September 29, 2023

Via Regulations.gov

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

Re: Comments on Council on Environmental Quality's National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49,924, Docket No. CEQ-2023-0003

Dear Chair Mallory:

Attached please find the comments of the American Petroleum Institute, the Liquid Energy Pipeline Association, the EnerGeo Alliance, the American Exploration and Production Council, and the Petroleum Alliance of Oklahoma in response to the Council on Environmental Quality's Notice of Proposed Rulemaking for National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49,924 (July 31, 2023).

Sincerely,

Dustin Meyer
Senior Vice President of Policy,
Economics and Regulatory Affairs
American Petroleum Institute

Steven M. Kramer
Senior Vice President, General Counsel
and Corporate Secretary
Liquid Energy Pipeline Association

Dustin Van Liew
Vice President
Global Policy & Government Affairs
EnerGeo Alliance

Wendy Kirchoff
Vice President
Regulatory Policy
American Exploration and Production
Council

Angie Burckhalter
Senior Vice President
Regulatory & Environmental Affairs
The Petroleum Alliance of Oklahoma

Comments of the American Petroleum Institute, the Liquid Energy Pipeline Association, the EnerGeo Alliance, the American Exploration and Production Council, and the Petroleum Alliance of Oklahoma on CEQ's Notice of Proposed Rulemaking on National Environmental Policy Act Implementing Regulations Revisions Phase 2

Docket No. CEQ-2023-0003

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I. INTRODUCTION

The American Petroleum Institute ("API"), the Liquid Energy Pipeline Association ("LEPA"), the EnerGeo Alliance ("EnerGeo"), the American Exploration and Production Council ("AXPC"), and the Petroleum Alliance of Oklahoma ("PAO") (collectively, "the Associations") respectfully submit the following comments in response to the Council on Environmental Quality's ("CEQ's" or "the Council's") proposed rule, National Environmental Policy Act Implementing Regulations Revisions Phase 2 ("the Phase II Proposal" or "the Proposal").[1] The Associations support an effective National Environmental Policy Act ("NEPA" or "the Act") review process that does not unduly delay projects with a federal nexus in order to support both the Administration's infrastructure goals and congressional intent to reform the federal permitting process.

As you know, the purpose of NEPA is to facilitate "fully informed and well-considered" agency decisions.[2] To that end, the Act "does not mandate particular results, but simply describes the necessary process" by which federal agencies are to make decisions.[3] This process is focused squarely on assessing the reasonably foreseeable effects caused by the proposed agency action under review and within the reviewing agency's authority to address. NEPA reviews and documents are meant to be "concise and informative,"[4] and thus must be reasonably tailored in duration and scope commensurate with the size and complexity of the proposed action. The information gathered on potential effects—and reasonable alternatives and potential mitigation measures—should be science-based, with input provided by both project sponsors and other stakeholders. Importantly, agencies must consider the gathered information fairly, impartially, and without regard for overarching policy preferences or goals unrelated to the discrete decision under review. And they must do so with an eye towards the potential environmental impacts that are significant in the context of the particular agency action—and not with a pre-determined emphasis on certain types of impacts or with a preference toward certain types of actions.

Despite its clear and reasonably narrow mandate, NEPA has over time morphed into an overly cumbersome environmental review process that frequently delays projects. Such delays stem not only from the time agencies necessarily spend gathering and reviewing information, conducting public engagement, and drafting NEPA documents, but also from the almost-inevitable protracted litigation over the sufficiency of those agency efforts. All the while, projects languish and development and construction timelines and project costs are thrown into disarray.[5] At times, the

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[1] *See* National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49,924 (July 31, 2023).

[2] *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

[3] *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); *Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980).

[4] 88 Fed. Reg. at 49,932.

[5] *See Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126, PP 5-6 (2021) (Christie, Comm'r, dissenting) (the "use of the legal weapons of unending litigation and collateral attacks against infrastructure projects long after they have been approved" can make such projects "less appealing to engage in by those who normally seek to build the projects" and "harder to finance"); Request for Commission Action on Remand for Texas LNG Project, *Texas LNG Brownsville LLC*, FERC Docket No. CP16-116-000 (Accession No. 20220812-5040), at 2–3 (Aug. 12, 2022), https://tinyurl.com/3r4jw855 (developer of LNG terminal explaining that while agency approval is pending on judicial remand "potential customers cannot be locked in" and "the cost of capital, materials and services is increasing").

sluggish if not stagnant nature of NEPA reviews has been the cause of project cancellation, including for critical infrastructure and energy transition projects.[6]

While appropriate information gathering and public engagement are important aspects of NEPA, Congress has recognized problems with NEPA's growing scope and ever-lengthening timelines and has recently reaffirmed the need for a more streamlined and efficient NEPA process by amending the Act as part of the Fiscal Responsibility Act ("FRA"), in a section of the law referred to here as the "Builder Act."[7] As the name implies, the ***Builder*** Act was designed to streamline NEPA to allow for the construction of new projects by introducing a range of mechanisms to improve the NEPA process, from deadlines and page limits for environmental assessments ("EAs") and environmental impacts statements ("EISs"), to centralization through a "lead agency," and codification and promotion of longstanding NEPA concepts like categorical exclusions. While the amendments are wide-ranging and varied, they evince a principal congressional intent to promote values of transparency, timeliness, predictability, efficiency, and durability within the NEPA process. And a more durable and predictable NEPA review process will be critical as our nation embarks on a historic infrastructure investment, spurred in large part by the Infrastructure Investment and Jobs Act ("IIJA") and Inflation Reduction Act ("IRA").

The Associations supported CEQ's streamlining efforts through its 2020 revisions to its NEPA implementing regulations ("2020 Regulations")[8] because they were in accord with those same values. We specifically supported those aspects of the 2020 Regulations that allowed for more efficient and reasonably circumscribed reviews, not simply based on interests in expediency, but because we view those measures as necessary to restore the NEPA review processes to the Act's central purpose of improving agency decision-making. We conversely voiced our concern that CEQ's initial set of revisions to the 2020 Regulations ("Phase I Regulations")[9] would do more to undermine rather than promote this central goal of NEPA. We noted that CEQ's revision or rescission of portions of the 2020 Regulations would undercut the clarity and consistency of agencies' NEPA review procedures and frustrate provisions of the 2020 Regulations that realigned

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[6] *See Wild Va. v. U.S. Forest Serv.*, 24 F.4th 915, 925 n.6 (4th Cir. 2022) (describing how vacatur of "several decisions of state and federal agencies approving" a natural gas transportation project led to "ongoing delays[,] increas[ed] cost uncertainty," and, ultimately, project cancellation); *Pub. Emps. for Env't Resp. v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (observing that the Cape Wind offshore wind project "slogged through state and federal courts and agencies for more than a decade"); Katharine Q. Seelye, *After 16 Years, Hopes for Cape Code Wind Farm Float Away*, N.Y Times (Dec. 19, 2017), https://tinyurl.com/26jax2yu (noting the Cape Wind project's cancellation due to "endless litigation and a series of financial and political setbacks that undermined Cape Wind's viability").

[7] *See* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38–46. Throughout these comments, the Associations will refer to the FRA's amendments to NEPA as "the Builder Act," and citations and references to NEPA are to the statute as amended by the FRA, unless otherwise noted.

[8] *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 Regulations"]; *see also* Joint Trades Comments, Docket No. CEQ-2019-0003 (Comment ID CEQ-2019-0003-169784) (Mar. 10, 2020), *available at* https://tinyurl.com/yxhkx89h; AXPC Comments, Docket No. CEQ-2019-0003 (Comment ID CEQ-2019-0003-169757) (Mar. 10, 2020*), available at* https://tinyurl.com/3huxns2f.

