

U.S. Chamber of Commerce Led Business Community Comments on the  
Council on Environmental Quality's Proposed Rule,  
"National Environmental Policy Act Implementing Regulations Revisions Phase 2"

Docket ID No. CEQ-2023-0003

Agricultural Retailers Association  
American Chemistry Council  
American Exploration & Mining Association  
American Exploration & Production Council  
American Farm Bureau Federation  
American Forest Resource Council  
American Fuel & Petrochemical Manufacturers  
American Gas Association  
American Public Gas Association  
American Road & Transportation Builders Association  
Associated Builders and Contractors  
Associated General Contractors of America  
Association of American Railroads  
Center for LNG  
The Fertilizer Institute  
Hardwood Federation  
Independent Petroleum Association of America  
Interstate National Gas Association of America  
National Cattlemen's Beef Association  
National Mining Association  
National Ocean Industries Association  
National Rural Electric Cooperative Association  
National Stone, Sand & Gravel Association  
Natural Gas Supply Association  
Public Lands Council  
U.S. Chamber of Commerce

September 29, 2023

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Via [WWW.REGULATIONS.GOV](http://WWW.REGULATIONS.GOV)  
Docket ID No. CEQ-2023-0003

Brenda Mallory  
Chair  
Council on Environmental Quality  
730 Jackson Place NW  
Washington, DC 20503

Re: Notice of Proposed Rulemaking, Council on Environmental Quality; National Environmental Policy Act Implementing Regulations Revisions Phase 2 (88 Fed. Reg. 49,924, July 31, 2023)

Dear Chair Mallory:

The undersigned associations (collectively, the “Coalition”) offer the following comments in response to the Council on Environmental Quality’s (“CEQ’s”) proposed National Environmental Policy Act (“NEPA”) Implementing Regulations Revisions Phase 2 (“Proposed Rule”).<sup>1</sup> Our organizations represent a diverse set of economic sectors that form the backbone of the American economy – agriculture, energy, construction, mining, forestry, manufacturing, transportation, and other sectors.

We support the goals of NEPA to inform federal decision-making and the public’s understanding of the potential environmental impacts of federal actions to foster effective engagement in the federal decision-making process. Since the statute’s enactment, NEPA has fulfilled its drafters’ goals by integrating environmental considerations into federal decision-making. A fair and efficient federal permitting system is also essential for timely investment to meet a wide array of critical needs and is consistent with NEPA. The Biden Administration and the business community agree on many of these critical needs, including addressing the digital divide in rural and large urban areas; facilitating construction of public transit to connect communities to job centers; upgrading ports; enhancing domestic agricultural production; mining critical and strategic minerals; building out water and energy infrastructure, including power lines to transmit electricity and pipelines transporting natural gas, low greenhouse gas intensity hydrogen, and carbon dioxide (“CO<sub>2</sub>”), that supports a strong economy and progress on the climate challenge; and many other national enterprises essential to meeting the needs of our modern society.

The business community represented by the Coalition has a long history of consistent engagement in the development of NEPA regulations and guidance with two goals in mind: efficient and transparent federal permitting, coupled with appropriate, effective, and meaningful disclosure and understanding of environmental impacts, consistent with federal law. Four key principles should guide CEQ’s efforts:

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<sup>1</sup> National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924, July 31, 2023 [hereinafter “Proposed Rule”].

- **Predictability:** Project developers and financiers must have an appropriate level of certainty regarding the scope and timeline for project reviews, including any related judicial review.
- **Efficiency:** Interagency coordination must be improved to optimize public and private resources to support better environmental and community outcomes.
- **Transparency:** Project developers and the public must have visibility into the project permitting milestones and schedule through an easily accessible public means.
- **Stakeholder Input:** All relevant stakeholders must be adequately informed and have the opportunity to provide input within a reasonable and consistent timeframe.

Broad support for improvement to the NEPA process has accelerated in recent years to address long-acknowledged frustrations with the burdens that needlessly long and complex reviews place on the economy. Administrations of both parties, over decades, have identified the need for faster and more efficient permitting decisions, and have issued executive orders and guidance attempting to expedite federal decision-making and accelerate project delivery. Timely, appropriately focused permitting processes are essential to successfully implement the investments of the 2021 Infrastructure Investment and Jobs Act, the CHIPS and Science Act of 2022, and the 2022 Inflation Reduction Act to facilitate critical projects.

Recognition that an overly complex federal permitting process often impedes critical projects culminated in the recently enacted Fiscal Responsibility Act of 2023 (“FRA”), which included significant amendments to NEPA.<sup>2</sup> This landmark law, containing the first major amendments to NEPA since it was enacted in 1970, is intended to promote timely, concise, and effectively coordinated reviews as an answer to a process that has become needlessly lengthy, inefficient, and unduly driven by litigation.

If finalized as proposed, the Proposed Rule would fail to respect the strong bipartisan spirit that drove the FRA’s NEPA amendments and would fail to effectively improve and further reform the permitting process. Respectfully, the proposal is a step in the wrong direction. While it adopts, as it must, elements of the FRA, many of its provisions contradict the FRA’s intent: to create a more efficient, predictable, and straightforward federal review process.

Further, the Proposed Rule would revise the existing NEPA regulations in a way that would seek to drive substantive outcomes favored by this Administration’s policy priorities. This approach contravenes decades of case law, agency practice, and consistent government interpretation that achieved the fulfillment of NEPA’s intent through a rigorous process to enable informed and transparent decisions, all without tipping the scales in favor of particular substantive outcomes. Favoring such particular outcomes would be short-sighted and would re-orient the application of a landmark statute in a fashion that would ultimately be destabilizing and self-defeating. If finalized in its current form, the Proposed Rule would portend a never-ending cycle of regulatory reversals between Administrations, eroding public confidence and depriving the business community and the public of the predictability needed for substantial investment in long-term projects.

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<sup>2</sup> See Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38 (2023).

The Proposed Rule would increase the complexity of analysis that agencies will need to perform, reducing the efficiency of the environmental review process, delaying decision-making, and ultimately blocking the realization of critical investments both envisioned by recently enacted legislation and otherwise needed.<sup>3</sup> Such delays and inefficiency would counter the FRA's clear intent and would drive increased litigation and delays. In considering the pros and cons of its potential revisions to the NEPA regulations, CEQ should continue to adhere to NEPA's statutory text, authoritative case law, and decades of beneficial agency practice. In doing so, CEQ can further a durable, defensible, and lasting approach to evaluating the environmental effects of federal agency action.

The Coalition and the members we represent are committed to working constructively with CEQ to develop implementing regulations that would properly assist federal agencies in complying with NEPA. However, the Proposed Rule neither removes unnecessary barriers to projects essential to the United States' economy and security nor adheres to the established, permissible limits of NEPA analysis. As detailed below, federal agencies conducting NEPA reviews under the Proposed Rule's new and unfamiliar requirements would take longer to arrive at their decisions and would face a considerably heightened risk of litigation that could delay and invalidate those decisions. Moreover, because CEQ has failed to remove barriers to projects – and in fact has proposed erecting new barriers to project completion – important projects would be adversely impacted, including those favored by this Administration.

For these reasons, the Proposed Rule should be withdrawn.

## I. SUMMARY

CEQ should withdraw the Proposed Rule and modify it in accordance with these comments before considering promulgating a new proposed rule for additional public review and comment. These comments address four central flaws in the Proposed Rule:

- **The Proposed Rule is written to drive policy outcomes.** In so doing, the Proposed Rule exceeds the bounds of the letter and intent of NEPA.
- **The Proposed Rule fails to fulfill the specific requirements and overall purpose of the Fiscal Responsibility Act.** The FRA amended NEPA to address permitting delays. The Proposed Rule would only exacerbate delays and complexity driven by new requirements that would inevitably be followed by litigation.
- **The Proposed Rule would add new requirements that would further delay and complicate reviews, including requirements that are outside the permissible bounds of the statute itself.** In addition, the Proposed Rule adds a new global dimension to

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<sup>3</sup> See Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58, 135 Stat. 429 (2021); Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (2022); CHIPS and Science Act of 2022, Pub. L. No. 117-167, 136 Stat. 1366 (2022).

required environmental analysis, improperly stepping away from the statute’s focus on “present and future generations of Americans.”

- **The Proposed Rule would remove key process improvements from the 2020 NEPA rule.**

If made final, the Proposed Rule would not fix the widely acknowledged project delays caused by federal NEPA reviews, delays that continue to plague critical projects, including projects needed to fulfill Congress’ recent investments in energy and infrastructure. For example:

- New York’s Bayonne Bridge project Environmental Impact Statement (“EIS”) was 5,000 pages long and cost \$2 million to produce. The project took a decade from conception to completion.<sup>4</sup>
- The federal review for the Boardman to Hemingway Transmission Line Project in Oregon took over nine years. The 500-kilovolt line will run approximately 290 miles, transmitting up to 1,000 megawatts of renewably generated power between Idaho and Oregon.<sup>5</sup>
- Mining companies, central to new energy technologies that rely on critical and strategic minerals, face 7-10 years for U.S. permitting as compared to about two years in Canada and Australia.<sup>6</sup>
- The Mount Hope minerals project in Nevada faced permitting delays spanning a 17-year period so far, including litigation that, for the second time, resulted in recent revocation of a key permit.<sup>7</sup>
- Almost \$2 trillion in goods shipped in and out of the U.S. each year are dependent on our waterways. To keep commerce flowing, we need to reduce port congestion, but it takes almost eight years just to get permits for port navigation improvements.<sup>8</sup>

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<sup>4</sup> Sasha Mackler & Michele Nellenbach, *America’s National Climate Strategy Starts with NEPA*, BIPARTISAN POLICY CENTER (Jan. 8, 2020), <https://bipartisanpolicy.org/blog/americas-national-climate-strategy-starts-with-nepa/>; see also Sam Roberts, *High Above the Water, but Awash in Red Tape*, N.Y. TIMES, Jan. 2, 2014, at A-14; <https://www.nytimes.com/2014/01/03/nyregion/long-review-of-bayonne-bridge-project-is-assailed.html>.

<sup>5</sup> See Bureau of Land Mgmt., Boardman to Hemingway Project (Jan. 7, 2021), <https://eplanning.blm.gov/eplanning-ui/project/68150/510> (describing project timelines).

<sup>6</sup> See Peter Cook, et al., *Getting Critical Minerals Right*, THE BREAKTHROUGH (June 29, 2023), <https://thebreakthrough.org/issues/energy/getting-critical-minerals-right>.

<sup>7</sup> See 72 Fed. Reg. 9,579 (Mar. 2, 2007) (noticing Bureau of Land Management’s intent to prepare a draft environmental impact statement for the mine); see also Order, Great Basin Res. Watch v. U.S. Dep’t of the Interior, No. 3:19-cv-00661 at 8 (D. Nev. Mar. 31, 2023) (explaining that “[b]ecause BLM has not prepared any analysis regarding whether valuable mineral deposits exist on the PWR 107 lands, the Court finds that it is appropriate to remand to the agency so that it can conduct the proper analysis in the first instance”).

<sup>8</sup> Eight years is the average time it took to approve port projects based on projects covered from 2010–2018 by CEQ’s timeline report. CEQ, EIS Timelines (last accessed Sept. 26, 2023), <https://ceq.doe.gov/nepa-practice/eis-timelines.html>.

- The Truckee Meadows Flood Control project in Nevada took over sixteen years to permit.<sup>9</sup> Some federal courts continue to impose increasingly onerous and novel NEPA requirements on federal agencies.<sup>10</sup>
- The Moxa Arch Infill Project, comprising further development in an existing oil and gas field, was cancelled after eight years as technology had outpaced the NEPA process, resulting in restarting the effort under a new proposed action, to then only be paused given the erosion of commodity pricing.<sup>11</sup>

These trends must be reversed – not exacerbated.

## **II. CEQ’s proposed revisions aim at driving favored outcomes, contrary to the letter and intent of NEPA, which directs consideration of environmental issues along with other critical concerns to foster informed decision-making.**

Two basic principles are fundamental to NEPA: (1) the statute requires agencies to analyze the environmental consequences of their actions;<sup>12</sup> and (2) “NEPA itself does not mandate particular results, but simply describes the necessary process.”<sup>13</sup> These dual principles, embedded in the text of the statute, are further confirmed by the statute’s legislative history and have been repeated in many thousands of instances over decades in agency documents, rulemakings, litigation, and court decisions from the federal district courts to the Supreme Court.<sup>14</sup> In this regard, we respectfully submit that CEQ’s Proposed Rule contains aspects that are ahistorical and that contradict established principles – seeking to make achievement of this Administration’s particular vision of environmental goals the driving force of NEPA.

