting from the combustion of oil and gas in the planning area under the RMP. BLM must quantify and reanalyze the indirect effects that emissions resulting from combustion of oil and gas in the plan area may have on GHG emissions.").

⁶ E.g., *Dine Citizens Against Ruining Our Environment v. David Bernhardt*, 923 F.3d 831, 850-51, 856 (10th Cir. 2019) (in failing to consider the cumulative impacts of water use associated with thousands of reasonably foreseeable horizontal wells, BLM did not comply with NEPA requirements and acted in arbitrary and capricious manner); *Cowpasture River Preservation Assoc. v. U.S. Forest Serv.*, 911 F. 3d 150, 173-79 (4th Cir. 2018).

⁷ See, e.g., *National Parks Conversation Assoc. v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019) (finding that production of EIS was required under NEPA where utility project would have affected unique geographic area and historic places along the James River near Jamestown, Virginia); *Te-Moak Tribe of Western Shoshone of Nev. v. United States DOI*, 608 F.3d 592 (9th Cir. 2010) (finding BLM violated NEPA by failing to adequately analyze cumulative impacts on cultural resources); *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 184-85 (4th Cir. 2005) (Navy violated NEPA by failing to consider cumulative effects of military flight operations in airspace over or near a National Wildlife Refuge area that was the winter home for thousands of migratory birds).

⁸ IPCC, CLIMATE CHANGE 2014: SYNTHESIS REPORT (2015), https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf.

total quantity of GHGs in Earth's atmosphere. Courts have repeatedly recognized that, in many situations, agencies are required under NEPA to conduct cumulative and/or indirect impacts analysis for the effects of GHG emissions.⁹

Moreover, the Proposed Rule's refusal to account for the impacts of climate change will conflict with Colorado's GHG reduction efforts. The Colorado legislature and Governor have adopted science-based emissions targets, designed to align our state's actions with the scale and pace of emissions reductions that are needed to mitigate the worst of these impacts. These targets include GHG reduction goals of 50% by 2030 and 90% by 2050 (based on 2005 levels). CO HB 19-1261 (2019).

Unfortunately, CEQ's proposed changes go in the opposite direction, allowing decision-makers to ignore, for example:

- A transportation project's contributions to GHG emissions because those emissions reach geographically remote areas or are a result of a chain of events outside of the project proponent's control;

⁹ *Sierra Club v. Federal Energy Regulatory Commission*, 867 F. 3d 1357, 1374 (D.C. Cir. 2017) (downstream GHG emissions were an indirect effect of FERC authorizing a natural gas pipeline, and therefore, FERC's EIS needed to analyze the significance of this indirect effect by either quantifying the GHG emissions or explaining specifically why it could not have done so); *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008) ("The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."); *Citizens for a Healthy Community v. U.S. Bureau of Land Management*, 377 F. Supp. 1223, 1238-1239 (D. Colo. 2019) (finding BLM took an appropriate hard look at cumulative climate change impacts); *San Juan Citizens Alliance v. U.S. Bureau of Land Management*, 326 F. Supp. 3d 1227, 1242-44, 1248 (D.N.M. 2018) (GHG emissions resulting from consumption of oil and gas are an indirect effect of the development of wells on the area leased by BLM, and therefore, BLM violated NEPA by failing to estimate the amount of such GHG emissions or analyze the impact of such emissions on climate change; BLM further violated NEPA by failing to consider the "broader, significant 'cumulative impact' of the proposed action."); *Wilderness Workshop v. U.S. Bureau of Land Management*, 342 F. Supp. 3d 1145, 1155-56 (D. Colo. 2018) ("BLM acted in an arbitrary and capricious manner and violated NEPA by not taking a hard look at the indirect effects resulting from the combustion of oil and gas in the planning area under the RMP. BLM must quantify and reanalyze the indirect effects that emissions resulting from combustion of oil and gas in the plan area may have on GHG emissions."); *Western Organization of Resource Councils v. U.S. Bureau of Land Management*, No. CV 16-21-GF-BMM, 2018 WL 1475470, at *13 (D. Mont. 2018) ("In light of the degree of foreseeability and specificity of information available to the agency while completing the EIS, NEPA requires BLM to consider in the EIS the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under these RMPs. Without such analysis, the EIS fails to 'foster informed decision-making' as required by NEPA.").

- Cumulative effects of multiple oil and gas leasing decisions if each individual projects' emissions were not considered significant, leaving out crucial impacts to areas already experiencing serious air quality issues;¹⁰ and
- The possible impacts of oil and gas activity in one area on areas outside of geographic boundaries, although air pollution does not respect such boundaries.

ii. Water Quality

Redefining “effects” to eliminate explicit requirements to evaluate indirect and cumulative impacts will similarly deprive agencies and the public of the ability to evaluate the impacts of projects on aquatic and riparian ecosystems that provide water for drinking, agriculture, outdoor recreation, and other industries.