[9] *See* National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022) [hereinafter "Phase I Regulations"]; *see also* Energy Associations Comments, Docket No. CEQ-2021-0002 (Comment ID CEQ-2021-0002-33770) (Nov. 22, 2021), *available at* https://tinyurl.com/y2ryj2k3 [hereinafter "Energy Associations Phase I Comments"]; PAO Comments, Docket No. CEQ-2021-0002 (Comment ID CEQ-2021-0002-39301) (Nov. 22, 2021), *available at* https://tinyurl.com/bp7nve6x.

and refocused agencies' reviews toward well-informed decision-making by incorporating relevant case law and codifying procedural approaches that decades of implementation experience have demonstrated to be effective. We voiced similar concerns with regard to CEQ's interim guidance on consideration of greenhouse gas ("GHG") emissions and climate change ("Interim Climate Guidance").[10]

While CEQ's Phase II Proposal makes some marked improvements to the NEPA process, the Associations believe the Proposal largely represents a yet-further departure from NEPA's central focus—fully informed and well-considered agency decision-making. And rather than streamline and improve the NEPA process and effectuate the language and intent of the Builder Act (and advance critical infrastructure projects), the Phase II Proposal adds unnecessary complexity, introduces new yet ill-defined considerations to an already overextended NEPA process, and runs counter to NEPA's statutory mandate. These problems will likely invite more regulatory uncertainty and result in needless and time-consuming litigation that will ultimately stall projects and require agencies to expend limited resources on revising NEPA review documents following case-by-case instructions from courts.

We therefore urge CEQ to revise its Phase II Proposal to fully and faithfully implement the Builder Act and the overarching congressional intent behind that legislation. Moreover, any final rulemaking should take into consideration and incorporate all of the Associations' recommendations contained in these comments. The Associations ask CEQ to view our comments below as reflecting our desire to engage with CEQ constructively to achieve a regulatory approach that informs the public and does not unnecessarily preclude or impede infrastructure development, consistent with the underlying statute.

For the reasons further detailed in this letter, the Phase II Proposal, as currently drafted, does not comply with NEPA, the Builder Act, or the Administrative Procedure Act ("APA"). The Associations provide general comments in Section III below on the need for a predictable, efficient, and durable NEPA process. Section III also details the Proposal's potentially detrimental impacts on those objectives and, more concretely, on a wide variety of nationally important projects and approvals due to the Proposal's elimination of clear and reasonable guideposts to the NEPA review process. In Sections IV through XIV, the Associations provide detailed explanations as to the following concerns:

- The Phase II Proposal fails to implement (and, at times, frustrates and circumvents) key provisions of the Builder Act meant to advance a more streamlined NEPA review process. CEQ is well-positioned to provide more robust guidance to faithfully effectuate congressional intent, yet instead elected to implement the Builder Act in such a way as to advance Administration-preferred policy priorities.

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[10] *See* National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1,196 (Jan. 9, 2023) [hereinafter "Interim Climate Guidance"]; *see also* API Comments, Docket No. CEQ-2022-0005 (Comment ID CEQ-2022-0005-0313) (Apr. 10, 2023), *available at* https://tinyurl.com/mvc2rve2 [hereinafter "API Interim Climate Guidance Comments"]; Coalition Comments, Docket No. CEQ-2022-0005 (Comment ID CEQ-2022-0005-0362) (Apr. 10, 2023), *available at* https://tinyurl.com/4by4dwbh [hereinafter "LEPA & AXPC Interim Climate Guidance Comments"].

- The Phase II Proposal runs counter to the longstanding interpretation of NEPA as a process-oriented, information-forcing statute and instead improperly construes NEPA as an "outcome-forcing" statute that subjects classes of project to disparate regulatory treatment.

- The Phase II Proposal also ignores longstanding principles articulated by the Supreme Court about the appropriate limits on the scope of NEPA review; namely, that it is designed to focus on "significant" effects that are both reasonably foreseeable and caused by the proposed action.

- Rather than providing much-needed clarity, CEQ introduces new and ill-defined terms and concepts into the Proposal, which will leave courts, agencies, and project proponents alike to guess at how to pivot from their prior understanding of well-known terms and phrases that have taken on particular meanings in the NEPA process.

- The Phase II Proposal's requirements that mitigation measures be legally binding and subject to ongoing monitoring for compliance is both an unexplained departure from longstanding agency and judicial interpretation and insufficiently sensitive to the limitations and constraints on mitigation imposed by agencies' governing authorities.

- The Phase II Proposal's outsized emphasis on potential climate change-related effects ignores critical NEPA principles regarding neutrality towards types of potential effects as well as causation and reasonable foreseeability, relies on unfounded assumptions regarding upstream and downstream GHG emissions, and would generally invite speculation and impede sound agency decision-making.

- The Phase II Proposal's integration of environmental justice-related considerations charts a new course that is not sufficiently tethered to either NEPA's procedural requirements or existing agency practice and case law, which will create more, not less, regulatory confusion about an agency's or a project applicant's obligations.

- The Phase II Proposal's approaches to extra-jurisdictional alternatives and "environmentally preferable alternatives" will needlessly divert agency and the public's attention away from those reasonable alternatives that actually advance NEPA's mandate for fully informed and reasoned decision-making.

- The Phase II Proposal should revise its approach to categorical exclusions to provide greater—not less—availability of exclusions, and promote greater inter-agency adoption of exclusions.

- The Phase II Proposal's "innovative approaches" framework appears legally untenable, would likely result in additional (not less) agency delay as presently drafted, and unnecessarily diverts CEQ attention from more meaningful efforts to streamline the NEPA review process for all projects. CEQ has not sufficiently explained why the current regulations or those proposed cannot otherwise accommodate reviews that would use this alternative approach.

- The Phase II Proposal, much like its Phase I predecessor, proposes to eliminate key regulatory reforms from the 2020 Regulations meant to promote greater efficiency, predictability, and transparency; these reforms from the 2020 Regulations should be retained.

- Any changes should *not* create new delay and uncertainty for pending reviews. The Phase II Proposal should clarify that notwithstanding the effective date of any final Phase II rulemaking, (1) an agency's NEPA regulations and procedures will continue in effect until the agency finalizes revisions to implement the final Phase II rulemaking, and (2) the agency NEPA regulations and procedures presently governing a particular application will continue to govern the project, up to and through the reviewing agency's final decision and any judicial challenges to that decision and throughout the project's operational life.

- By both failing to fully and faithfully effectuate the Builder Act, and going well beyond its provisions in other respects, the Phase II Proposal highlights the ongoing and ever-pressing need for bipartisan, comprehensive permitting reform that will help advance all projects critical to energy security and the energy transition.

We hope that CEQ thoroughly considers these comments and uses them in furtherance of our shared interest in a well-functioning, informed, and collaborative NEPA review process.

II. THE ASSOCIATIONS' INTERESTS

API represents all segments of America's oil and gas industry, which supports more than 11 million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. API's nearly 600 members produce, process, and distribute most of the nation's energy. Together with its member companies, API is committed to ensuring a strong, viable U.S. natural gas and oil industry capable of meeting our nation's energy needs in an efficient and environmentally responsible manner. API members are also committed to achieving a lower-carbon energy future and investing in infrastructure projects that will promote achievement of those goals, subject to permitting reforms that will make the necessary infrastructure projects possible.

Representing the interests of the natural gas and oil industry in regulatory and judicial proceedings, including those involving NEPA, is part of API's overall purpose, and API has, on numerous occasions in recent years, submitted comments on CEQ regulatory documents, including (as noted above) the 2020 Regulations, the Phase I Regulations, and the Interim Climate Guidance. From time to time, API also intervenes as a party in NEPA litigation affecting the interests of its members. As relevant here, API's efforts to advocate through judicial intervention include our recent intervention to defend the 2020 Regulations.