Although Section 101 of NEPA articulates broad forward-looking principles, they must necessarily be read in light of the rest of the statute. Congress intended the provisions of

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<sup>9</sup> *Id.*

<sup>10</sup> *See, e.g.*, *Eagle Cnty Colo. v. Surface Transp. Bd.*, \_\_ F. 4th \_\_, 2023 WL 5313815 at \*5 (D.C. Cir. Aug. 18, 2023) (in challenge to construction of 80-mile railway connecting termini in Utah, court held EIS to be inadequate because, inter alia, it did not consider effects of delivering oil by rail on the Louisiana Gulf Coast); *Nat’l Parks Conservation Ass’n v. Semonite*, 916 F.3d 1075, at 1085–86 (D.C. Cir. 2019) (explaining that U.S. Army Corps of Engineers had failed to resolve controversy over the effects of a series of proposed electrical transmission towers across the James River); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 985 F.3d 1032, 1053 (D.C. Cir. 2021) (concluding that it was not abuse of discretion to require preparation of EIS for one mile of pipeline).

<sup>11</sup> Energy Permitting Oversight Hearing: Before the U.S. Senate Committee on Energy and Natural Resources at 5 (2023) (statement of Paul Ulrich, Vice President of Jonah Energy LLC), <https://www.energy.senate.gov/services/files/9F6B0D8D-8C82-4CAA-BA65-B2D85D8C2077>.

<sup>12</sup> *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (citing *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463, 481 (2nd Cir. 1971)).

<sup>13</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). *See also* *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756–57 (2004); *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 371 (1989); *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 558 (1978).

<sup>14</sup> *See, e.g.*, Hearing before the Committee on Interior and Insular Affairs, United States Senate, 1st Session, S.1075, S.237, S. 1752 (April 16, 1969); *Public Citizen*, 541 U.S. at 756.

Section 102 to shape an agency’s decision-making to further, where practicable, the statute’s lofty goals; such goals not to be the driving force of agency action or to provide additional authority for agencies to act to generate environmentally-preferable outcomes.<sup>15</sup> In Section 101, Congress explained that its purpose was to “create and maintain conditions under which man and nature can exist in productive harmony, and *fulfill the social, economic, and other requirements* of present and future generations of *Americans*.”<sup>16</sup> In other words, Congress intended to provide for review of environmental considerations, which were often not considered at all by federal agencies at the time NEPA was passed, to ensure they were considered *along with* other considerations, in appropriate circumstances, as a means to fostering Congressional policy.

Section 101 incorporates notions of practicability and “other essential considerations of national policy.”<sup>17</sup> NEPA’s policies are “supplementary” to agency authorities, which reflect those “other essential considerations.”<sup>18</sup> As recognized in numerous decisions issued since NEPA’s enactment, NEPA exists to inform the public and federal decision-makers about the potential environmental effects of proposed actions and requested authorizations, but it does not alter the limits of an agency’s “delegated authority” from Congress.<sup>19</sup> NEPA neither expands an agency’s statutory jurisdiction nor gives it the legal ability to take or compel action beyond the scope of its otherwise-established statutory mandate.<sup>20</sup>

In proposing NEPA regulations that would drive policy outcomes and impose substantive requirements on federal agencies, such as those related to mitigation, CEQ would run afoul of the Supreme Court’s direction that absent clear congressional authorization, agencies cannot claim the power to make decisions of vast economic and political significance.<sup>21</sup> An agency cannot “effect[] a fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation’ into an entirely different kind.”<sup>22</sup> NEPA mandates that federal agencies describe the “environmental impact of the proposed action”<sup>23</sup> and discuss

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<sup>15</sup> See *Methow Valley*, 490 U.S. at 350; *Kleppe*, 427 U.S. at 409 (quoting Conference Report on NEPA, 115 Cong. Rec. 40416 (1969)) (NEPA section 102(2)(C) directs “all agencies to assure consideration of the environmental impact of their actions in decisionmaking”).

<sup>16</sup> 42 U.S.C. § 4331(a) (emphasis added).

<sup>17</sup> 42 U.S.C. § 4331(b).

<sup>18</sup> 42 U.S.C. § 4335.

<sup>19</sup> See, e.g., *Sierra Club v. Fed. Energy Regul. Comm’n*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) and concluding that NEPA is limited by the statutory authority delegated to agencies).

<sup>20</sup> See *Sierra Club*, 867 F.3d at 1373; *Int’l Brh. of Teamsters v. U.S. Dep’t of Transp.*, 724 F.3d 206, 217 (D.C. Cir. 2013) (holding that an “agency lacks authority to impose the [NEPA] alternatives proposed by the Teamsters and those alternatives would go beyond the scope of the [program under review]”).

<sup>21</sup> *Biden v. Nebraska*, 600 U.S. \_\_\_, 143 S. Ct. 2355 (2023); see also *Texas v. Nuclear Regul. Comm’n*, 78 F.4th 827, 844 (5th Cir. 2023) (disposal of nuclear waste is issue of great economic and political significance, requiring clear delegation of authority from Congress); *N. Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 299 (4th Cir. 2023) (regulation of bycatch, intruding on states’ authority to manage fisheries in their own waters, would have enormous impact on recreational and commercial fishing industries, thus requiring clear delegation of authority from Congress).

<sup>22</sup> *West Virginia v. EPA*, 142 S.Ct. 2587, 2612 (2022) (quoting *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)).

<sup>23</sup> 42 U.S.C. § 4322(c)(i).

“any adverse environmental effects, which cannot be avoided.”<sup>24</sup> But NEPA does not instruct agencies to consider some environmental effects as more meaningful than others, does not instruct agencies to downplay the effects of favored projects with perceived climate benefits, and does not give CEQ substantive authority to direct that agencies take certain substantive actions.

CEQ’s Proposed Rule would thus fundamentally revise NEPA from being a procedural statute focused on the analysis of effects and alternatives to a substantive statute that all but formally requires agencies to prefer or fast-track certain types of projects and impose certain types of substantive requirements. If Congress had intended NEPA to be the statutory vehicle for specific policy outcomes or CEQ to be enabled with substantive authority, it certainly could have amended NEPA and other statutes to instruct agencies to pursue those outcomes.<sup>25</sup> It did not, and when Congress amended NEPA in the FRA it continued to focus on the process whereby effects and alternatives are identified, considered, and disclosed – *not* on substantive outcomes.

Despite clear signals from the Supreme Court<sup>26</sup>, the Proposed Rule is replete with specific provisions intended to achieve favored environmental outcomes at the expense of other considerations, contrary to the history and plain language of NEPA. Transforming NEPA in this fashion into a substantive statute would rewrite the law – and greatly augment CEQ’s regulatory powers – in a manner that is not authorized by the statute and would warrant rejection under the Court’s precedent on statutory interpretation.

**A. CEQ should retain the current “Purpose & Policy” provision of the regulations at 40 C.F.R. Part 1500.**

The Proposed Rule would make substantial revisions to the “Purpose & Policy” section of the current regulations, removing the explanation of NEPA’s process requirements. Instead, CEQ inserts language that portrays NEPA’s statutory policy goals as the driving force in agency decision-making, without recognition that NEPA does not compel particular outcomes, but rather uses process to foster good decision-making by ensuring that potential environmental impacts are evaluated along with a wide range of other interests – interests that may, or may not, be reflected in the NEPA analysis which focuses on environmental matters.<sup>27</sup> While CEQ acknowledges in the preamble that NEPA is a procedural statute, CEQ rejects retaining that language because it “may suggest that NEPA mandates a rote paperwork exercise.”<sup>28</sup> With the Proposed Rule, CEQ substitutes this Administration’s purposes for NEPA’s statutory purposes, which are achieved through the well-understood Section 102 review process.<sup>29</sup>

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<sup>24</sup> *Id.* § 4322(c)(ii).

<sup>25</sup> See *West Virginia*, *supra* note 22, at 2613. There is no indication in NEPA that the CEQ is to use its role to shape substantive policy outcomes at other agencies; that power is absent from the text of NEPA.

<sup>26</sup> See *West Virginia*, *supra* note 22, at 2612.

<sup>27</sup> Proposed Rule, at 49,966–68.

<sup>28</sup> Proposed Rule, at 49,930.

<sup>29</sup> Congress’s policy statements in Section 101 are effectuated through the process established in Section 102. To alter the fundamental Section 102 process would be contrary to *how* Congress intended NEPA’s purpose to be achieved. See *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (*per curiam*) (“[N]o legislation pursues its



CEQ overstates its case. The current NEPA rule does not, as CEQ asserts in its preamble, take an “inappropriately narrow view of NEPA’s purpose . . . .”<sup>30</sup> The current regulations articulate the policy goals of NEPA, straight from Section 101 of the statute, with no need for revision.<sup>31</sup> The current rule combines those policy goals with a full explanation of how the statute actually works – that NEPA creates procedural requirements to foster consideration of those policy goals without mandating “particular results or substantive outcomes.”<sup>32</sup> According to the current rule and the statute itself, NEPA’s goal is to “foster excellent action” by ensuring that environmental considerations are taken into account along with other important interests.<sup>33</sup> Finally, and critically, the current rule provides the public and NEPA practitioners with an understanding of how NEPA is implemented, the purpose of the regulations, and the critical goals of “timely and efficient decision making.”<sup>34</sup>

If the Proposed Rule is finalized in its current form, CEQ’s effort to achieve particular policy goals through the NEPA process beyond the statute’s scope is certain to expose more projects to increased litigation risk. The Proposed Rule would create new standards and new requirements that potential plaintiffs and courts would spend decades interpreting, generating much needless uncertainty.

Removal of this statute-based and precedent-based language from the current rule would disserve the public, as well as the mandates and goals of the FRA, by re-framing the federal obligation without the context of key statutory requirements.<sup>35</sup> CEQ should retain the current rule’s articulation of “purpose and policy” as a balanced and objective statement of the law.

**B. The Proposed Rule language strays outside the permissible boundaries of NEPA by dictating requirements designed to achieve a particular policy outcome.**

While nominally agreeing that NEPA is a procedural statute, yet removing references to its procedural nature in the Proposed Rule, CEQ’s Proposed Rule attempts to ensure outcomes it perceives as environmentally preferable. These provisions do not comport with the text of the statute and should not be included in the final rule.

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purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume *whatever* furthers the statute’s primary objective must be the law.”) (emphasis in original).

<sup>30</sup> Proposed Rule, at 49,930.

<sup>31</sup> 40 C.F.R. § 1500.1 (Purpose and Policy).

<sup>32</sup> *Id.* at § 1500.1(a). See *Methow Valley*, 490 U.S. at 350 (1989) (explaining that “it is now well settled that NEPA itself does not mandate particular results, but simply the necessary process.”).

<sup>33</sup> *Id.* See *Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 200 (D.C. Cir. 2017) (approving of the Department of Energy’s decision not to consider certain data that would not provide “meaningful information” about environmental impacts).

<sup>34</sup> *Id.* at § 1500.1(b).

<sup>35</sup> The FRA amended NEPA to explain that only “reasonably foreseeable” effects of proposed actions need be analyzed. In doing so, Congress sought to clarify that “an agency need not evaluate all effects of a proposed action, but rather only those effects that are “reasonably foreseeable.”” Congressional Record, Fiscal Responsibility Act of 2023, H2704 (May 21, 2023) (statement of Rep. Westerman).

**1. The proposed “environmentally preferable” alternative would create new requirements & litigation risk.**

CEQ proposes a new requirement that would create new complexity for overburdened federal agencies and a new opportunity for litigation: the identification of “the environmentally preferable alternative or alternatives.”<sup>36</sup> In proposed regulatory text, CEQ explains that the “environmentally preferable alternative” “*will* best promote the national environmental policy . . . by maximizing environmental benefits, such as addressing climate change-related effects or disproportionate and adverse effects on communities with environmental justice concerns; protecting, preserving, or enhancing historic, cultural, Tribal, and natural resources, including the rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders; or causing the least damage to the biological and physical environment.”<sup>37</sup> But by emphasizing that agencies should focus on “maximizing” perceived environmental benefits, CEQ distracts from NEPA’s goal of identifying and evaluating reasonably foreseeable environmental effects of the proposed action and its alternatives.