For example, the Proposed Rule will undermine water quality decision-making in the state in the following ways:

- Section 401 of the Clean Water Act requires Colorado to review federal permits and actions and issue water quality certifications to provide reasonable assurance that water quality standards will be met. With a less robust alternatives analysis under NEPA, it is likely that a less protective project alternative will be presented for evaluation as part of 401 certifications. The state will then bear greater costs to formulate conditions that ensure protection of water quality.
- If required to evaluate large water supply projects without the benefit of understanding cumulative effects, the state may impose requirements that are unrealistic because the impact analysis does not consider how future conditions will actually unfold.

iii. Water Supply

The proposed redefinition of “effects” would also impact our state’s and region’s ability to ensure an adequate supply of water resources in the future. For instance, the Colorado River system is the lifeblood of the Intermountain West, supplying water to 40 million people and providing irrigation for four million acres of cropland. As a member of the Upper Colorado River Commission and one of seven states in the Colorado River basin, Colorado is heavily involved in federal planning decisions to determine how federal agencies, states, and other stakeholders should cooperate to address the region’s future water supply demands to meet human consumption, agriculture, and environmental uses.

Modeling and analysis conducted under the existing NEPA regulations account for climate change and its associated cumulative effects. Colorado and other basin states rely on these analyses to identify plausible water availability scenarios and develop strategic processes, such as the Long Term Experimental and Management Plan (LTEMP) for Glen Canyon Dam¹¹ and the Upper Colorado River

¹⁰ For example, the Denver Metro North Front Range (DMNFR) is an ozone nonattainment area that was recently reclassified to “Serious” for failure to attain the 2008 Ozone National Ambient Air Quality Standard (NAAQS). 84 Fed. Reg. 70897 (December 26, 2019).

¹¹ LTEMP is an adaptive management protocol governing operations at Glen Canyon Dam and administered by the Department of Interior’s Bureau of Reclamation.

Basin Drought Contingency Plan (DCP).¹² Absent the ability to evaluate the cumulative and indirect effects of projects within the context of a changing climate, NEPA decisions will be less likely to accurately account for future water supply needs and relevant environmental conditions.

iv. Fish and Wildlife

CDNR and its division, Colorado Parks and Wildlife (CPW), are responsible for conserving and improving habitat for fish and wildlife and managing the state's native fish and wildlife species.¹³ Colorado statutes mandate that CPW evaluate and recommend measures for offsetting anticipated impacts from the construction, operation, or maintenance of water diversion, delivery or storage facilities that require federal permits, licenses, or approval.¹⁴ An estimated 80 percent (350,000 acre-feet of water) of already-planned projects need to be implemented, and many of these still need to go through the permitting process.¹⁵

NEPA's current requirements provide the information necessary to the state's analysis of the appropriate scope of its mitigation recommendations. The Proposed Rule would likely adversely affect the efficacy of these plans and the state's ability to assure the viability of Colorado's fish and wildlife.

v. Land Use Management Planning and Forest Health

With 36 percent of land in Colorado under federal jurisdiction, the long-term, indirect, and cumulative effects of federal land use decisions have enormous implications for the state's ability to realize its natural resource management priorities. By removing or modifying the requirement to account for cumulative and indirect effects at the ecosystem level, the Proposed Rule will impact Colorado's ability to:

- Carry out its wildlife conservation and management objectives;
- Protect declining winter range, migration corridors, and production areas for Colorado's "big game" species such as elk, mule deer, pronghorn, and bighorn sheep – much of which spans or crosses lands not under state jurisdiction, including 35 percent of priority habitat on federal lands;¹⁶ and
- Protect public safety, natural resources, and wildlife by developing natural disaster resiliency plans informed by climate change considerations.

¹² The Colorado River Drought Contingency Authorization Act, Pub. L. No. 116-14, 133 Stat. 850 (2019), requires the Department of Interior to execute contingency water allocation measures laid out in the multi-state DCP agreement.

¹³ COLO. REV. STAT. §§ 24-1-124, 24-33-111; *see* COLO. PARKS & WILDLIFE, STRATEGIC PLAN (2015), <https://cpw.state.co.us/Documents/About/StrategicPlan/CPWStrategicPlan.pdf>.

¹⁴ COLO. REV. STAT. § 37-60-122.2 (2019).

¹⁵ Colorado Water Conservation Board, Colorado's Water Plan (2015), <https://www.colorado.gov/pacific/cowaterplan/plan>.