LEPA is a national trade association that promotes responsible policies, safety excellence, and public support for liquid energy pipelines. LEPA represents owners and operators of pipelines transporting approximately 97 percent of all reported hazardous liquids barrel miles, extending over 225,000 in total length throughout the U.S. LEPA educates all branches of government and the public about the benefits and advantages of transporting liquid energy by pipeline as the safest, most reliable, and most cost-effective method. LEPA's diverse membership includes large and

small pipelines carrying crude oil, refined petroleum products, natural gas liquids, carbon dioxide ("CO_2"), and other energy liquids.

Founded in 1971, EnerGeo is a global trade association for the energy geoscience industry, the intersection where earth science and energy meet. Providing solutions to revolutionize the energy evolution, EnerGeo and its member companies span more than 50 countries, representing onshore and offshore survey operators and acquisition companies, energy data and processing providers, energy companies, equipment and software manufacturers, industry suppliers, service providers, and consultancies. Together, our member companies are the gateway to the safe discovery, development, and delivery of mainstay sources of energy, alternative energy, and low-carbon energy solutions that meet our growing world's needs.

Through reliable science- and data-based regulatory advocacy, credible resources and expertise, and future-focused leadership, EnerGeo continuously works to develop and promote informed government policies that advance responsible energy exploration, production, and operations. As the global energy demand evolves, we believe that all policymakers and energy companies, providing mainstay, alternative, and low-carbon solutions, – should have access to reliable data and analysis to support their forward moving efforts.

AXPC is a national trade association representing 34 of the largest independent oil and natural gas exploration and production companies in the United States. AXPC companies are among leaders across the world in the cleanest and safest onshore production of oil and natural gas, while supporting millions of Americans in high-paying jobs and investing a wealth of resources in our communities. Dedicated to safety, science, and technological advancement, our members strive to deliver affordable, reliable energy while positively impacting the economy and the communities in which we live and operate. As part of this mission, AXPC members understand and promote the importance of ensuring positive environmental and public-welfare outcomes and responsible stewardship of the nation's natural resources. It is important that regulatory policy enables us to support continued progress on both fronts through innovation and collaboration.

PAO represents more than 1,400 individuals and member companies and their tens of thousands of employees in the upstream, midstream, and downstream sectors and ventures ranging from small, family-owned businesses to large, publicly traded corporations. Our members produce, transport, process and refine the bulk of Oklahoma's crude oil and natural gas.

The Associations' consistent advocacy in favor of further NEPA reform and refinement stems from the firsthand experiences of our member companies, who frequently engage in a wide variety of activities that have a federal nexus triggering NEPA reviews. These activities include, among others, exploration and production of oil and gas resources on federal lands both onshore and offshore on the Outer Continental Shelf ("OCS"); construction of interstate natural gas pipelines and liquid energy and natural gas pipelines that cross federal lands or international borders; construction and operation of liquefied natural gas terminals; and carbon capture, utilization, and sequestration ("CCUS") infrastructure. Accordingly, our member companies are directly impacted by the NEPA review decisions and consultations made by, among other agencies, the Bureau of Land Management ("BLM"), the Bureau of Ocean Energy Management ("BOEM"), the Department of Energy ("DOE"), the Environmental Protection Agency ("EPA"), the Federal Energy Regulatory Commission ("FERC"), the Department of State, the U.S. Fish and Wildlife

Service ("FWS"), the National Marine Fisheries Service ("NMFS"), the U.S. Army Corps of Engineers ("Army Corps"), and the U.S. Forest Service ("USFS").

The Associations' long history of consistent engagement on NEPA permitting matters has been pursued with three key principles in mind—principles that we believe should similarly guide CEQ's efforts here and going forward:

- **Transparency and Predictability**: Because energy infrastructure projects are years-long endeavors, transparent and predictable timelines and review processes are critical for securing project funding, ensuring a return on capital investments, and procuring long-term contracts needed to underpin the substantial investments involved.

- **Timeliness and Efficiency**: Certainty and consistency in any permitting process are imperative and help ensure that projects are completed on time, on budget, and without redundant requirements. And accountability, for both project sponsors and permitting authorities, is essential for bringing energy infrastructure online to provide reliable and affordable energy to the U.S. public, both now and in the future.

- **Durability**: From an individual project standpoint, project operators need certainty that permits and approvals obtained will be subject to neither continual agency review, revision, or revocation nor protracted litigation—particularly after projects are already under construction or operational. More broadly, project sponsors and operators need assurances that applicable permitting regulations will not change at the whims of each successive Administration.

III. GENERAL COMMENTS

The Associations appreciate and advocate for the careful consideration of potential environmental impacts while allowing for the timely authorization of projects that spur job creation, economic activity, and federal, state, and local tax revenue; promote energy security at home and abroad; and allow for upgrades to aging infrastructure. When properly used, NEPA reviews can ensure that localized environmental impacts are taken into account while still allowing for these much-need projects to be completed. Since NEPA was enacted over fifty years ago, the scope of NEPA reviews has expanded dramatically, particularly so over the past decade. This expanded scope has, in turn, lengthened project review timelines; fostered confusion among project sponsors, regulators, and stakeholders; and resulted in conflicting and divergent judicial decisions. The end result, in practical terms, is the suppression of billions of dollars in energy investment,[11] including those projects integral to meeting present energy needs, to supporting the ongoing energy transition, and to providing long-term energy security for our Nation.

[11] *See* API, *2023 State of American Energy* 15, https://tinyurl.com/4v2n858b ("In all, $157 billion in energy investment is waiting in the NEPA pipeline . . . .").

This was not what Congress intended in enacting NEPA, nor when it recently amended the statute through the Builder Act. NEPA is a procedural statute,[12] which Congress intended to facilitate "fully informed and well-considered" agency decisions.[13] It certainly never intended for NEPA's procedural requirements to so encumber agencies with extraneous analytical and arguably outcome-oriented requirements that it would become effectively impossible for an agency to complete an environmental review in a timely manner and then be required to defend it in litigation. Today, it is difficult to reconcile NEPA's aspiration 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"[14] with the decades of implementation that have transformed NEPA into what is now widely regarded as among the foremost obstacles to developing our nation's most critical energy, transportation, water treatment, and communications infrastructure.

Despite decades of CEQ guidance, agency implementation, and related case law, the NEPA review process has remained unnecessarily complex, unreasonably time-consuming, and unpredictable. There is no better evidence of this than the ever-increasing lengths of NEPA documents and completion timelines. According to CEQ's most recent calculations, the median length for final EISs is 447 pages, although the upper quartile far exceed that number at 748 pages or more.[15] The appendices for final EISs are no different, with a median length of 423 pages and an average length of 1,042 pages, evincing the wide range of outcomes.[16] This expansion in length is striking when considering CEQ's directive—recently codified by Congress—that EISs should normally be 150 pages or less, and at most 300 pages for proposals of unusual scope or complexity.[17] Worse still, CEQ now estimates that the median time to complete an EIS is 3.5 years, and for the upper quartile of projects, 6 years or more.[18]

The ever-expanding size of NEPA documents (and the attendant delays in the review process) is often attributed to the perceived need to include highly attenuated and speculative alternatives and effects, the analysis of which do not further meaningful project review and indeed can detract from both agencies' and the public's ability to understand the most significant environmental impacts of a proposed project. At times, agencies engage in these needlessly protracted reviews of their own volition and often with an eye toward a means of defending the sufficiency of their analyses

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[12] *See infra* Section IV; 42 U.S.C. § 4332(2)(C) (directing federal agencies to "include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, *a detailed statement*" regarding, among other things, "reasonably foreseeable environmental effects of the proposed action" and "a reasonable range of alternatives to the proposed action" (emphasis added)); *see also, e.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976) ("The procedural duty imposed upon agencies by this section is quite precise . . . ."); *Vt. Yankee*, 435 U.S. at 558 (NEPA's "mandate to the agencies is essentially procedural." (citing 42 U.S.C. § 4332)); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) ("NEPA . . . simply guarantees a particular procedure, not a particular result.").