To be sure, substantive considerations can be relevant to the alternatives analysis to the proposed action. These issues should be properly considered in that analysis – as a means of *comparing* the environmental impacts of action and no action alternatives. However, this new proposed requirement is likely to lead agencies far beyond the requirements of NEPA by directing agencies to incorporate these considerations into the development of the alternative actions themselves, suggesting that agencies look for opportunities to create “benefits,” above and beyond the established requirement to consider mitigation, in the formulation of alternatives to a proposed project.<sup>38</sup> This further analysis would mean delay of the agency’s ultimate decision on the project, and further is likely to lead to litigation if project opponents seek to challenge an agency’s identification of an environmentally preferable alternative. In other words, CEQ has proposed to create a new requirement that would impose significant new obligations on agencies and applicants – obligations that would, without a doubt, result in litigation challenging the sufficiency of an agency’s efforts that would render agency decisions more vulnerable to invalidation.

Although CEQ states that the “no action” alternative, the proposed action, or a reasonable alternative “may be” the environmentally preferable alternative, the Proposed Rule fails to acknowledge that it effectively establishes the substance of what the alternative must contain – something without precedent or authority under NEPA. Similarly, CEQ notes that the regulations have “always required agencies to identify the environmentally preferable alternative in the ROD [record of decision].”<sup>39</sup> While that requirement appears in the original 1978 regulations, that longstanding obligation does not impose additional subjective requirements on the federal agencies to develop an environmentally preferable alternative

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<sup>36</sup> Proposed Rule, at 49,977 (proposed § 1502.14(f)).

<sup>37</sup> *Id.* (emphasis added).

<sup>38</sup> This new requirement is also in addition to the direction in CEQ’s Interim Guidance on Consideration of Greenhouse Gas Emissions and Climate Change. In the Interim Guidance, CEQ tells agencies to identify alternatives with the least net GHG emissions. 88 Fed. Reg. 1196, 1203 (January 9, 2023).

<sup>39</sup> Proposed Rule, at 49,949.

based on enumerated substantive requirements. It merely requires the agencies to identify the alternative, developed to meet the project's purpose and need, considered "environmentally preferable" when balancing a host of factors including "economic and technical considerations and agency statutory missions."<sup>40</sup>

This new requirement is contrary to NEPA, decades of case law, and the intent and requirements of the FRA. It is axiomatic that consideration of the reasonable range of alternatives to be considered is dictated by the "purpose and need" of the proposed action. The 2020 Rule<sup>41</sup> provisions codified longstanding case law by tailoring the purpose and need of the federal action to the agency's relevant statutory authority and, where a non-federal project proponent is seeking a federal action, to the goals of a non-federal applicant that is planning and building the project.<sup>42</sup> By clearly defining the purpose and need of a proposed federal action, agencies focus on "real alternatives," as anticipated by the 1978 rule, that respond to the non-federal request for action and are within the agency's jurisdiction to implement.<sup>43</sup> "An agency cannot redefine the goals of the proposal that arouses the call for action;" rather, "it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process."<sup>44</sup> CEQ's new proposed requirement, to identify an alternative that "*will* best promote the national environmental policy," does not comport with the statute's direction to consider "alternatives to the proposed action" or with years of case law.

CEQ's Proposed Rule appears to build upon CEQ's explanation in its 2021 proposed rule that agencies should have the "discretion" to base purpose and need, and therefore consideration of alternatives, on such things as the "desired conditions on the landscape or other environmental outcomes, and local economic models, as well as the applicant's goals."<sup>45</sup> However, NEPA "does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them."<sup>46</sup>

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<sup>40</sup> 40 C.F.R. §§ 1505.2(b) (2022) (2021) (1992). The original NEPA regulations are referred to herein as the "1978 Regulations," although the 1992 published version is cited.

<sup>41</sup> See Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) [hereinafter "2020 Rule"].

<sup>42</sup> In this Proposed Rule, CEQ compounds the error of its 2022 Final Rule in which the agency reverted to the 1978 definition of "purpose and need" rather than retaining language codifying the well-established principles that "purpose and need" must be tailored to the agency's statutory authority and the goals of a non-federal applicant that is planning and building the project. See National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757, 55,760 (proposed Oct. 7, 2021); 87 Fed. Reg. 23,453, 23,457 (Apr. 20, 2022) [hereinafter "2022 Rule"]. Despite CEQ's reversion to the 1978 language, these principles remain controlling.

<sup>43</sup> 40 C.F.R. § 1500.2(b) (2019). For the same reasons, CEQ should eliminate language in proposed § 1502.14(a) that agencies "may include reasonable alternatives not within the jurisdiction of the agency." If the agency has no authority to implement the alternative, it is unreasonable and should not be considered. Including such an alternative is the definition of a paperwork exercise that will tax limited agency time and resources while serving no legitimate purpose.

<sup>44</sup> *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991). See also *City of Grapevine, Tex. v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (quoting *Busey*, 938 F.2d at 197–98) ("where a federal agency is not the sponsor of a project, 'the Federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project'").

<sup>45</sup> 87 Fed. Reg. at 23,458.

<sup>46</sup> *Busey*, 938 F.2d at 196.

This aspect of the Proposed Rule falls outside the limits of NEPA, which does not create regulatory authority or change the underlying statutory authority of federal agencies.<sup>47</sup> Furthermore, if made final, this aspect of the Proposed Rule is likely to increase litigation risk faced by agencies, and therefore non-federal projects, as it would provide a new avenue for project opponents to allege deficiencies in NEPA compliance as agencies attempt to follow this new directive.

## **2. The Proposed Rule puts its thumb on the scale in favor of certain types of projects.**

For the first time, CEQ proposes regulations that would embed consideration of impacts to specific types of resources and communities – in particular, climate and environmental justice and Tribal communities and interests – in many aspects of the NEPA process, and in a way that inappropriately privileges certain types of projects and creates additional hurdles for others, thereby picking winners and losers.<sup>48</sup> Under the current regulations, these types of impacts and interests already are considered by federal agencies (and by applicants for federal authorizations or funding) as appropriate to the facts of a proposed project. By weaving requirements related to specific resources and impacts throughout the regulations, the Proposed Rule would demand an analysis intended to favor certain types of projects rather than ensuring an objective, fair, and efficient process that fosters good decision-making and will stand the test of time, regardless of the type of project or potential impact before a federal agency.

The Proposed Rule would inappropriately make climate change, environmental justice, and Tribal interests the drivers of decision-making by calling them out specifically in many portions of the Proposed Rule in a way that favors certain types of projects and disfavors other projects that would also benefit from more expeditious reviews.<sup>49</sup> CEQ has identified no

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<sup>47</sup> See *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 100 (1983) (explaining that “NEPA does not require agencies to adopt any particular internal decisionmaking structure”); see also *State Farm*, 463 U.S. at 43 (explaining that agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider”).

<sup>48</sup> Under the 1978 NEPA regulations, consideration of the degree of impacts to specific types of resources was relevant to the question of whether impacts might be “significant” so as to require an EIS. 40 C.F.R. § 1508.27(b) (1978). CEQ again proposes that approach. See Proposed Rule, at 49,935. In addition, CEQ proposes to embed this Administration’s priorities in many more aspects of the proposed regulations, as discussed herein.

<sup>49</sup> This approach mirrors CEQ’s misguided Interim Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, which recommends a skewed analytical framework for review of certain infrastructure and renewable energy projects versus other types of projects. CEQ Chair Brenda Mallory put it plainly when she said: “These updated guidelines will provide greater certainty and predictability for green infrastructure projects, help us grow our clean energy economy, and help fulfill President Biden’s climate and infrastructure goals.” Press Release, White House, Biden-Harris Administration Releases New Guidance to Disclose Climate Impacts in Environmental Reviews (Jan. 6, 2023) <https://www.whitehouse.gov/ceq/news-updates/2023/01/06/biden-harris-administration-releases-new-guidance-to-disclose-climate-impacts-in-environmental-reviews/>). Such statements evince CEQ’s stated intention to advance a particular outcome, by picking winners and losers, rather than to develop a method of impartial review that provides appropriate “certainty and predictability” for *all* environmental analyses, consistent with NEPA and the Administrative Procedure Act.

statutory authority that allows it to direct consideration of certain types of impacts or give more weight to particular impacts.

For example, in addressing to how to handle “beneficial and adverse impacts,” CEQ notes that certain actions may have short-term adverse impacts and long-term beneficial impacts, like carbon emissions attributable to an installation of a renewable energy project or a forest restoration project that displaces species, and summarily instructs that an EIS would not be required for such actions.<sup>50</sup> Proposed Section 1502.15(b) again singles out one resource, climate, by proposing to require agencies to use high-quality information to “describe reasonably foreseeable environmental trends, including anticipated climate-related changes to the environment.”<sup>51</sup> In another example, in proposed Section 1500.2(e), CEQ identifies climate and environmental justice as examples of factors that should be addressed in alternatives, rather than allowing the agencies to determine what sorts of impacts are relevant to selecting alternatives in a particular situation. Also, CEQ expects agencies to consider how the project, or project alternatives, protects against climate risk, including “wildfire risk, extreme heat and other extreme weather events, drought, flood risk, loss of historic and cultural resources, and food scarcity.”<sup>52</sup>

Further, in revisions to the significance determination, CEQ now proposes that agencies should, “[d]epending on the scope of the action . . . [c]onsider . . . the potential global, national, regional, *and* local contexts, as well as the duration, including short- and long-term effects.”<sup>53</sup> This would be a significant change from the requirement to consider “national, regional, *or* local contexts” in the current version of the regulations.<sup>54</sup> The current regulations are consistent with NEPA’s statutory policy goals of “foster[ing] and promot[ing] . . . the general welfare . . . of present and future generations of *Americans*” and “assur[ing] for all *Americans* safe, healthful, productive, and esthetically and culturally pleasing surroundings.”<sup>55</sup>

Besides CEQ’s proposed deviation from the statute’s focus on achieving environmental goals for Americans, the addition of “global” and use of the conjunctive “and” would likely lead agencies to require explicit consideration and extensive discussion of all four contexts to avoid litigation risk associated with this new requirement – including attempting to assess how any specific project may contribute to global impacts such as climate change or other complex, large-scale phenomena. These revisions may lead agencies to divert limited resources to needlessly detailed discussions of climate change when the issue may not reasonably be implicated by an individual proposed action – especially in light of an agency’s narrow statutory scope or the purpose and need of a proposed action. This also strays from the fundamental requirement that agencies consider only the reasonably foreseeable impacts of their actions – impacts proximately caused by the proposed agency action, not any degree of speculative and attenuated potential impact.

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<sup>50</sup> Proposed Rule, at 49,936.

<sup>51</sup> *Id.* at 49,977.

<sup>52</sup> *Id.* at 49,950.

<sup>53</sup> *Id.* at 49,935(emphasis added).

<sup>54</sup> 40 C.F.R. § 1501.3(b)(1) (emphasis added).

<sup>55</sup> 42 U.S.C. §§ 4331(a), (b)(2) (emphasis added).

There is no basis in NEPA for agencies to craft their analysis around particular policy priorities among the broad range of concerns that may arise from potential ecological, historic, cultural, economic, social, or health impacts. Again, requiring attention to such particular priorities would deviate from the fundamental principle that NEPA's action-forcing obligations are process obligations, not substantive ones that change with the policy priorities of each new Administration. NEPA requires that federal agencies collect and disseminate information on the environmental effects of agency action, but agencies' substantive action statutes dictate what must be done with that information. The limited analysis requirement in NEPA itself is entirely neutral regarding both project-type and impact-type – and it is specific to “proposed actions.”<sup>56</sup> In turn, the CEQ NEPA regulations have long been neutral to project-type and impact-type, although they do define the universe of impacts that requires analysis. The regulations define “effects or impacts” as “changes to the human environment from the proposed action or alternatives that are *reasonably foreseeable* . . . .”<sup>57</sup> The Supreme Court has further defined “reasonably foreseeable” as requiring something more than “a ‘but for’ causal relationship . . . .”<sup>58</sup> Instead, effects must be considered when there is a “reasonably close causal relationship” between the proposed federal action and the impact.<sup>59</sup> The FRA codified this definition of effects.<sup>60</sup>

As the causal connection between a proposed action and potential upstream and downstream effects becomes more attenuated, attempts to consider what CEQ characterizes as “indirect effects” of individual projects becomes more speculative and less helpful for NEPA purposes. In cases spanning two decades, *Metropolitan Edison Company v. People Against Nuclear Energy*<sup>61</sup> and *Department of Transportation v. Public Citizen*<sup>62</sup>, the Supreme Court rejected the assumption at the heart of CEQ's Proposed Rule. Most recently, in *Public Citizen*, the Court held that NEPA requires a “reasonably close causal relationship,” akin to the “familiar doctrine of proximate cause from tort law,” between an agency's proposed action and identified effects.<sup>63</sup> The unanimous *Public Citizen* Court did not break new ground with these conclusions<sup>64</sup> – rather, its opinion was rooted in *Metropolitan Edison*, issued two decades

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<sup>56</sup> The statute directs consideration of “the reasonably foreseeable environmental effects of the proposed agency action,” “any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented,” “a reasonable range of alternatives to the proposed action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal,” “the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity,” and “any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. § 4332(C); see Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321(b), 137 Stat. 10, 38 (2023).