¹⁶ COLO. PARKS & WILDLIFE, COLO. ACTION PLAN FOR THE IMPLEMENTATION OF DEP'T OF THE INTERIOR SECRETARIAL ORDER 3362: "IMPROVING HABITAT QUALITY IN WESTERN BIG-GAME WINTER RANGE AND MIGRATION CORRIDORS" 6 (Sept. 6, 2019), <https://www.nfwf.org/sites/default/files/rockymountains/Documents/Colorado2020ActionPlan.pdf>.

b. Proposed changes to the meaning of “significant[ly].”

NEPA requires federal agencies to take a “hard look” at the environmental consequences of their decision-making and requires preparation of an EIS for proposals that significantly affect the environment.¹⁷ CEQ regulations currently define “significantly” as requiring consideration of both context and intensity, the latter of which incorporates various factors including “whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” 40 CFR § 1508.27.

The Proposed Rule eliminates “significantly” as a defined term, and replaces the robust definition of “significantly” with the following: “In considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action.” 85 Fed. Reg. 1714 (Jan. 10, 2020) (proposed 40 CFR § 1501.3(b)). Combined with the proposal to specify that even reasonably foreseeable effects “should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy casual chain,” 85 Fed. Reg. 1708 (Jan. 10, 2020), this revision would allow agencies to downplay and ignore the significance of certain air, water, and waste impacts from the types of projects mentioned in this comment letter. These changes would justify the exclusion of important environmental impacts, including GHG emissions and climate change considerations, from consideration during NEPA reviews.

c. Threshold for applying NEPA.

The Proposed Rule would exclude from the NEPA process “non-Federal projects with minimal federal funding or minimal Federal involvement.” 85 Fed. Reg. 1709 (Jan. 10, 2020). While the impact of this change is unclear, Colorado notes that if a de minimis threshold is applied to all projects, the small efficiencies gained by removing small and simple projects from NEPA review would be overwhelmed by the dangerous lack of scrutiny for small, yet highly impactful projects.

This change may reduce the number of infrastructure, recreation, and water supply projects subject to environmental review without limiting the project proponent’s responsibility to mitigate any impacts on state aquatic or wildlife resources.

This provision should be much more narrowly defined and targeted to ensure that major projects with significant environmental impacts do not evade NEPA’s public transparency solely because the federal government is not the primary source of project funding.

d. Time and page limits.

¹⁷ 42 U.S.C. § 4332 (2) (C); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *National Parks Conversation Association v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019). The Proposed Rule acknowledges NEPA’s emphasis on ensuring agencies make informed decisions and provide public disclosure regarding actions significantly affecting the quality of the human environment. 85 Fed. Reg. 1712 (proposed 40 CFR § 1500.1(a)).

Environmental reviews require complex consideration and analysis. The presumptive one-size-fits-all time frames and page limits in the Proposed Rule do not account for this fact or otherwise factor in the realities of agency staffing or funding, nor do they consider the vast range of projects undertaken under NEPA. As decades of NEPA case law has shown us, federal decisions are typically overturned due to the failure of the environmental review to properly identify and consider the environmental effects of the action against other non-environmental effects, not the substance of the decision.¹⁸

Understaffed federal agencies striving to stay within time and page limits may produce incomplete NEPA documents that fail to withstand judicial scrutiny, likely resulting in even greater project delays and increased litigation. Rather than arbitrarily limiting an agency's consideration and frustrating the foundational purpose of NEPA to require thoughtful decision-making, the federal government might consider allocating the staffing resources necessary to ensure that environmental reviews are completed in a timely manner.

The Proposed Rule will:

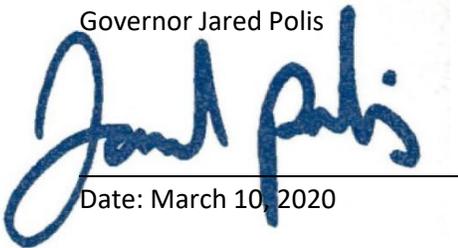
- Weaken opportunities for public involvement by constraining time for public input, counter to the collaborative work done in Colorado, and thereby narrow opportunities to earn trust with local partners, which allows for integrated solutions and sounder decision making;
- Reduce one of NEPA's greatest efficiencies—facilitating compliance with other environmental laws—by imposing arbitrary time limits without contemplating the time required to comply with these other laws; and
- Undermine the flexibility of NEPA by requiring agencies to obtain written approval from a “senior agency official” to exceed page or time limits.

IV. CONCLUSION

For the reasons stated above, Colorado urges CEQ to withdraw the Proposed Rule.

STATE OF COLORADO

Governor Jared Polis



Date: March 10, 2020

Attorney General Philip J. Weiser



Date: March 10, 2020

¹⁸ *Wildearth Guardians v. United States BLM*, 870 F.3d 1222, 1226 (10th Cir. 2017); *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072-79 (9th Cir. 2002); *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1157-59 (9th Cir. 1997).