[13] *Vt. Yankee*, 435 U.S. at 558.

[14] 42 U.S.C. § 4331(a).

[15] CEQ, *Length of Environmental Impact Statements (2013–2018)*, at 1 (June 12, 2020), https://tinyurl.com/ack89vxz [hereinafter "Length of EISs"].

[16] *Id.* at 3.

[17] *See* 40 C.F.R. § 1502.7; 40 C.F.R. § 1502.7 (2019); *see also* 42 U.S.C. § 4336a(e).

[18] CEQ, *Environmental Impact Statement Timelines (2010–2018)*, at 1 (June 12, 2020), https://tinyurl.com/mrysvnw8.

in legal challenges. There appears to be no significant evidence that more voluminous and protracted reviews are reducing litigation delays. In fact, the opposite is likely the case.

Indeed, NEPA is, by far, the most litigated environmental statute.[19] It is viewed by many groups as an effective tool to impede or fully preclude projects that facilitate industrial or commercial activities that the litigants oppose. Quite often, litigants lack credible objections to agency analyses but nevertheless pursue challenges that can significantly delay or halt the projects they oppose. The delays stemming from such litigation can exceed the amount of time spent by agencies on undertaking the underlying NEPA analysis. And this type of vexatious litigation not only often substantially delays or pauses the challenged project but may also incentivize agencies to extend the scope of subsequent reviews so they include more unnecessary analysis lest their next NEPA document be so fly-specked. Nonetheless, with frustratingly circularity, and irrespective of how protracted the process or how detailed the review, it appears that many agencies have become resigned that their analyses will surely be challenged, thereby effectively assuring that subsequent NEPA reviews are even longer and more detailed without regard to the actual significance of the potential environmental impacts.

It is against this backdrop of unpredictability and unproductive delay that the Associations supported the 2020 Regulations and the reforms enacted in the Builder Act as a catalyst for further improvement of NEPA. We believe the reforms embodied by those efforts, if dutifully implemented by CEQ and federal agencies, could help restore the NEPA review process back to the Act's core purpose of fully informed and well-considered agency decision-making, and away from the litigation-fueled dysfunction and delay that have become the statute's hallmarks. But given the history of litigation-based delays, we are also concerned that any new terminology, procedure, or requirements introduced in the Phase II Proposal, if implemented, will create additional risk of new litigation delays as agencies and courts attempt to decipher the meaning of these new requirements.

There has perhaps never been a greater need for CEQ to facilitate a well-functioning NEPA review regime. The United States is in the midst of an evolving global and domestic energy landscape in which the nation has become a net exporter of natural gas;[20] the resilience of the country's electric transmission and distribution grid is in need of extensive bolstering and will remain a significant policy concern;[21] and domestic natural gas, particularly liquified natural gas ("LNG"), has taken on greater importance in bolstering affordable access to energy and the reliability of the electric

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[19] *See* 2020 Regulations, 85 Fed. Reg. at 43,310 ("Perhaps surprisingly, there have been thousands of NEPA suits. It might seem strange that NEPA's seemingly innocuous requirement of preparing an EIS has led to more lawsuits than any other environmental statute." (quoting James E. Salzman & Barton H. Thompson, Jr., *Environmental Law and Policy* 340 (5th ed. 2019))).

[20] *See* U.S. Energy Info. Admin., *The United States Became the World's Largest LNG Exporter in the First Half of 2022* (Dec. 27, 2022), https://tinyurl.com/ydjmxvna; *see also* U.S. Energy Info. Admin., *U.S. Natural Gas Production and LNG Exports Will Likely Grow Through 2050 in AEO2023* (Apr. 27, 2023), https://tinyurl.com/27fw9bm3.

[21] *See, e.g.*, FERC, *Technical Conference to Discuss Climate Change, Extreme Weather, & Electric System Reliability* (last updated Aug. 11, 2021), https://tinyurl.com/4wvc7nam.

grid,[22] in displacing higher GHG-emitting fuels,[23] and in improving the energy security of the United States and our allies.[24] The U.S. Energy Information Administration has documented that oil and natural gas will remain an important part of the U.S. energy mix over the next 30 years, even with a significant increase in renewable energy.[25] Without regulations to promote a NEPA review process reflective of the three key principles outlined above— transparency and predictability, timeliness and efficiency, and durability—important energy infrastructure projects of all sorts are unlikely to be constructed according to timelines reflective of the urgency with which they are needed. The end result could be *worse* for the environment and the climate: any gaps in our nation's present and future energy needs would likely be filled by energy produced in countries with far less environmentally friendly regulatory landscapes, and likely with a higher carbon footprint.

A well-functioning and fully informed NEPA regime is similarly essential to effectuate the infrastructure investments spurred by the IIJA and IRA. The IIJA dedicated $550 billion in additional infrastructure spending over current infrastructure spending levels and, according to the White House, represents

> a historic opportunity to rebuild America's roads, bridges and rails; expand access to clean drinking water; ensure that every American has access to high-speed internet; to tackle the climate crisis and advance environmental justice, while investing in communities—both urban and rural—that have too often been left behind.[26]

Specifically, the IIJA allocates significant funding for major infrastructure projects—from $100 billion towards roads and bridges, to almost $90 billion for public transit, to $65 billion toward clean energy transmission and grid infrastructure, to over $8 billion towards CCUS and similar carbon-related infrastructure and programs, to $9.5 billion towards hydrogen infrastructure and programs.[27]

As a major supplement to the IIJA's already historic level of clean energy infrastructure funding, the IRA provides nearly $370 billion in additional federal funding through a mix of tax incentives,

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[22] *See, e.g.*, North Am. Elec. Reliability Corp., *2022 Long-Term Reliability Assessment* 7 (Dec. 2022), https://tinyurl.com/2ncw4s22.

[23] *See* U.S. Energy Info. Admin., *Electric Power Sector CO2 Emissions Drop as Generation Mix Shifts from Coal to Natural Gas* (June 9, 2021), https://tinyurl.com/t5h8pcz9. *Compare* API, *Climate Action Framework* 11 (2021), https://tinyurl.com/9spuebht (documenting reductions in methane emissions per unit of production from key basins by nearly 70% between 2011 and 2019, using data from EPA and EIA), *with* Aaron Clark & Laura Millan, *Russia's Dirty Gas Is Keeping Europe from Freezing Over*, Bloomberg (Nov. 1, 2021), https://tinyurl.com/22ppmv26 (describing Russia's position as the highest emitter of methane in the world in 2020, according to the International Energy Agency).

[24] *See* Arvind P. Ravikumar, Morgan Bazilian & Michael E. Webber, *The US Role in Securing the European Union's Near-Term Natural Gas Supply*, 7 Nature Energy 465 (2022), https://tinyurl.com/SudEtal; *see also* Kate Abnett, *Explainer: Europe's Energy Security Better than Feared after a Year of War in Ukraine*, Reuters (Feb. 24, 2023), https://tinyurl.com/3tsrr98f.

[25] U.S. Energy Info. Admin., *Annual Energy Outlook 2023* 9–10 (Mar. 2023), https://tinyurl.com/mrftnttc.

[26] *See* White House, *A Guidebook to the Bipartisan Infrastructure Law for State, Local, Tribal, and Territorial Governments, and Other Partners* 5 (2022), https://tinyurl.com/2p9s9z4b.