<sup>57</sup> 40 C.F.R. § 1508.1(g) (emphasis added).

<sup>58</sup> *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

<sup>59</sup> *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

<sup>60</sup> See Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321(a)(3)(B), 137 Stat. 10, 38 (2023).

<sup>61</sup> 460 U.S. 766 (1983).

<sup>62</sup> 541 U.S. 752 (2004).

<sup>63</sup> *Id.* at 767 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

<sup>64</sup> The Coalition disagrees with CEQ's past descriptions of the *Public Citizen* decision. CEQ has unpersuasively attempted to limit *Public Citizen* to its facts – even though the Supreme Court spoke generally about the requirements of NEPA – and has improperly avoided the discussion of proximate causation that was so central to the case and the Court's decision. See 86 Fed. Reg. 55,766.

before. In *Public Citizen*, the Court explained that some effects “‘caused by’ a change in the physical environment in the sense of ‘but for’ causation, will nonetheless not fall within [NEPA] § 102 because the causal chain is too attenuated.”<sup>65</sup> These appropriate limits not only promote informed agency decision-making by ensuring that decisions are based on environmental impacts over which the federal agency has control, but also protects agencies and private entities against baseless litigation over hypothetical, tangential, or de minimis environmental effects.

Effectively addressing the challenge of climate change requires citizens, governments, and businesses to work together toward meaningful and achievable objectives. The business community is collectively leveraging their innovation and expertise to find durable solutions that improve our environment, grow our economy, and leave the world better for generations to come. Building the smart, modern, resilient infrastructure of the future -- whether new roads and bridges, new nuclear power plants, renewable energy projects, affordable and clean natural gas, carbon capture and storage, energy storage facilities built with critical and strategic minerals, or new hydrogen pipelines – requires a transparent, efficient, and reliable federal permitting process.

With respect to environmental justice, an effective approach would foster equal opportunities and upward mobility for disadvantaged communities while simultaneously making environmental progress and growing an inclusive economy. Many businesses are effectively addressing environmental justice concerns by encouraging and fostering community engagement, driving sustainable solutions that meet society’s needs, and creating economic opportunity.<sup>66</sup>

Tribal interests, including leveraging Tribes’ unique knowledge of land and other resources, are fully integrated into federal decision-making under NEPA, the National Historic Preservation Act, and other applicable laws and policies. Further, the federal government’s special government-to-government relationships with Tribes frames consideration of these important issues.

Thus, while potential impacts to climate, environmental justice communities, and/or Tribal interests may very well be “reasonably foreseeable” effects of some proposed agency actions, embedding those specific considerations in multiple sections of the NEPA regulations appears intended to impermissibly drive particular outcomes and would distort NEPA analysis. Finally, this approach risks de-emphasizing other equally important environmental considerations such as water quality, waste management, and air emissions as agencies struggle to fulfill heightened obligations in other areas.

### **3. CEQ does not have jurisdiction under NEPA to require mitigation or compel enforcement.**

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<sup>65</sup> *Metro. Edison Co.*, 460 U.S. at 774.

<sup>66</sup> Existing environmental justice tools can be helpful to ensure that environmental justice issues are timely and appropriately considered within the confines of the NEPA process. Many agencies have already used these tools to help further the participation of environmental justice communities into NEPA public engagement processes, while continuing to ensure that NEPA and permit decisions are issued in a timely fashion.

The Proposed Rule would build on the well-established role of mitigation in NEPA reviews with a new requirement outside of the law. Instead of requiring agencies to consider mitigation separately or as part of the alternatives analysis, the Proposed Rule would direct both lead and cooperating agencies that they “*should*, where relevant and appropriate, incorporate mitigation measures that address or ameliorate significant adverse human health and environmental effects of proposed Federal actions that disproportionately and adversely affect communities with environmental justice concerns.”<sup>67</sup> This is based on a proposed definition of “environmental justice” that appears to impose upon federal agencies an obligation to “fully protect” certain individuals and communities from disproportionate impacts and create equitable environments in the context of individual projects.<sup>68</sup> As CEQ admits, NEPA is a procedural statute – NEPA provides no statutory basis to allow CEQ to compel federal agencies to require mitigation. And CEQ fails to explain how a cooperating agency, perhaps called upon only for its “special expertise” and not because it has jurisdiction over a proposed project, would have legal authority to require mitigation of any sort based on its input to NEPA review. As indicated above, the Coalition agrees that environmental justice concerns are important. Nonetheless, CEQ does not have the authority to compel, or even encourage, substantive results with a new obligation subjecting agencies to foreseeable litigation over whether the agency has complied with such a directive.<sup>69</sup>

The Coalition also opposes CEQ’s proposed new provisions that would require lead or cooperating agencies to prepare a “monitoring and compliance plan” and incorporate that plan as a binding aspect of the agency’s decision document, even when mitigation is not necessary for the agency to issue a Finding of No Significant Impact (FONSI).<sup>70</sup> To be sure, it has long been customary for agencies to make mitigation the subject of enforceable agency decision documents when an agency has relied on mitigation to issue a mitigated FONSI in circumstances where the agency otherwise has authority to do so. But CEQ would take a further, unwarranted step here, now proposing that agencies include enforceable mitigation provisions in their decision documents whenever mitigation is involved in evaluating “reasonably foreseeable environmental effects.”<sup>71</sup> CEQ cannot require agencies to alter their own decision-making procedures and enforcement approaches to make mitigation enforceable – that ability comes from an agency’s statutory jurisdiction, if it exists. Furthermore, this aspect of CEQ’s proposal fails to account for situations where an agency has limited statutory authority to require mitigation or where no lead or cooperating agency has the jurisdiction to enforce said mitigation requirements.

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<sup>67</sup> Proposed Rule, at 49,981 (proposed § 1505.3). The Supreme Court explained that “[t]here is a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. . . . [I]t would be inconsistent with NEPA’s reliance on procedural mechanisms—as opposed to substantive, results-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.” *Methow Valley*, 490 U.S. at 352–53 (citing *Baltimore Gas & Electric Co.*, 462 U.S. 87, 100 (1983)).

<sup>68</sup> Proposed Rule, at 49,986 (proposed § 1508.1(k)).

<sup>69</sup> No language in NEPA states that CEQ has the authority to direct agencies to remedy environmental justice concerns with mitigation.

<sup>70</sup> Proposed Rule, at 49,981 (proposed § 1505.3(c)).

<sup>71</sup> *Id.*



Practically speaking, CEQ's proposal would mean that *any* proposed mitigation discussed in the NEPA process would require a monitoring and compliance plan. This requirement would further complicate the NEPA process and stretch agencies' already-limited implementation and enforcement resources and jurisdictional abilities. Nothing that CEQ proposes would insulate agencies from additional litigation over whether the agencies had properly crafted and enforced the contents of those monitoring and compliance plans.

Perhaps most significantly, the Proposed Rule ignores that many members of the regulated community – including Coalition members – routinely consider, propose, and complete voluntary mitigation in their sincere desire to minimize the direct environmental effects of project development and operations. As a result of CEQ's proposal for making mitigation plans enforceable, companies would have to evaluate whether to propose voluntary mitigation measures *at all*, knowing that agencies – if they consider the effects of the mitigation at all on reasonably foreseeable environmental effects – will be required to incorporate binding and enforceable mitigation provisions into a decision document. These enforceable provisions would necessarily mean that companies face agency orders and possible penalties for what had previously been a voluntary mitigation effort. Thus, CEQ's proposal would have a chilling effect on what had long been a positive legacy of the NEPA process, which has up to this point resulted in voluntary mitigation efforts and the minimization of environmental effects.

### **III. CEQ has failed to fulfill the direction of the FRA to streamline the federal review process.**

Congress enacted amendments to NEPA through the FRA in response to longstanding bipartisan concerns regarding the impediments to essential investment created by agency implementation of NEPA.<sup>72</sup> The process has become inefficient and lengthy. It takes an average of 4.5 years to complete the NEPA process, with many projects, including projects essential to this Administration's agenda, taking far longer. Some projects as highlighted earlier never come to fruition because technology outpaces the NEPA process or due to permitting roadblocks – including where the process is so long that the project loses financial viability. Nevertheless, the Proposed Rule states that the provisions of the FRA are consistent with the CEQ's approach in the Proposed Rule.<sup>73</sup> This assertion disregards both the letter and intent of the law in certain respects, and CEQ has not explained why it has not proposed to give full effect to the FRA's amendments to NEPA.

The Proposed Rule does not fully implement the FRA or leverage its language to improve the NEPA process.<sup>74</sup> A key concern that motivated the FRA's NEPA amendments is the proclivity of agencies to undertake complex environmental reviews even where such reviews do not serve the public or the decision-maker. As a result, Congress created a list of circumstances in which NEPA is not triggered; CEQ specifically invited comment on whether it should further

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<sup>72</sup> See Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321(a)(3)(B), 137 Stat. 10, 38 (2023).

<sup>73</sup> See Proposed Rule, at 49,924 (explaining that the CEQ is revising NEPA regulations to “implement the Fiscal Responsibility Act's amendments to NEPA”).

<sup>74</sup> In other respects, as discussed in this letter, CEQ's Proposed Rule substantially increase the complexity of federal reviews contrary to the purpose of the FRA.

revise the Proposed Rule to implement that section.<sup>75</sup> It is unclear why CEQ placed some of these circumstances under the question of whether a proposed action is a “major federal action.”<sup>76</sup> All of these circumstances, including whether an agency’s decision-making statute allows it to take into account environmental considerations, address the question whether NEPA review is required and all should be included as separate categories under Section 1501.3(a), rather than as subcategories of “major federal action.”

In addition, CEQ failed to address one of the key innovations of the FRA: that agencies *must* allow applicants to prepare environmental documents under the supervision of the federal agency. The FRA amends NEPA to direct: “[a] lead agency shall prescribe procedures to allow a project sponsor to prepare an environmental assessment or an environmental impact statement under the supervision of the agency.”<sup>77</sup> This is a critical improvement, because it allows an applicant to create substantial efficiencies in the federal review process by preparing the document in lieu of a federal agency or a third-party contractor working on the government’s often slow and burdened schedule. However, CEQ declined to propose regulations implementing this provision because “agencies must establish procedures . . .”<sup>78</sup>

While it is true that the agencies are required to establish such procedures under the FRA, CEQ’s Proposed Rule fails to leverage this process improvement to its fullest extent. The Proposed Rule should be modified to clarify that an applicant first decides whether it will prepare an environmental document under the supervision of the agency. Only if the applicant decides not to do so would the agency rely on agency-prepared documents or those prepared by a third-party contractor. This clarity is warranted to realize the substantial benefit of the FRA – that applicants may be in a position to prepare environmental documents much faster than an agency or an agency-directed contractor. Regardless of the approach, the agency remains responsible for the accuracy and scope of the contents, through review and direction to the preparer.

In another example, CEQ adds requirements and complexity, unauthorized by the FRA, to an agency’s ability to use another agency’s categorical exclusion. The FRA allows an agency to “adopt a categorical exclusion listed in another agency’s NEPA procedures for a category of proposed agency actions for which the categorical exclusion was established . . .”<sup>79</sup> The process is simple and is intended to make things less complex, not more. Under the FRA, an agency must “identify the categorical exclusion,” “consult with the agency that established the categorical exclusion to ensure that the proposed adoption . . . is appropriate,” “identify to the public the categorical exclusion,” and “document adoption of the categorical exclusion.”<sup>80</sup>

In its Proposed Rule, CEQ appears to be ignoring or even frustrating Congress’s legislation in the FRA regarding categorical exclusions. First, CEQ would add a requirement

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<sup>75</sup> Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321(b), 137 Stat. 10, 40 (2023) (amending Section 107 of NEPA to establish deadlines for environmental reviews).

<sup>76</sup> Proposed Rule, at 49,969 (proposed § 1501.3(a)).

<sup>77</sup> Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321(b), 137 Stat. 10, 40 (2023).

<sup>78</sup> Proposed Rule, at 49,956.

<sup>79</sup> Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321(b), 137 Stat. 10, 43–44 (2023).

<sup>80</sup> *Id.*

that the agency evaluate the “proposed action or category of proposed actions for extraordinary circumstances . . . .”<sup>81</sup> This is redundant of the FRA’s mandate as incorporated in the Proposed Rule, which already requires the agency to “ensure that the proposed adoption . . . is appropriate.” Second, CEQ would direct agencies to “[p]rovide public notice of the categorical exclusion . . . .”<sup>82</sup> This is found nowhere in the FRA and appears to contemplate the potential for pre-adoption public comment. Rather, the FRA directs the agency to “identify to the public” the categorical exclusion it plans to use. Third, CEQ uses the word “determination” throughout Sections 1506.3(d) and 1507.3(c)(8)(i), rather than retaining the original categorical exclusion language. Finally, while the FRA simply directs the agency to “document adoption,” CEQ proposes adding another requirement that the agencies “publish” documentation of the adoption, even though the FRA does not require it.<sup>83</sup> These changes, many of which are unexplained, would add more process that would only delay projects that clearly qualify for categorical exclusions.

For the foregoing reasons, the Proposed Rule should be withdrawn and revised to comport with the language and intent of the FRA as the additional structure contemplated herein undermines the effects which Congress sought to achieve.

**IV. The 2020 Rule provides needed clarity, codifies existing law, supports review that serves the goals of NEPA, and should be retained.**

**A. CEQ has not articulated a reasoned explanation for the proposed rulemaking that adequately justifies its proposal to change position.**

As the Supreme Court has held, when “an agency chang[es] its course by rescinding a rule [the agency] is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”<sup>84</sup> Agency rulemaking that fails to provide the required explanation for a change of course is arbitrary and capricious.<sup>85</sup> Here, while CEQ has offered conclusory reasons to justify its change in approach, as discussed herein, those reasons do not support its change in position.

The four decades since the promulgation of the 1978 NEPA rules have been marked by two significant trends that the 2020 Rule sought to address. First, federal courts across the country issued decisions and opinions which guided and shaped the implementation of NEPA across numerous federal agencies.<sup>86</sup> The 2020 Rule aimed to codify significant, well-reasoned court precedents, particularly Supreme Court case law, to provide a much-needed update to NEPA regulations in light of these precedents and decades of experience.<sup>87</sup> Second, NEPA

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<sup>81</sup> Proposed Rule, at 49,970 (proposed § 1501.4(e)(3)).

<sup>82</sup> Proposed Rule, at 49,970 (proposed § 1501.4(e)(4)).

<sup>83</sup> Proposed Rule, at 49,970 (proposed § 1501.4(e)(5)).

<sup>84</sup> *State Farm*, 463 U.S. at 42.

<sup>85</sup> *Id.*; see 5 U.S.C. § 706(2)(A).

<sup>86</sup> 2020 Rule, at 43,305.

<sup>87</sup> *Id.* In some instances, the 2020 Rule “clarifie[d] the meaning of the regulations where there [wa]s a lack of uniformity in judicial interpretation of NEPA and the CEQ regulations.” *Id.* at 43,310; see also *id.* at 43,328, 43,352, 43,355 (referencing and emphasizing Supreme Court case law).

reviews became increasingly lengthy and complex, resulting in significant delays to project decisions. CEQ observed that the average time across all federal agencies for completion of NEPA review was 4.5 years, with only one quarter of EISs being completed in less than 2.2 years.<sup>88</sup> This timeline was a significant departure from CEQ's 1981 prediction that EISs for the most complex projects could be completed in about twelve months.<sup>89</sup> Thus, CEQ aimed in the 2020 Rule to incorporate the "most efficient and effective practices" into NEPA regulations to address the delays and unpredictable timing associated with federal reviews of infrastructure projects and other developments.<sup>90</sup>

Here, and in the face of the FRA amendments, CEQ has "abandoned without cogent explanation a policy option it had earlier studied extensively and strongly endorsed."<sup>91</sup> CEQ has not adequately addressed the two significant concerns that motivated CEQ in preparing the 2020 Rule, when it sought to conform regulations to existing, well-reasoned case law and to improve decision-making timelines for important projects. Despite the continuing relevance of these concerns, both for agencies charged with following NEPA and for Coalition members whose projects develop much-needed infrastructure, CEQ dismisses and has "failed even to mention or discuss" these problems plaguing NEPA practice, beyond passing references to "delay."<sup>92</sup> In failing to appropriately grapple with these problems even as it sought to advance this Administration's particular goals, CEQ "failed to consider an important aspect of the problem."<sup>93</sup>

**B. CEQ should retain or reintroduce key process improvements from the 2020 Rule.**

**1. CEQ should restore codification of the Supreme Court's holding in *Public Citizen*.**

CEQ explains that it has prepared the Proposed Rule "to ensure that the NEPA implementing regulations provide for sound and *efficient* environmental review of Federal actions."<sup>94</sup> To achieve that important goal, CEQ should restore specific language that codifies important NEPA precedent, especially the lessons of *Metropolitan Edison Company v. People Against Nuclear Energy*<sup>95</sup> and *Department of Transportation v. Public Citizen*.<sup>96</sup> CEQ should therefore reintroduce important language from the 2020 Rule's amendment of "effects" to ensure that federal agencies consider only those effects that have a "reasonably close causal

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<sup>88</sup> *Id.* at 43,305.

<sup>89</sup> *Id.* (citing *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, [46 Fed. Reg. 18,026](https://www.energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act) (Mar. 23, 1981) ("Forty Questions"), <https://www.energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act>.)

<sup>90</sup> *Id.*

<sup>91</sup> *Nat'l Coal. Ass'n v. Lujan*, 979 F.2d 1548, 1553 (D.C. Cir. 1992) (citing *State Farm*, 463 U.S. at 46–51) (Ginsburg, R., J.).

<sup>92</sup> *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013).

<sup>93</sup> *Physicians for Social Responsibility v. Wheeler*, 956 F.3d 634, 647 (D.C. Cir. 2020) (quoting *State Farm*, 463 U.S. at 43).

<sup>94</sup> Proposed Rule, at 49,928.

<sup>95</sup> 460 U.S. 776 (1983).

<sup>96</sup> 541 U.S. 752 (2004).

relationship to the proposed action,”<sup>97</sup> as Congress intended in the FRA. When agencies consider potential effects that are *not* reasonably causally connected to a proposed action, agencies not only delay the consideration of the most relevant effects of the proposed action, but confuse the public about the most likely effects of the action.

CEQ had previously included helpful language tracking the holdings and interpretations of *Metropolitan Edison Company* and *Public Citizen* in the 2020 Rule. However, in the 2022 Phase 1 rule, CEQ withdrew this language from the definition of “effects,” specifically withdrawing the instruction that agencies evaluate effects that have a “reasonably close causal relationship to the proposed action.”<sup>98</sup> In so doing, CEQ explained that it believed the 2020 Rule “inappropriately transform[ed] a Court holding affirming an agency’s exercise of discretion in a particular factual and legal context into a rule that could be read to limit agency discretion.”<sup>99</sup> But rather than limiting agency discretion, the 2020 Rule’s definition of “effects” properly focused an agency’s review on those effects that were most relevant to the application under review. The 2020 Rule warned that effects “should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain.”<sup>100</sup> This language does nothing more than restate what it means for an effect to be the “*reasonably foreseeable*” result of agency action. As the Supreme Court explained in *Metropolitan Edison Company*, “the element of risk lengthens the causal chain beyond the reach of NEPA” as the “risk of an accident is not an effect on the physical environment. A risk is, by definition, unrealized in the physical world.”<sup>101</sup> In *Public Citizen*, the Supreme Court reiterated that NEPA contains an “inherent . . . ‘rule of reason,’ which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any potential new information to the decision-making process.”<sup>102</sup>

CEQ can best ensure that agencies follow this “rule of reason” by making clear that only effects with “a reasonably close causal connection” – a concept similar to “the familiar doctrine of proximate cause from tort law”<sup>103</sup> – need be considered in NEPA reviews. By doing so, CEQ would improve the efficient evaluation of *meaningful* and *reasonably foreseeable* environmental effects of actions and improve the public’s understanding of those effects as well. CEQ should reintroduce language from the 2020 Rule that agencies should consider effects that bear a “reasonably close causal relationship to the proposed action.”<sup>104</sup>

## **2. CEQ should return to the 2020 Rule’s articulation of purpose and need.**

CEQ should reintroduce language from the 2020 Rule that provided that “[w]hen an agency’s statutory duty is to review an application for authorization, the agency shall base the purpose and need on the goals of the applicant and the agency’s authority.”<sup>105</sup> CEQ removed

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<sup>97</sup> 40 C.F.R. § 1508.1(g) (2021); *see also* 2020 Rule, at 43,375.

<sup>98</sup> *See* 2022 Rule, at 23,465.

<sup>99</sup> *Id.*

<sup>100</sup> 40 C.F.R. § 1508.1(g)(2) (2021); *see also* 2020 Rule, at 43,375.

<sup>101</sup> *Metro. Edison Co.*, 460 U.S., at 775.

<sup>102</sup> *Public Citizen*, 541 U.S., at 767 (quoting *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373–75 (2004)).

<sup>103</sup> 2020 Rule, at 43,343 (quoting *Metro. Edison Co.*, 460 U.S. at 774).

<sup>104</sup> 40 C.F.R. § 1502.13 (2021); *see also* 2020 Rule, at 43,365.

<sup>105</sup> 40 C.F.R. § 1502.13 (2021); *see also* 2020 Rule, at 43,365.

this instruction in its 2022 Rule, basing the removal on perceived and unspecific “ambiguities” that resulted from the 2020 Rule’s amendment to Section 1502.13.<sup>106</sup> But to evaluate alternatives based on factors besides an applicant’s proposal (and an agency’s statutory authority) is to turn NEPA into a paperwork exercise divorced from the concrete proposed action that is reviewed under NEPA’s provisions. Likewise, were an agency to consider factors besides its own statutory authority in determining the purpose and need of the project, the agency would necessarily analyze potential alternatives that the agency lacks legal authority to implement.<sup>107</sup> NEPA’s goal of informing the public about the environmental effects of agency actions is not served by considering a purpose and need (and related alternatives) unrelated to applicant proposals or agency legal authorities. Accordingly, CEQ should reintroduce this clarifying language to Section 1502.13. As a practical matter, the results of considering factors besides applicant goals and agency authority wastes time, effort, and limited resources.

CEQ originally introduced this clarification to incorporate caselaw into NEPA regulations.<sup>108</sup> This caselaw remains valid, and the articulation of the proper approach to “purpose and need” is important to implementation of NEPA and fulfillment of the FRA’s goals. Accordingly, CEQ should reintroduce this language into Section 1502.13.

**3. CEQ should retain the 2020 Rule’s participation requirement and exhaustion provisions to provide clarity to commenters and predictability to the agency and applicant.**

CEQ has not articulated a reasoned justification for removing Section 1500.3(b), which requires that public participants raise objections and comments to the agencies during the public engagement process, or forfeit them as unexhausted. CEQ explains that this requirement is not found in NEPA, and that exhaustion is better left to background principles of exhaustion under the Administrative Procedure Act (“APA”) and caselaw. However, it is common for an agency to incorporate regulatory exhaustion requirements even when the agency’s action statute does not specifically provide for them.

For example, the U.S. Army Corps of Engineers requires that parties exhaust administrative remedies in connection with Section 404 permitting, even though the Clean Water Act does not explicitly direct the agency to establish exhaustion requirements<sup>109</sup>;

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<sup>106</sup> See 2022 Rule, at 23,453, 23,457.

<sup>107</sup> CEQ should eliminate language in proposed § 1502.14(a) that agencies “may include reasonable alternatives not within the jurisdiction of the agency.” If the agency has no authority to implement the alternative, it is unreasonable and should not be considered. Including such an alternative is the definition of a paperwork exercise, wasting valuable agency time and resources.

<sup>108</sup> See 2020 Rule, at 43,330 (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)).

<sup>109</sup> Compare 33 C.F.R. § 331.12 with 33 U.S.C. §§ 401, 1344, 1413; see also USACE, Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers, 64 Fed. Reg. 11,708, 11,711 (Mar. 9, 1999) (“with regard to the need to exhaust the administrative appeal process before seeking relief in the Federal courts, we [USACE] believe that the administrative appeal process would serve to identify and correct any procedural shortcomings of the original permit evaluation process, and can lead to a resolution of problems without the added burden to both parties of an action in the Federal courts.”)

similarly, EPA requires that petitioners alleging error in various EPA-issued permits must exhaust their administrative remedies before seeking judicial review.<sup>110</sup>

By retaining exhaustion requirements under NEPA, CEQ would provide both project proponents and public participants in the NEPA process with adequate notice of how the public engagement process should occur, and would incentivize timely comments to inform agencies and help shape their decisions. Retaining the exhaustion requirement would also help to achieve CEQ's goal of efficiency; by requiring commenters to express their concerns, agencies would have an opportunity to address such concerns before taking final action on a proposal. Federal agencies and project proponents that conclude a NEPA review according to the procedures set forth by CEQ should not be unfairly surprised by litigation against NEPA reviews or agency decision documents based on objections to projects that were not raised in the record with particularity during the established administrative process.