[27] *See generally id.* (funding estimates drawn from Guidebook).

grants, loan guarantees, and other investments.[28] This includes an additional $1.55 billion in tax credits for CCUS projects and more than $5.3 billion in additional tax credits for clean hydrogen projects.[29] The IRA also provides DOE with $40 billion in clean energy loan authority, including $2 billion in direct loan programming for the construction or modification of electric transmission facilities, and another $760 million in grants to facilitate the siting of interstate transmission lines.[30] The IRA also allocates to EPA $27 billion to award competitive grants for clean energy and climate projects that will reduce GHG emissions.[31]

This unprecedented level of infrastructure investment will almost certainly precipitate NEPA reviews on a scale not encountered since the statute's inception. Likely the only way federal agencies will be able to effectively manage the number of NEPA reviews necessary to put the anticipated infrastructure investment into action is through clear, constructive, and defensible interpretative regulations and guidance from CEQ. Otherwise, NEPA will likely present a formidable barrier to the myriad infrastructure projects envisioned by the IIJA and IRA. The Administration should not squander this historic opportunity to invest in America's future. CEQ must recognize the unprecedented levels of infrastructure investment on the horizon and the need for well-functioning NEPA review processes—as well as the cascading economic and environmental risks if such investment are slowed or halted.

As currently proposed, though, the Phase II Proposal (much like Phase I) appears likely to be counterproductive towards the aims of greater efficiency, predictability, and durability in the NEPA review process. To be sure, the Associations support many aspects of the Proposal, such as CEQ's encouragement for greater use of programmatic review for broad federal actions;[32] the ability for agencies to jointly develop categorical exclusions or develop categorical exclusions through land use plans, decision documents, or equivalent programmatic decisions;[33] and many others highlighted throughout these comments. But taken as a whole, the Phase II Proposal evinces an intent to saddle the NEPA process (and accordingly, essential infrastructure projects through individual project reviews) with additional requirements, including many that stretch the traditionally understood bounds of the Act to encourage particular substantive outcomes.

While CEQ appears superficially poised to improve the functionality and efficiency of NEPA, many of those benefits appear intended only for those projects and industries favored by the current Administration. Such an approach is misguided, inappropriate, and in direct conflict with the Act, and undermines the goal of promulgating a durable NEPA regulatory regime. While environmental reviews should be tailored to the significance of potential environmental effects, CEQ appears to go beyond this goal, as traditionally understood. Rather than providing a streamlined process of all projects, CEQ appears to be creating a way to circumvent certain dysfunctional aspects of the NEPA review process only for those industries and projects that the current or any future

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[28] *See* White House, *Building a Clean Energy Economy: A Guidebook to the Inflation Reduction Act's Investments in Clean Energy and Climate Action* 5 (2023), https://tinyurl.com/mry4b94u [hereinafter *IRA Guidebook*].
[29] *Id.* at 68; Cong. Budget Off., *Summary Estimated Budgetary Effects of Public Law 117-169, to Provide for Reconciliation Pursuant to Title II of S. Con. Res. 14*, at 9 (Sept. 7, 2022), https://tinyurl.com/4wd9cvc4.
[30] *IRA Guidebook*, *supra* n.28, at 34.
[31] *Id.* at 10.
[32] 88 Fed. Reg. at 49,493–94, 49,973–74 (proposed § 1501.11).
[33] *Id.* at 49,937–38, 49,969–70 (proposed § 1501.4(a) & (c)).

Administration may favor in a given moment. But NEPA should be agnostic to political agendas and instead embrace the bipartisan spirit of the Builder Act to foster informed but efficient project development of all kinds. Agencies are not permitted to base decisions on policy preferences without regard to the significance of effects, or to tailor their reviews and expedite the approval of Administration-preferred projects while continuing to mire in delay disfavored yet critically necessary projects. NEPA was designed to prevent preordained outcomes—not facilitate them.

The Associations therefore reiterate their recommendation that CEQ revise its Phase II Proposal to fully and faithfully implement the Builder Act, and that any final rulemaking should take into consideration and incorporate the Associations' recommendations contained herein.

IV. NEPA IS A PROCEDURAL, INFORMATION-FORCING STATUTE THAT DOES NOT PREDETERMINE OUTCOMES.

Surveying the many and varied revisions contained in the Phase II Proposal, it appears as though CEQ is turning what the Supreme Court has said is a process-focused statute into a regulatory regime focused on achieving particular outcomes.[34] And while NEPA has historically been understood to be neutral in its application, CEQ now proposes for the first time to explicitly embed and elevate consideration of particular types of effects throughout its NEPA regulations, and does so in a way that favors certain types of projects and creates additional hurdles for others. It also attempts to put a thumb on the scale in favor of certain types of projects by creating alternative pathways for projects that meet certain poorly defined, largely subjective criteria. The Associations are particularly concerned with this development and believe it may have an unintended destabilizing and self-defeating effect. Indeed, the further CEQ strays from the language and intent of NEPA, the more likely stakeholders will test CEQ's authority to issue regulations that seem to contravene the Act and decades of Supreme Court precedent.[35] We thus wish to highlight these overarching concerns before addressing particular components of the Phase II Proposal.

NEPA is a procedural statute that neither alters nor supplants an agency's substantive authority as defined by Congress. To be sure, Section 101 of NEPA lays out a series of broad, forward-looking principles.[36] But the primary intent behind NEPA was to elevate the review of the environmental effects of actions with the requisite federal nexus, effects that agencies had previously neglected

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[34] *See, e.g.*, *Methow Valley*, 490 U.S. at 350; *Vt. Yankee*, 435 U.S. at 558.

[35] Indeed, significant and novel departures from NEPA as traditionally understood may expose CEQ to legal challenges to its authority to issue binding regulations in the first place. CEQ's authority to issue binding regulations derives from an executive order rather than NEPA itself. *See* Exec. Order No. 11,991 (May 24, 1977) (authorizing CEQ to "[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA]"). Accordingly, the D.C. Circuit has, on several occasions, questioned the Council's authority to issue regulations that are actually binding on federal agencies. *See, e.g.*, *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 866 n. 3 (D.C. Cir. 1999); *Food & Water Watch v. FERC*, 1 F.4th 1112, 1118–19 (D.C. Cir. 2021) (Randolph, J. concurring). This unresolved question is important because even if CEQ's NEPA regulations have historically received "substantial deference," *see Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979), more recent judicial trends have indicated that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that *Congress*," rather than the Executive Branch, "delegated authority to the agency generally to make rules carrying the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). NEPA does not on its face provide an explicit congressional delegation of authority to CEQ to issue binding regulations, potentially limiting the availability of deference if the question is squarely presented to a court.

[36] *See* 42 U.S.C. § 4331.

to consider. To that end, Section 102—the primary operative provision of NEPA—has long been interpreted as embodying two fundamental but related principles: while NEPA directs a federal agency to take a "hard look at [the] environmental consequences" of a proposed action,[37] "NEPA itself does not mandate particular results" and instead "simply prescribes the necessary process."[38] Section 102 illustrates these principles by directing agencies to identify the "reasonably foreseeable environmental effects of [a] proposed agency action," while also conceding that there are potential effects that "cannot be avoided should the proposal be implemented,"[39] thus showing that there are external limits to the authority granted under NEPA as it relates to substantive environmental outcomes. Similarly, courts have long recognized that NEPA does not *require* federal agencies to adopt or enforce the mitigation measures identified and discussed in NEPA documents, recognizing the strictly process-level obligations imposed by NEPA.[40]

Congress, through the Builder Act, recently solidified NEPA's status as a process-orientated, information-forcing statute by emphasizing that the statute does not otherwise supplement or supplant an agency's authority under its organic statutes. Specifically, Congress added limiting language, such as "consistent with the provisions of this Act" and "except where compliance would be inconsistent with other statutory requirements," throughout Section 102.[41] These amendments—in conjunction with longstanding precedent interpreting NEPA as procedural in effect—evince a congressional intent to more clearly communicate that despite NEPA's more lofty statements of policy, the statute is nevertheless limited and procedural in character and effect.