#### **4. CEQ should retain its statement of intention regarding expeditious review.**

CEQ should also retain the statement in Section 1500.3(c) that “[i]t is the Council’s intention that any allegation of noncompliance with NEPA and the regulations in this subchapter should be resolved as expeditiously as possible.”<sup>111</sup> CEQ suggests that this proviso is “inappropriate,” as NEPA regulations “cannot compel members of the public or courts to resolve NEPA disputes.”<sup>112</sup> But it is appropriate to express CEQ’s desire that agencies and others take proactive steps to resolve NEPA disputes, which can often add years of litigation and subsequent agency review. Far from “compel[ling]” members of the public to settle disputes, this proviso is a helpful policy statement that instructs agencies, and reminds courts, that resolution of NEPA disputes is critical in light of both agency and project proponent investment in the NEPA process. Timely resolution of NEPA litigation has always been in the interest of federal agencies, project proponents, and the public. It is also important for achieving Congress’s and this Administration’s goals expressed in the Infrastructure Investment and Jobs Act, the CHIPS and Science Act, the Inflation Reduction Act, and the FRA.

#### **5. CEQ should retain regulatory language recognizing that environmental reviews under other statutes may fulfill NEPA’s purpose and function.**

The Coalition opposes CEQ’s proposal to remove efficiency-creating language that recognizes that “[t]he purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information, and the public has been informed regarding the decision-making process”<sup>113</sup> and that, in some circumstances, “another statute’s requirements may serve the function of agency compliance with [NEPA].”<sup>114</sup> CEQ considers it “more appropriate . . . for agencies to establish mechanisms in their NEPA procedures to align

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<sup>110</sup> Compare 40 C.F.R. § 124.19(l) with 42 U.S.C. § 6901 *et seq.*; 42 U.S.C. § 300f *et seq.*; 33 U.S.C. § 1251 *et seq.*; 42 U.S.C. § 7401 *et seq.*; *see also* EPA, Revisions to Procedural Rules to Clarify Practices and Procedures Applicable in Permit Appeals Pending Before the Environmental Appeals Board, 78 Fed. Reg. 5,281 (Jan. 25, 2013).

<sup>111</sup> 40 C.F.R. § 1500.3(c) (2021).

<sup>112</sup> Proposed Rule, at 49,932.

<sup>113</sup> 40 C.F.R. § 1500.1(a).

<sup>114</sup> 40 C.F.R. § 1507.3(d)(6).

processes and requirements from other environmental laws with the NEPA process.”<sup>115</sup> Respectfully, limiting the ability of other agencies to fulfill NEPA through other statutory reviews would be inefficient and counterproductive; in short, it “would be a legalism carried to the extreme.”<sup>116</sup>

From the earliest days of NEPA – including before the 1978 Rules were promulgated – courts recognized that certain statutes require environmental reviews that fulfill NEPA’s purpose and function.<sup>117</sup> What matters is not an agency using the same terms or jumping through procedural hoops, but rather whether “all of the five core NEPA issues [are] carefully considered.”<sup>118</sup> When agencies, through their own action statutes and required procedures, meaningfully consider the various environmental effects of federal actions, they have accomplished Congress’s goals for NEPA.<sup>119</sup> By requiring agencies to duplicate these other environmental reviews, CEQ would be mandating a “rote paperwork exercise” and “de-emphasiz[ing] the Act’s larger goals and purposes,” and wasting agency resources in the process.<sup>120</sup> CEQ should retain language that recognizes that other environmental reviews may fulfill the purpose and function of NEPA.

## **6. CEQ should retain language that explains that Farm Service Agency loans and loan guarantees are not “major federal actions.”**

The Coalition urges CEQ to retain existing NEPA regulations that exclude farm ownership and operating loans and loan guarantees, issued by the Farm Service Agency (“FSA”)<sup>121</sup> from the definition of “major federal action.”<sup>122</sup> These generally local loans and loan guarantees are not significant federal actions, with FSA regulations limiting direct loans to \$600,000 and loan guarantees to \$1,750,000.<sup>123</sup> As the FSA explains, these loans continue a “long tradition of providing a financial safety net for America’s farmers and ranchers to sustain economically viable agricultural production.”<sup>124</sup> Although courts have concluded that

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<sup>115</sup> Proposed Rule, at 49,934.

<sup>116</sup> *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 489 F.2d 1247, 1256 (D.C. Cir. 1973) (quoting *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 n. 130 (1973)) (holding that decision under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to cancel pesticide registrations is exempt from NEPA).

<sup>117</sup> *See, e.g., Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 383–84 (D.C. Cir. 1973) (explaining that NEPA analysis would not benefit EPA’s promulgation of stationary source standards under the Clean Air Act); *State of Wyo. v. Hathaway*, 525 F.2d 66, 71–72 (10th Cir. 1975) (stating that, “an organization like EPA whose regulatory activities are necessarily concerned with environmental consequences need not stop in the middle of its proceedings in order to issue a separate and distinct impact statement just to be issuing it.”); *State of Ala. ex rel. Siegelman v. U.S. EPA*, 911 F.2d 499, 505 (11th Cir. 1990) (explaining that “Congress did not intend for EPA to comply with NEPA when RCRA applies to the particular EPA activity”).

<sup>118</sup> *Environmental Defense Fund*, 489 F.2d at 1256 (recognizing that “[t]he law requires no more” when an agency carefully considers “the environmental impact of the action, possible adverse environmental effects, possible alternatives, the relationship between long- and short-term uses and goals, and any irreversible commitments of resources”).

<sup>119</sup> *See* 42 U.S.C. § 4332.

<sup>120</sup> *See* Proposed Rule, at 49,930.

<sup>121</sup> *See* 7 U.S.C. §§ 1925, 1941–49.

<sup>122</sup> *See* Proposed Rule, at 49,962; *cf.* 85 Fed. Reg. 43,348; 40 C.F.R. § 1508.1(q)(1)(vii).

<sup>123</sup> *See* 7 C.F.R. § 761.8(a).

<sup>124</sup> *See* Farm Service Agency, Program Data (last accessed Sept. 26, 2023), <https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/program-data/index>.



some loans or other financial incentives can rise to the level of major federal action – for example, the authorization of a project to issue \$1.75 billion in tax-free bonds<sup>125</sup>, or restructuring hundreds of million of dollars in loans<sup>126</sup> – the FSA’s loan and loan guarantee programs involve much, much smaller outlays of financial assistance to America’s small farmers and the banks that support them. The NEPA exclusion for these loans and loan guarantees should be retained.

The FRA provides that “loans, loan guarantees, or other forms of financial assistance where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effect of the action” are not “major Federal action[s]” for NEPA purposes.<sup>127</sup> FSA loans and loan guarantees clearly fall into this category, as they involve limited or no meaningful federal control over an applicant’s use of the loans and loan guarantees. In the case of direct loans, the FSA evaluates an applicant’s agricultural productivity and assists the applicant in developing a farm operating plan to improve the chances of successful repayment – the FSA does not exercise significant control over an applicant’s activities outside that limited context.<sup>128</sup> In the context of FSA loan guarantees, CEQ has also already observed that “[t]he mere possibility of [F]ederal funding in the future is too tenuous to convert a local project into [F]ederal action.”<sup>129</sup> In proposing to strike language excluding FSA loans and loan guarantees, CEQ states, without any further explanation, that the agency “considers it best left to agencies to identify exclusions from the definition of major Federal action absent specific statutory authority like those for the Small Business Administration loan guarantees.”<sup>130</sup> But the FRA explicitly adopted the *reasoning* articulated in the 2020 Rule for excluding FSA loans and loan guarantees, which explains in detail that FSA loans clearly fit within this definition.<sup>131</sup>

CEQ identifies no real harm or confusion that would come from retaining the FSA loan and loan guaranty exclusions from major federal action, and because the exclusions are consistent with the text and purpose of the FRA, they should be retained in the regulations themselves. However, at minimum, CEQ should explain clearly in its final rule that it understands that FSA loans and loan guarantees are the types of loans and guarantees covered by proposed Section 1508.1(u)(1)(vi), and that no additional procedures are necessary to apply Section 1508.1(u)(1)(vi) to the FSA loans and loan guarantees.

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<sup>125</sup> See *Indian County R. v. Rogoff*, 201 F. Supp. 3d 1, 4 (D.D.C. 2016)

<sup>126</sup> See *Sierra Club v. U.S. Dep’t of Agriculture*, 777 F. Supp. 2d 44, 48 (D.D.C. 2011).

<sup>127</sup> Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321(b), 137 Stat. 45 (2023) (amending the definition of “major federal action”).

<sup>128</sup> See 7 C.F.R. §§ 761.103–104.

<sup>129</sup> 85 Fed. Reg. 43,348 (quoting *Pres. Pittsburg v. Conturo*, 2011 WL 4025731 at \*4 (W.D. Pa., Sept. 9, 2011)).

<sup>130</sup> See Proposed Rule, at 49,962.

<sup>131</sup> 85 Fed. Reg. 43,348–349.

**7. CEQ should retain language requiring cooperating agencies to limit their comments to matters for which the agency has jurisdiction by law or special expertise.**

The Coalition also disagrees with CEQ's proposal to strike language in Section 1501.8(b)(7) that instructs cooperating agencies to focus their participation on matters over which the cooperating agencies have jurisdiction by law or special expertise with respect to specific environmental issues. CEQ asserts that, but does not explain why, this deletion of the regulatory text is necessary to "align with section 107(a)(3) of NEPA."<sup>132</sup> By removing the language, CEQ removes an important instruction to a cooperating agency to focus its comments on the issues that the FRA establishes as the basis for a cooperating agency's participation in the first place. The removal of this language would unnecessarily raise questions about the proper scope of a cooperating agency's participation in the NEPA process and would further encourage agencies to stray outside their legal bounds, adding needless complexity and delay to NEPA reviews and distracting from the core purposes of such reviews.

**8. CEQ should retain the provision requiring public disclosure of NEPA costs.**

CEQ proposes to remove the requirement that agencies disclose the costs incurred in preparing environmental assessments and EIS's on the covers of those documents. The Coalition supports the public disclosure of costs in preparing these environmental documents for public and interagency transparency and accountability. CEQ adopted the requirement that agencies disclose their NEPA costs in response to "concerns raised by the U.S. Government Accountability Office that agencies are not tracking the costs of NEPA analyses."<sup>133</sup> Although this requirement is relatively new, and some agencies may not be accustomed to tracking costs,<sup>134</sup> tracking costs will help promote the efficient use of resources in the NEPA context. The Coalition encourages CEQ to retain the cost-tracking and disclosure requirements.

**9. CEQ should retain language expressly stating that agencies are not required to undertake new scientific and technical research.**

The Coalition opposes CEQ's proposal to remove common-sense language from Section 1502.23(b), which simply states that "[a]gencies are not required to undertake new scientific and technical research to inform their [NEPA] analyses."<sup>135</sup> CEQ notes that some commenters during the 2020 rulemaking expressed concern that this language "could limit agencies to 'existing' resources and preclude agencies from undertaking site surveys," but these concerns are both unrealistic and unrealized.<sup>136</sup> No reasonable reader of this advice could conclude that CEQ's recognition that new research is *not required* somehow *prohibits* appropriate project-specific baseline data gathering during field investigations. Moreover, the FRA amended NEPA to substantially codify this basic provision into Section 106(b)(3):

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<sup>132</sup> Proposed Rule, at 49,941.

<sup>133</sup> 2020 Rule, at 43,329.

<sup>134</sup> See Proposed Rule, at 49,947.

<sup>135</sup> 40 C.F.R. § 1502.23(b).

<sup>136</sup> Proposed Rule, at 49,951.

SOURCES OF INFORMATION.—In making a determination under this subsection, an agency—

- (A) may make use of any reliable data source; and
- (B) is not required to undertake new scientific or technical research unless the new scientific or technical research is essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable.<sup>137</sup>

Inexplicably, CEQ does not even discuss the FRA's revision of NEPA on this point, let alone provide a reasoned explanation for departing from *statutory text*.<sup>138</sup> CEQ should incorporate this statutory text verbatim into NEPA's implementing regulations.

In light of the FRA, CEQ's proposal to remove "but available" from the regulatory text of Section 1502.21(b) is confusing. This removal could suggest that the "time frame" considerations in Section 106(b)(3) are irrelevant, and that agencies should undertake new scientific studies based on reasonable costs alone. Instead, CEQ should make clear that new scientific studies of possible effects need not be undertaken where the costs *or time* required to obtain the new information are unreasonable.