The Phase II Proposal, however, would deviate from this long-established understanding of NEPA and undermine recently articulated congressional intent. Most notably, CEQ proposes to revise Section 1500.1 to eliminate the 2020 Regulations' explicit emphasis on NEPA as a "procedural statute intended to ensure Federal agencies consider the environmental impacts" of proposed actions.[42] In its place, CEQ would "restor[e] language from the 1978 regulations" interpreting NEPA as providing "'action-forcing' procedural provisions to ensure Federal agencies implement the letter and spirit of the Act."[43] It is this initial, top-line revision that sets the stage for much of the remainder of the Phase II Proposal, which would direct agencies to, among other things, place special and potentially unnecessary (depending on the project) emphasis on particular effects (such as considerations related to climate change and environmental justice), mandate binding

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[37] *Kleppe*, 427 U.S. at 410 n.21 (internal quotation marks and citation omitted).
[38] *Methow Valley*, 490 U.S. at 350; *see also Stryker's Bay*, 444 U.S. at 227–28 ("[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences[.]"); *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 45 F.4th 291, 299 (D.C. Cir. 2022) ("NEPA is a purely procedural statute that 'does not mandate particular results, but simply prescribes the necessary process.'" (quoting *Methow Valley*, 490 U.S. at 350)).
[39] 42 U.S.C. § 4332(2)(C)(i), (ii).
[40] *See, e.g.*, *Methow Valley*, 490 U.S. at 352; *Westlands Water Dist. v. Dep't of Interior*, 376 F.3d 853, 873 (9th Cir. 2004); *Miss. Basin All. v. Westphal*, 230 F.3d 170, 176–77 (5th Cir. 2000); *Nat'l Parks & Conservation Ass'n v. Dep't of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000).
[41] *See, e.g.*, 42 U.S.C. § 4332(2)(C) ("[A]ll agencies of the Federal Government shall . . . *consistent with the provisions of this Act and except where compliance would be inconsistent with other statutory requirements*, include in every recommendation or report . . . ." (emphasis added)); *id.* § 4332(2)(F) ("*consistent with the provisions of this Act*, study, develop, and describe technically and economically feasible alternatives" (emphasis added)).
[42] *See* 88 Fed. Reg. at 49,930; *see also* CEQ, Redline Comparing Current Regulations to Proposed Rule Redline, at 1, *available at* https://tinyurl.com/yj5nktwb [hereinafter "Redline"].
[43] *See* 88 Red. Reg. at 49,930; *id.* at 49,967 (proposed § 1500.1(a)(2)).

mitigation, and identify "environmentally preferable alternatives." The intended result appears to be a NEPA regulatory regime that is better described as "outcome-forcing" than "action-forcing," let alone "information-forcing" or "process-forcing" as Congress intended.

Additionally, CEQ proposes several edits that appear intended to expand NEPA beyond any reasonable confines. For instance, while purporting to restore language from the pre-2020 Regulations in proposed Sections 1500.1(a)(1) and 1508.1(p), CEQ noticeably eliminates reference to the relationships and requirements "of present future generations *of Americans*,"[44] which is not only contained in the existing NEPA regulations but also in the NEPA statute itself, which repeatedly and specifically references *Americans*.[45] More worrisome, in revisions to the regulations on the significance determination, CEQ now proposes that agencies should, "[d]epending on the scope of action, . . . consider the potential *global*, national, regional, *and* local contexts."[46] By contrast, the regulations currently direct agencies to consider the potential "national, regional, *or* local contexts."[47] The inclusion of "global" and the use of the conjunctive "and," in contrast to the current regulations' use of the disjunctive "or," are both notable and concerning. More than "minor edit[s]" for "consistency,"[48] these proposed revisions evince an intent to imbue a decidedly global perspective in NEPA reviews, elevating consideration of impacts far beyond the jurisdiction of federal agencies to address and distracting from issues of local significance within the agencies' control. The revisions are a notable departure from the pre-2020 Regulations (and as largely reflected now), which more clearly communicated to agencies that for site-specific actions, "significance would usually depend upon the effects in the locale,"[49] language that CEQ now moves to eliminate.[50]

By emphasizing extraterritorial effects and scales, the Phase II Proposal may inappropriately encourage agencies to discount domestic effects and to wade into an international policymaking role by way of project-level NEPA reviews. In doing so, CEQ ignores NEPA's actual statutory mandate. NEPA remains the *National* Environmental Policy Act, and *not* the International Environmental Policy Act. By placing undue and outsized emphasis on the potential global effects of projects, CEQ risks forcing agencies to dedicate less attention to national, regional, or local effects, which fall squarely within the ambit of NEPA and federal agencies' respective statutory authorities. CEQ also risks discounting domestic-focused priorities (e.g., energy security, job creation, capital investment) in favor of poorly defined global objectives. Project-level NEPA reviews conducted by myriad federal agencies—each with their own statutory authorities, resource

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[44] *Id.* at 49,961; *see* Redline at 1, 71.
[45] 42 U.S.C. § 4331(a) ("[I]t is the continuing policy of the Federal government . . . to use all practicable means and measures . . . in a manner to," *inter alia*, "fulfill the social, economic, and other requirements of present and future generations *of Americans*." (emphasis added)); *see id.* § 4331(b)(2) (congressional goal to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings").
[46] 88 Fed. Reg. at 49,969 (proposed § 1501.3(d)(1)) (emphases added); *see* Redline at 11.
[47] *See* 40 C.F.R. § 1501.3(b)(1) (emphasis added); Redline at 11.
[48] 88 Fed. Reg. at 49,961.
[49] *See* 40 C.F.R. § 1501.3(b)(1) ("In considering the potentially affected environment, agencies should consider, as appropriate to the specific action, the affected area (national, regional, or local) and its resources . . . [I]n the case of a site-specific action, significance would usually depend only upon the effects in the local area."); Implementation of Procedural Provisions, 43 Fed. Reg. 55,978, 55,983 (Nov. 29, 1978) (40 C.F.R. § 1508.27(a)) ("[I]n the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole.").
[50] *See* 88 Fed. Reg. at 49,935; Redline at 11.

constraints, and incentives—are an unsuitable vehicle for developing and implementing any sort of coordinated federal policy to address global resource needs and environmental concerns. Such a piecemeal approach would, moreover, encourage agencies to venture beyond their respective areas of domestic expertise and statutory authorities, and into the field of foreign relations, as well as engage in highly speculative analyses.

There is simply no basis in NEPA for agencies to shape their project reviews around particular policy priorities among the broad range of resource concerns that may be impacted by a project. Nor is there any basis for CEQ to direct agencies to conduct ever-expanding project reviews, completely untethered to the significance of local effects from the proposed action. The Phase II Proposal deviates from the fundamental truth that NEPA's "action-forcing" obligations are simply process-level obligations, not substantive ones that place a thumb on the scale for particular environmental effects or classes of projects, or that are subject to change at the whim of each successive Administration.

As a practical matter, federal agencies are ill-equipped to undertake these kinds of global analyses, particularly within the time periods and page limits mandated by the Builder Act. As a result, CEQ's proposed changes to the regulatory text would do little more than create new distractions and litigation risks for agencies as they attempt to implement this new language while providing little to no meaningful value in assessing the potential environmental impacts from a proposed project and generating further delay and friction in the NEPA process while also detracting from NEPA's core purpose.

Specific Recommendations:

- Retain regulatory text from the 2020 Regulations focusing agencies on the national, regional, *or* local context of their actions, as appropriate; and

- Retain the reference to Americans in the regulatory text.

V. REQUIRING LEGALLY BINDING MITIGATION IS CONTRARY TO NEPA, AND CEQ HAS NOT SUFFICIENTLY JUSTIFIED ITS DEPARTURE FROM LONGSTANDING POLICY.