Both the FRA and NEPA's existing regulations on this topic reflect common sense for both federal agencies and the projects needed to support modern society. Few agencies have the technical or scientific capacity to undertake novel research, and few projects could remain viable faced with a lengthy research-driven delay. Agencies must be able to properly rely on existing literature regarding environmental effects from academic, governmental, and other reputable sources. The NEPA regulations have long accommodated the reality that decisions are often made with incomplete information. CEQ should retain this phrase from Section 1502.23(b).

#### **10. CEQ should retain language requiring specificity of comments.**

In order to meet deadlines established by the FRA and NEPA's implementing regulations, interagency coordination and public engagement must be as efficient as possible, and focused on the goal of ensuring that reasonably foreseeable environmental effects of agency action are considered and disclosed. To make that efficiency a reality between and among lead agencies, cooperating agencies, and the public, CEQ should retain Section 1503.3(b), which instructs that "[c]omments on the submitted alternatives, information, and analyses and summary thereof . . . should be as specific as possible."<sup>139</sup> While federal agencies have the obligation under NEPA to ensure that public concerns about environmental effects are heard and addressed, federal agencies are under no obligation to divine possible meanings from vague or general comments. Requiring that comments be specific and precise is a

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<sup>137</sup> Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321(b), 137 Stat. 10, 40 (2023).

<sup>138</sup> See Proposed Rule, at 49,951.

<sup>139</sup> 40 C.F.R. § 1503.3(b).

common-sense requirement, and CEQ has not explained why it is necessary to remove the requirement. The Coalition opposes the removal of Section 1503.3(b).

**11. CEQ should retain other aspects of NEPA’s regulatory structure and avoid introducing uncertainty or other causes for delay into the rules.**

The Coalition opposes a number of other procedural changes in CEQ’s Proposed Rule that would have the effect of increasing the complexity of the NEPA process:

- By removing the phrase requiring a commenter to “provide as much detail as necessary to meaningfully participate and fully inform the agency of the commenter’s position,”<sup>140</sup> the agency is likely to reduce transparency and meaningful and actionable public engagement. If commenters do not provide clear comments, it will be more difficult for agencies to address environmental issues before taking action. This proposal is at odds with the stated objectives of the Proposed Rule.<sup>141</sup>
- CEQ proposes to reduce the time that agencies have to develop their own proposed NEPA procedures from 36 months to 12 months. Given the complexity and burdensome features of CEQ’s proposed rule, the Coalition suggests that this is an unreasonably short period of time for agencies to develop and propose their respective NEPA procedures.<sup>142</sup> However, CEQ should be clear that agencies should not delay any NEPA reviews of proposed federal actions pending finalization of their own NEPA procedures.
- CEQ proposes to require that agencies continually review their agency-specific NEPA procedures and revise them<sup>143</sup> – the Coalition believes this requirement could reduce or eliminate stability as agencies engage in a process of constant revision.
- The Proposed Rule would require agencies to remove the list of actions or decisions that may be excluded from the NEPA review process<sup>144</sup>; this would lead to inefficiencies and confusion about what types of actions are properly excluded from the NEPA process. Moreover, these types of exclusions are listed in the FRA and should be clearly identified in NEPA’s regulations to avoid confusion about inconsistent statutory and regulatory requirements.

**V. CEQ’s proposed revision includes numerous additional elements that would make reviews inappropriately complex.**

**A. Climate impacts should not be specifically addressed in the regulations.**

The Coalition supports the evaluation of climate impacts through NEPA in lawful instances, but climate impacts should not be called out throughout the regulatory text. As

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<sup>140</sup> *Id.* § 1503.3(a).

<sup>141</sup> *See, e.g.*, Proposed Rule, at 49,927, 49,929, 49,932.

<sup>142</sup> *See id.* at 49,958.

<sup>143</sup> *See id.* at 49,985.

<sup>144</sup> *See id.* at 49,959.

noted above, Coalition members are taking meaningful and effective steps to mitigate greenhouse gas emissions in their operations while simultaneously furthering Congress' and this Administration's goals in passing and implementing the Infrastructure Investment and Jobs Act, the CHIPS and Science Act, the Inflation Reduction Act, and the FRA. Achieving the goals of these acts will require new projects throughout all sectors and industries, and these projects will have a variety of environmental effects – which will need to be considered, as appropriate, via NEPA processes.

By emphasizing climate impacts in its proposed changes to the regulations themselves, CEQ inappropriately elevates one kind of impact for consideration over many others. This is a significant departure from the 1978 Rule, which CEQ claims as the inspiration for the Proposed Rule. For example, Section 1502.16 (“Environmental Consequences”) in the 1978 Rule outlined the categories of effects and other topics that agencies were to evaluate in the NEPA process.<sup>145</sup> By contrast, CEQ now highlights that agencies are to consider “[a]ny reasonably foreseeable climate change-related effects, including the effects of climate change on the proposed action and alternatives.”<sup>146</sup> This language and its use of “any” appears to signal a departure from the Supreme Court’s recognition that “reasonably foreseeable effects” are those that are linked to agency action by a close causal connection.<sup>147</sup>

At minimum, these changes are superfluous and unnecessary regulatory text. At worst, CEQ’s elevation of climate change over other environmental impacts would likely lead agencies towards unfairly conducting NEPA reviews in an inappropriately biased manner; proposed projects with perceived climate benefits would be fast-tracked (regardless of other environmental impacts, however significant), while proposed projects with perceived adverse climate impacts would likely be reviewed more aggressively by agencies and the courts.

These changes are superfluous because agencies have been evaluating climate-change-related effects for over a decade under the effect-neutral provisions of the 1978 Rules. The NEPA regulations already require that agencies evaluate the environmental consequences of their actions, and agencies already incorporate climate change into their NEPA evaluations in appropriate circumstances.<sup>148</sup>

Although federal agencies are already evaluating relevant climate-change impacts of proposed projects, climate change effects would likely be given relatively greater consideration because of CEQ’s proposed emphasis, even though the statutory text of NEPA does not emphasize one type of effect over another. This emphasis – combined with CEQ’s other actions

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<sup>145</sup> See 40 C.F.R. § 1502.16 (1992).

<sup>146</sup> Proposed Rule, at 49,977 (proposed § 1502.16).

<sup>147</sup> See *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

<sup>148</sup> See, e.g., Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,331 (July 16, 2020) (explaining that “[u]nder the final rule, agencies will consider predictable environmental trends in the area in the baseline analysis of the affected environment. Trends determined to be of consequence of climate change would be characterized in the baseline analysis . . . .”). See also, e.g., Exec. Order 13432, Cooperation Among Agencies in Protecting the Environment With Respect to Greenhouse Gas Emissions from Motor Vehicles, Nonroad Vehicles, and Nonroad Engines (May 14, 2007); Exec. Order 13693, Federal Leadership on Climate Change and Environmental Sustainability (Feb. 19, 2015); Exec. Order 14008, Tackling the Climate Crisis at Home and Abroad (Jan. 21, 2021).

to address climate change<sup>149</sup> – would likely result in longer administrative processes and delayed permits as agencies would strive to evaluate the climate effects of a proposed action, while also increasing the risk that agencies would not give proportionately appropriate weight and attention to other significant environmental considerations. Rather than identifying and disclosing the climate effects proximately caused by proposed projects, agencies would be overscrupulous in the review process *solely* in an attempt to avoid litigation.

Delay would especially frustrate bipartisan congressional and Presidential timelines to develop new infrastructure, build new projects, access new resources, and alleviate supply chain limits. Further, virtually all energy sources are needed to aid in the transition towards a cleaner energy future and will require projects with greater up-front emissions – like mining critical and strategic minerals, for example. On the other hand, low-density energy sources may appear in the short-term to address climate change but ultimately may prove unreliable or less preferable than other energy sources. To ensure that the NEPA regulations do not quickly become out of date, CEQ should thus avoid specifically emphasizing climate effects throughout the regulatory text and should entrust agencies to demonstrate their expertise in applying NEPA to evaluate an array of potential environmental impacts in the federal permitting process in changing circumstances.

Consider the case of natural gas pipelines and pipelines for the transport of carbon dioxide for permanent carbon dioxide sequestration.<sup>150</sup> Both types of projects support this Administration’s goal of reducing greenhouse gas emissions. In fact, the construction of new pipeline infrastructure to carry hydrogen and, separately, CO<sub>2</sub>, will be essential to facilitate the preferred compliance pathways proposed by the EPA in its Clean Air Act section 111 regulations applicable to existing fossil-fueled electric generating units.<sup>151</sup> Without the efficient permitting of significant new pipeline infrastructure, the compliance pathways proposed by EPA will be impossible to achieve. Natural gas co-firing options proposed within this EPA rule would also rely upon natural gas pipeline infrastructure. Natural gas infrastructure is also critical to providing reliable and affordable energy while reducing greenhouse gas emissions and enabling the increased integration of zero emissions intermittent renewables to the power grid.<sup>152</sup> Each of these projects suffer from overly complex federal reviews and the threat of project-killing and project-delaying litigation. However, instead of streamlining the process, the Proposed Rule complicates it by creating new requirements related to climate change. At the same time that the electric power sector is being called upon to build out lower carbon

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<sup>149</sup> See National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1,196 (Jan. 9, 2023).

<sup>150</sup> The natural gas industry has played a critical role in reducing greenhouse gas emissions. Between 2005 and 2019, CO<sub>2</sub> emissions fell by 33 percent, at the same time U.S. energy generation increased, because of the increased use of natural gas. <https://ingaa.org/natural-gas-part-of-our-climate-solution/>

<sup>151</sup> EPA New Source Performance Standards For Greenhouse Gas Emissions From New, Modified, And Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines For Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; And Repeal Of The Affordable Clean Energy Rule, 88 Fed. Reg. 33240 (May 23, 2023).

<sup>152</sup> See U.S. Energy Information Administration, *Electric power sector CO<sub>2</sub> emissions drop as generation mix shifts from coal to natural gas* (June 9, 2021), <https://www.eia.gov/todayinenergy/detail.php?id=48296> (explaining that “[l]ower CO<sub>2</sub> emissions have largely been a result of a shift from coal to natural gas in the electricity generation mix.”).

generating sources at a scale and pace that is unprecedented, with estimates that more than a million miles of transmission lines<sup>153</sup> are needed to connect new wind and solar power generation, the proposed rule would simultaneously construct an increasingly complex labyrinth of requirements that would be expected to entangle even electric transmission projects in increased litigation leading to further delays and blocked projects.

Furthermore, consider forest management projects designed to reduce the risk of wildfire, increase the growth of residual trees, and store harvested timber in long lasting wood products. Collectively, these design features would advance climate change mitigation goals by: 1) reducing the likelihood of carbon emissions through wildfire; 2) increasing the rate of carbon sequestration by reducing competition to residual trees; and 3) storing carbon in long-lasting wood products that would otherwise be at risk of loss through wildfire. Carbon loss through wildfire has become a leading cause of our National Forests transitioning from carbon sinks to carbon sources.<sup>154</sup> Active forest management to reduce such a transition would not only reduce carbon loss, but would also accelerate carbon sequestration.<sup>155</sup> Ultimately, any timber harvested from National Forests to further these two objectives has been shown to have long-lasting carbon storage potential.<sup>156</sup> As wildfire occurrences escalate, implementation of these types of projects needs to be expedited. Unfortunately, the Proposed Rule has the potential to complicate and delay such implementation and increase the likelihood for delay from additional NEPA requirements and more litigation.

Finally, the Coalition opposes the proposed codification of CEQ's 2023 Interim Greenhouse Gas Guidance.<sup>157</sup> As the Coalition has explained in its comments on that Interim Guidance, CEQ's Greenhouse Gas Guidance will reduce the efficiency of environmental reviews at a time when Congress and this Administration have joined forces to support a variety of modern and essential projects through the Infrastructure Investment and Jobs Act, the CHIPS and Science Act, the Inflation Reduction Act, and the Fiscal Responsibility Act.<sup>158</sup> Nor should CEQ codify a direction from that guidance to use the SC-GHG in the NEPA process; direction that the White House recently reiterated, albeit informally.<sup>159</sup> The SC-GHG estimates are not

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<sup>154</sup> Michael Jerrett, et al., *Up in smoke: California's greenhouse gas reductions could be wiped out by 2020 wildfires*, ENVIRONMENTAL POLLUTION, Vol. 310 (Oct. 1, 2022), <https://doi.org/10.1016/j.envpol.2022.119888>; see also U.S. Forest Service, FUTURE OF AMERICA'S FOREST AND RANGELANDS: FOREST SERVICE 2020 RESOURCES PLANNING ACT ASSESSMENT (2023), <https://doi.org/10.2737/WO-GTR-102>.

<sup>155</sup> James D. Johnston, et al., *Mechanical thinning without prescribed fire moderates wildfire behavior in an Eastern Oregon, USA ponderosa pine forest*, FORESTRY AND ECOLOGY (2021); see also Brooks N. McDowell, et al., *Carbon isotope discrimination and growth response of old Pinus ponderosa trees to stand density reductions*, PLANT, CELL & ENVIRONMENT, Vol. 26, 631 (2003).

<sup>156</sup> Duncan C. McKinley, et al., *A synthesis of current knowledge on forests and carbon storage in the United States*, ECOLOGICAL APPLICATIONS, Vol. 21, 1902 (2011).

<sup>157</sup> Commission on Environmental Quality, National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1,196 (Jan.9, 2023).

<sup>158</sup> See Coalition Comment on Interim Greenhouse Gas Guidance, CEQ-2002-0005-0362 at 2 (Apr. 10, 2023), <https://www.regulations.gov/comment/CEQ-2022-0005-0362>.

<sup>159</sup> "FACT SHEET: Biden-Harris Administration Announces New Actions to Reduce Greenhouse Gas Emissions and Combat the Climate Crisis," September 21, 2023.

useful for agency decision-making under NEPA on individual permit decisions. Use of the SC-GHG for such decisions would distort decision-making for individual projects.

## **B. CEQ should not include the proposed “Context and Intensity” factors.**

CEQ proposes to return to “context” and “intensity” instead of “potentially affected environment” and “degree,” for determining significance, explaining that this framing has “long provided agencies with guidance [as to] how the intensity of an action’s effects may inform the significance determination.”<sup>160</sup> The Coalition believes that the 2020 Rule’s framing is adequate and properly implements the directive of the statute. Further, by reintroducing these factors with new elements CEQ is expanding the scope of NEPA review, rather than encouraging streamlining.

As discussed above, CEQ would require agencies to consider effects in “global, national, regional, *and* local contexts.”<sup>161</sup> In prior versions of the NEPA regulations, CEQ encouraged agencies to consider “national, regional *or* local” contexts, “as appropriate to the specific action.”<sup>162</sup> CEQ’s proposed addition of “global” and change from the disjunctive “or” to the conjunctive “and” would likely lead federal agencies to address all four contexts, regardless of whether a site-specific action has any appreciable national or global effects, significantly expanding the complexity and scope of NEPA review.

In another example, the proposed factors would expand the scope of NEPA review of potential project effects on endangered species habitat. Although the 1978 Rules explained that agencies should consider “[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat *that has been determined to be critical* under the Endangered Species Act of 1973,”<sup>163</sup> EQ now proposes that *any* habitat for protected species be considered.<sup>164</sup> This is a significant expansion of the scope of the types of species habitat that must be reviewed and factored into the significance determination. CEQ provides no explanation for why federal agencies should review impacts to *any* protected species habitat, especially when federal agencies are already under an obligation to engage in Section 7 consultation when protected species or critical habitat may be affected by a proposed action.<sup>165</sup> The Endangered Species Act already requires federal agencies to ensure that their actions do not jeopardize protected species. The likely outcome of CEQ’s proposed expansion of this requirement would be further delay of projects and litigation risk stemming from alleged agency errors regarding endangered species and critical habitat science and policy. These delays and risks would affect linear infrastructure severely, and would delay electrical transmission projects that are sorely needed to modernize the grid and access renewable sources of power.

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<sup>160</sup> Proposed Rule, at 49,936.

<sup>161</sup> See *id.* 49,969 (proposed § 1501.3(d)(2)(ii)–(x)).

<sup>162</sup> See *id.* 49,969 (proposed § 1501.3(d)(2)(ii)–(x)).

<sup>163</sup> 40 C.F.R. § 1508.27(b)(9) (1992) (emphasis added).

<sup>164</sup> Proposed Rule, at 49,936.

<sup>165</sup> See 50 C.F.R. § 402.14(a).



**C. Public and government engagement factors should be conducted within the bounds of NEPA.**

The Coalition notes that CEQ has proposed a number of changes to Section 1501.9 regarding public and governmental engagement. CEQ advises agencies to engage other agencies and the public “as early as practicable”<sup>166</sup> and to “[c]onsider what methods of outreach and notification are necessary and appropriate based on the likely affected entities.”<sup>167</sup> The Coalition believes that appropriate public engagement is important to informing the agency of important perspectives on a proposed action and achieving Congress’s goals expressed in NEPA. At the same time, the Coalition encourages CEQ to remind federal agencies that public engagement efforts should be conducted consistent with the lead agency’s deadlines for the NEPA process.<sup>168</sup>

**D. Lead agencies should actively manage the process.**

The Coalition agrees with many of the steps that CEQ has taken to ensure that NEPA reviews are completed in a timely manner. As explained above, NEPA-related delays have adverse economic impacts on a wide range of industries represented by the Coalition.<sup>169</sup> The Coalition supports CEQ’s retention of existing requirements that agencies shall complete environmental assessments within one year and environmental impact statements within two years. Extensions of these deadlines should be discouraged absent the agreement of an applicant or extraordinary circumstances.<sup>170</sup> These and other measures will help achieve the bipartisan goal of excellent and timely agency decision-making as enacted in the FRA.

**E. CEQ should not create an additional role for itself in dispute resolution.**

CEQ proposes a new “informal dispute resolution” process for resolving interagency disputes over the environmental review process.<sup>171</sup> This dispute resolution process would likely further complicate the NEPA process for a particular project, frustrate deadlines for the completion of the NEPA process, and tax CEQ’s limited resources. By allowing any “[f]ederal agency” to request informal dispute resolution, CEQ would likely be inundated with dispute resolution requests that could have been resolved through further interagency coordination and that would likely further delay agency review.<sup>172</sup> The Coalition therefore recommends that CEQ retain the existing “Criteria for Referral” provisions that authorize lead agencies to refer specific disputes to CEQ only after “concerted” efforts to resolve the dispute themselves prove fruitless.<sup>173</sup> Any meetings convened by agency decision makers and CEQ for purposes of

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<sup>166</sup> Proposed Rule, at 49,972 (proposed § 1501.9(c)(1)).

<sup>167</sup> *Id.* (proposed § 1501.9(c)(2)).

<sup>168</sup> *Id.* (proposed § 1501.10).

<sup>169</sup> In its revision, CEQ should retain elements from the current rule, as well as those specific provisions or clarifications that it has newly proposed that increase the efficiency of the federal review process. For example, the Coalition appreciates CEQ’s statement of the law surrounding whether public controversy may be a factor for determining significance – it is not. *See* Proposed Rule, at 49,936

<sup>170</sup> Proposed Rule, at 49,972–73 (proposed § 1501.10(b)(1)–(2)).

<sup>171</sup> *Id.* at 49,980 (proposed § 1504.2).

<sup>172</sup> *See* Proposed Rule, at 49,980 (proposed § 1504.2(b)).

<sup>173</sup> 40 C.F.R. § 1504.2.

informal dispute resolution should also include the project proponent, who will be able to meaningfully address relevant project design aspects involved in the dispute.<sup>174</sup>

**F. The Coalition opposes the proposed adoption of non-standard approaches to NEPA reviews.**

For the first time, CEQ proposes to allow agencies to adopt idiosyncratic “innovative approaches to NEPA reviews” to address “extreme environmental challenges.”<sup>175</sup> CEQ explains that it would authorize “innovative approaches” if CEQ believes a proposed approach to be “consistent with [the regulations];”<sup>176</sup> CEQ would publish the proposed innovative approach and CEQ’s approval on the CEQ website.<sup>177</sup> CEQ has not made the case that existing procedures do not accommodate anticipated needs. Further, CEQ’s proposed approval method for innovative approaches would bypass notice and comment procedures that more thoroughly inform the public of agency actions and provide an opportunity for comment.<sup>178</sup> Although CEQ provides examples of innovative approaches that relate mostly to procedural changes, CEQ proposes that “an innovative approach . . . allows an agency to comply with [NEPA] following procedures modified from the requirements *in this subchapter* [i.e., 40 C.F.R. Subchapter A, National Environmental Policy Act Implementing Regulations].”<sup>179</sup>

Agency departures from established and well-understood NEPA processes through “innovative approaches” are likely to result in uncertainty, litigation, and delay. As CEQ acknowledges throughout the Proposed Rule, “CEQ and Federal agencies [have] developed extensive experience implementing the 1978 regulations.”<sup>180</sup> Indeed, CEQ relies on this “extensive experience” in proposing changes that CEQ believes return to the spirit of the 1978 Rule.<sup>181</sup> By contrast, agencies, the regulated community, and the public –have little familiarity with “innovative approaches,” which may vary from one agency to the next, and both regulated entities and the public would be uncertain about whether courts would conclude that NEPA’s requirements were fulfilled. Administrations with different priorities may also pursue different innovative approaches based on different policy agendas or scientific evaluations of what actions are helpful to address extreme environmental challenges, and without notice and comment rulemaking an innovative approach could be withdrawn just as easily as it was approved. A project’s reliance on an innovative approach is likely to result in litigation and further delay of important projects, and may also fail to fulfill the NEPA objective of informing the public about the potential impacts of agency action.

Moreover, to the extent any agency can identify “innovative approaches” to *streamline* NEPA that remain consistent with the statute and the regulations, there is no apparent reason why those approaches should not be applied to all proposed federal actions, as appropriate.

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<sup>174</sup> See Proposed Rule, at 49,980 (proposed § 1504.2(c)).

<sup>175</sup> Proposed Rule, at 49,984 (proposed § 1506.12(a)).

<sup>176</sup> *Id.* (proposed § 1506.12(b)).

<sup>177</sup> *Id.* (proposed § 1506.12(e)).

<sup>178</sup> *Id.* 49,958.

<sup>179</sup> *Id.* 49,984 (proposed § 1506.12(a)).

<sup>180</sup> *Id.* at 49,927.

<sup>181</sup> *Id.* at 49,928.

Reserving innovative approaches that create efficiencies only to projects intended to meet certain kinds of environmental challenges would put a thumb on the scale in favor of some projects above others based on the policy preferences of a particular Administration.

Because of these concerns about uncertainty, litigation, and delay, CEQ should abandon its proposed “innovative approaches to NEPA” in any final rulemaking.

**VII. CEQ should clarify that agencies should not delay reviews if the Proposed Rule is finalized.**

If CEQ does move forward with finalizing any aspect of the Proposed Rule, CEQ should clarify that agencies should continue with NEPA reviews without delay. While CEQ states that agencies do not “need to redo or supplement a completed review” because of the rulemaking,<sup>182</sup> CEQ should direct agencies to continue reviews already begun under the current regulations rather than changing the rules in midstream. Such a change would cause delays, confusion and increased costs for project proponents.

In addition, CEQ should clarify that agencies should not slow or stop performing NEPA reviews of any projects of any kind while the agencies are developing their own new NEPA implementing procedures. It is critical that agencies continue to assess proposals for action without the delays that would be caused by halting or delaying federal reviews while agencies develop and promulgate their own new implementing procedures – a process that could take years. To prevent such delays, we strongly recommend that CEQ change the provisions of the Proposed Rule regarding the transition period between the date any final rule takes effect and the dates when various agencies issue their final NEPA procedures to conform to the new final rule.

**VIII. CONCLUSION**

The Coalition appreciates the opportunity to provide comments on the Proposed Rule and urges CEQ to withdraw the Proposed Rule. In the alternative, the Coalition urges CEQ to revise and finalize the Proposed Rule consistent with the FRA’s revisions to NEPA without making any further regulatory changes. Doing so would facilitate efficient federal reviews of authorizations needed for projects critical to the United States.

Sincerely,

Agricultural Retailers Association  
American Chemistry Council  
American Exploration & Mining Association  
American Exploration & Production Council  
American Farm Bureau Federation  
American Forest Resource Council  
American Fuel & Petrochemical Manufacturers

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<sup>182</sup> *Id.* at 49,958.

American Gas Association  
American Public Gas Association  
American Road & Transportation Builders Association  
Associated Builders and Contractors  
Associated General Contractors of America  
Association of American Railroads  
Center for LNG  
The Fertilizer Institute  
Hardwood Federation  
Independent Petroleum Association of America  
Interstate National Gas Association of America  
National Cattlemen's Beef Association  
National Mining Association  
National Ocean Industries Association  
National Rural Electric Cooperative Association  
National Stone, Sand & Gravel Association  
Natural Gas Supply Association  
Public Lands Council  
U.S. Chamber of Commerce