The Phase II Proposal appears to require that agencies make mitigation measures legally enforceable and accompanied by ongoing monitoring and compliance plans.[51] In other instances,

[51] *See, e.g.*, 88 Fed. Reg. at 49,971 (proposed § 1501.6(c)) ("If the agency finds no significant effects based on mitigation, the mitigated finding of no significant impact shall state *the enforceable mitigation requirements or commitments that will be undertaken* and *the authority to enforce them, such as permit conditions, agreements, or other measures.* In addition, the agency shall prepare a *monitoring and compliance plan for any mitigation the agency relies on* as a component of the proposed action consistent with § 1505.3(c) of this subchapter." (emphases added)); *id.* at 49,981 (proposed § 1505.3(c)) ("The lead or cooperating agency shall prepare a monitoring and compliance plan when the environmental assessment or environmental impact statement relies on mitigation as a component of the proposed action to analyze the reasonably foreseeable environmental effect . . . .").

the Proposal appears to *require* agencies put forth mitigation measures.[52] To be sure, considering the availability of mitigation has long been a core component of the NEPA review process,[53] and agencies have long been required to discuss possible mitigation measures, including monitoring and enforcement programs "where applicable for any mitigation."[54] Yet, in line with NEPA's role as a process-focused statute,[55] NEPA neither requires nor independently authorizes agencies to adopt or require project sponsors to implement mitigation measures.[56] Rather, it is agencies' underlying statutory authorities that define their respective mitigation authorities. As such, CEQ has no independent authority to require mitigation or dictate its legal enforceability. In order to more clearly communicate to agencies what is actually required under NEPA, the Associations urge CEQ to revise its proposed regulations according to the recommendations proposed below.

A. CEQ has not sufficiently explained its rationale for its departure from discretionary, flexible mitigation in favor of mandatory, binding mitigation.

As noted, mitigation has long been part of the NEPA review process, and the Associations agree that agencies, alongside project sponsors, should have flexibility in the ability to use mitigation. But the Phase II Proposal's approach represents a departure from CEQ's prior emphasis on flexibility and consciousness of limitations on agencies' statutory authority. The pre-2020 Regulations recognized that "monitoring and enforcement program[s]" for mitigation measures were to be adopted "where applicable for any mitigation."[57] There was thus agency flexibility and implicit recognition that mandatory monitoring or enforcement may not be legally authorized under an agency's organic statute or may not be appropriate for a particular project versus another. Similarly, the pre-2020 Regulations provided cooperating agencies discretion as to when and whether to suggest necessary mitigation measures: "*When a cooperating agency with jurisdiction by law objects to or expresses reservations* about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences."[58] Cooperating agencies thus had the option, not the obligation, to suggest potential mitigation.

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[52] *See, e.g.*, Redline at 16 (proposed § 1501.6) (changing "shall state *any* enforceable mitigation requirements or commitments that will be undertaken" to "shall state *the* enforceable mitigation measures or commitments that will be undertaken" (emphases added)); 88 Fed. Reg. at 49,979 (proposed § 1503.3(d)) ("A cooperating agency with jurisdiction by law *shall* specify mitigation measures *it considers necessary to allow the agency to grant or approve* applicable authorizations or concurrences." (emphases added)).

[53] *See* 42 U.S.C. § 4332(2)(C) (requiring a detailed statement on "any reasonably foreseeable adverse environmental effects *which cannot be avoided* should the proposal be implemented" (emphasis added)); *see also Methow Valley*, 490 U.S. at 351 ("To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences.").

[54] *See, e.g.*, 40 C.F.R. §§ 1502.14, 1502.16,1505.2(c), 1505.3 (2019); *see also Methow Valley*, 490 U.S. at 352.

[55] *See supra* Section IV.

[56] *See Methow Valley*, 490 U.S. at 352–53; *id.* at 353 ("Even more significantly, it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act."); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 517 (D.C. Cir. 2010) ("The procedural requirements of NEPA do not force agencies to make detailed, unchangeable mitigation plans for long-term development projects.").

[57] 40 C.F.R. § 1505.2(c) (2019).

[58] *Id.* § 1503.3(d) (emphasis added).

And more generally, CEQ's own guidance released during the Obama Administration recognized that mitigation is discretionary and dependent upon myriad considerations, such as underlying statutory authority, resources, and the particular details of a proposed action:

> [A]gencies should not commit to mitigation considered in an EIS or EA unless there are sufficient legal authorities and they expect the resources to be available to perform or ensure the performance of the mitigation. In some cases, . . . agencies may exercise their authority to make relevant funding, permitting, or other agency approvals and decisions conditional on the performance of mitigation commitments by third parties. It follows that an agency must rely on its underlying authority and available resources to take remedial steps. Agencies should consider taking remedial steps as long as there remains a pending Federal decision regarding the project or proposed action. Agencies may also exercise their legal authority to enforce conditions placed on funding, grants, permits, or other approvals. If a mitigation commitment is simply not undertaken or fails to mitigate the environmental effects as predicted, the responsible agency should further consider whether it is necessary to prepare supplemental NEPA analysis and documentation. . . . Much will depend upon the agency's determination as to what, if any, portions of the Federal action remain and what opportunities remain to address the effects of the mitigation failure.[59]

Now, CEQ proposes to remove much of this flexibility in favor of mandated and legally enforceable mitigation. According to CEQ's proposed revisions, when an agency considers potential mitigation "to analyze the reasonably foreseeable environmental effects," that mitigation "shall be enforceable, such as through permit conditions, agreements, or other measures" and "shall" be accompanied by "a monitoring and compliance plan."[60] The same is true for mitigated findings of no significant impact ("FONSIs"), where agencies will need to state "the" (rather than "any," as used in the current regulations) legally "enforceable" mitigation measures and "shall prepare a monitoring and compliance plan for any mitigation" relied upon for the mitigated FONSI.[61] And now cooperating agencies "shall specify mitigation measures [they] consider necessary to allow the agency to grant or approve applicable authorizations or concurrence,"

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[59] Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3,843, 3,851 (Jan. 21, 2011) [hereinafter "Mitigation Guidance"].

[60] 88 Fed. Reg. at 49,981 (proposed § 1505.2(c)); *see id.* (proposed § 1505.3(c)) ("The lead or cooperating agency shall prepare a monitoring and compliance plan when the environmental assessment or environmental impact statement relies on mitigation as a component of the proposed action to analyze the reasonably foreseeable environmental effects . . . .").

[61] *Id.* at 49,971 (proposed § 1501.6(c)).

removing the current predicate that cooperating agencies would need to object or express reservations before specifying mitigation.[62]

The reasons for this departure—from discretion and flexibility to mandatory obligations—go largely unexplained. CEQ primarily alludes to unsupported "concerns that mitigation measures included in agency decisions are not always carried out or monitored for effectiveness,"[63] and conclusory assertions that the changes will "help effectuate NEPA's purpose as articulated in section 101."[64] As to mandatory enforceability, CEQ is largely silent.[65] While CEQ has the discretion to change course with respect to its regulations, it must nevertheless "provide a reasoned explanation for the change"—in other words, "at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'"[66] CEQ's explanation with respect to mitigation is sorely lacking and likely not legally defensible. Moreover, the APA "requires an agency to provide more substantial justification when . . . 'its prior policy has engendered serious reliance interests that must be taken into account.'"[67] Given the longstanding flexibility and discretion inherent in mitigation analyses under administrations of both major parties and in both the pre-2020 and 2020 Regulations, CEQ was required to address the reliance interests of both agencies and project sponsors on such flexibility; it has not done so.

B. CEQ's proposed revisions do not adequately take into account statutory limitations on agencies' mitigation authority.

Beyond the lack of a reasoned explanation, CEQ's proposed approach ignores the reality that an agency's mitigation authority is controlled by its governing statutes, not NEPA.[68] Indeed, because NEPA is a purely procedural statute, it does not and cannot provide agencies with substantive authority to require mitigation beyond what their own statutes may provide. Courts have routinely confirmed that there is no substantive obligation under NEPA to adopt mitigation measures identified in an EIS.[69] In fact, current CEQ guidance explicitly observes that "[i]t is an agency's underlying authority or other legal authority that provides the basis for the commitment to implement mitigation and monitor its effectiveness,"[70] and CEQ's currently effective regulations

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[62] *Id.* at 49,979 (proposed § 1503.3(d)).
[63] *Id.* at 49,954.
[64] *Id.* at 49,940.
[65] *Id.* at 49,940, 49,953.
[66] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).
[67] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 (2015) (quoting *Fox Television*, 556 U.S. at 515).
[68] *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991); *see also Methow Valley*, 490 U.S. at 350 ("Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action."); *id.* (comparing NEPA, which does not impose substantive obligations on an agency, with Section 7 of ESA, which requires agencies to ensure that its actions do not jeopardize threatened or endangered species).
[69] *See, e.g.*, *Methow Valley*, 490 U.S. at 352; *Westlands Water Dist.*, 376 F.3d at 873; *Miss. River Basin All.*, 230 F.3d at 176-77.
[70] Mitigation Guidance, 76 Fed. Reg. at 3,851 ("[A]gencies should not commit to mitigation considered in an EIS or EA unless there are sufficient legal authorities.").

explicitly recognize that NEPA "does not mandate the form or adoption of any mitigation,"[71] although CEQ puzzlingly seeks to remove this language as part of the Proposal.[72]

And often times, an agency's authority to mitigate effects or condition approval of an application is *limited* by its organic statutes. For instance, while the Natural Gas Act authorizes FERC to "attach to the issuance of [a certificate of public convenience and necessity] and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require,"[73] such conditioning power is limited by the overriding purpose of the Natural Gas Act—i.e., "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[74] Thus to the extent FERC could look to interests of "public convenience and necessity" when considering environment-related mitigation, its conditioning authority is narrowly focused on "those factors which reasonably relate to the purpose for which FERC was given certification authority."[75] FERC similarly cannot use its indirect conditioning authority to directly regulate non-jurisdictional facilities or activities.[76] This is all to illustrate, using just one agency as an example, that while NEPA may compel consideration of mitigation measures, the actual exercise of any mitigation authority is necessarily controlled by (and often restrained by) an agency's underlying permitting or approval authority.

While we presume CEQ does not intend to (erroneously) communicate that agencies should go beyond the authority granted to them by their governing statutes when instituting mitigation measures or plans, the proposed regulations, as currently crafted, could create that exact misimpression, which would result in confusion in the agency decision-making process and additional litigation over those decisions. For instance, CEQ proposes that "[w]hen an agency includes mitigation as a component of the proposed action and relies on implementation of that mitigation to analyze the reasonably foreseeable environmental effects, the mitigation *shall be enforceable*, such as through permit conditions, agreements, or other measures."[77] Without a more explicit limitation regarding an agency's underlying mitigation or conditioning authority, this proposed language may be interpreted such that an agency may be placed in the untenable position of having to choose between complying with NEPA regulations or its statutory authority, which may not permit the type of legal enforceability that CEQ contemplates here. It may be reasonable,

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[71] 40 C.F.R. § 1508.1(s).

[72] CEQ proposes to eliminate the language because it is, as the Council sees it, "unnecessary and could mislead readers by not acknowledging that agencies may use other authorities to require mitigation." 88 Fed. Reg. at 49,963. It is not clear to the Associations how one could conclude from a statement that NEPA does not mandate mitigation that an agency could not otherwise rely on its actual substantive authority, especially given that CEQ elsewhere would instruct agencies to cite to such "outside" mitigation authority where required. *See, e.g.*, 88 Fed. Reg. at 49,971 (proposed § 1501.6(c)) ("The finding of no significant impact shall state the authority for any mitigation that the agency has adopted . . . ."); *id.* at 49,981 (proposed § 1505.2(c)) ("The agency shall identify the authority for enforceable mitigation . . . .").

[73] 15 U.S.C. § 717f(e).

[74] *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669–70 (1976); *see Off. of Consumers' Couns. v. FERC*, 655 F.2d 1132, 1146 (D.C. Cir. 1980).

[75] *Off. of Consumers' Couns.*, 655 F.2d at 1147.

[76] *See Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996); *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1510 (D.C. Cir. 1990).

[77] 88 Fed. Reg. at 49,981 (proposed § 1505.2(c)) (emphasis added).

for example, for an agency to consider mitigation measures that the applicant or a third party is likely to implement even though the agency lacks authority to mandate that mitigation.

Similarly, CEQ proposes to require agencies to prepare and use monitoring and compliance plans for any mitigation measure, without due regard for whether an agency has the authority to do so in a particular instance or the availability of agency resources to review and implement such plans.[78] Additionally, CEQ proposes a mitigation hierarchy, "in general order of priority," that places "avoidance" at the top, followed by minimization, rectification, reduction or elimination, and, lastly, compensation.[79] While some agencies certainly use mitigation hierarchies, a mandatory hierarchy in the NEPA context may encourage agencies to venture beyond their underlying authority in order to, say, "avoid" an effect, rather than simply "reduce" the effect. Or it may place agencies in a difficult position if parties seek to compel the agency to prioritize one form of mitigation over another, even if the agency concludes it lacks the authority to do so.

The Associations believe it is plainly evident that NEPA does not provide agencies any independent authority to require the adoption of mitigation measures, or to oversee the implementation of mitigation measures, but wish to clarify that we are not suggesting that mitigation has no role in agency NEPA reviews. Many project proponents include mitigation measures as integral components of their project design, and often voluntarily propose and commit to implementing mitigation that originates outside of federal authority. Yet potentially converting voluntary mitigation measures into enforceable requirements (subject to penalty for failure to fully implement) could discourage project proponents from voluntarily incorporating mitigation into project designs and applications. Moreover, agencies often consider (but cannot require) mitigation measures as reasonable alternatives in EISs as well as in EAs to avoid or lessen potentially significant environmental effects of proposed actions that would otherwise need to be analyzed in an EIS. This latter use of mitigation can allow agencies to comply with NEPA's procedural requirements by issuing an EA and a mitigated FONSI.[80] In other words, the Associations are not suggesting that agencies disregard consideration of mitigation, but rather urge CEQ to refrain from directing agencies to treat their procedural considerations under NEPA as new substantive obligations or statutory authorizations.

Specific Recommendations:

- Retain current regulatory language clarifying that NEPA *does not* mandate the form or adoption of any kind of mitigation;

- Clarify that any mitigation directed by agencies must fit within their existing statutory authorities and that NEPA does not provide additional authority to require mitigation;

- Remove the requirements that mitigation be legally enforceable, and that agencies adopt monitoring and compliance plans for such mitigation; and

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[78] 88 Fed. Reg. at 49,971 (proposed § 1501.6(c)); *id.* at 49,981 (proposed § 1505.2(c)).
[79] *Id.* at 49,987 (proposed § 1508.1(w)); *see* Redline at 74.
[80] Mitigation Guidance, 76 Fed. Reg. at 3,846.

- Limit cooperating agencies to offering mitigation only to address those actions or effects within their jurisdiction or special expertise.

VI. THE PHASE II PROPOSAL'S OUTSIZED FOCUS ON CLIMATE CHANGE-RELATED EFFECTS WILL INCREASE THE TIME AND EXPENSE OF ENVIRONMENTAL REVIEWS AND LITIGATION RISKS, WITHOUT ANY CORRESPONDING BENEFITS.

NEPA's focus on environmental impacts has always been neutral: the statute, as long interpreted by the courts, focuses on significant environmental impacts, without selecting particular types of impacts for outsized attention. By repeatedly emphasizing climate change-related effects, CEQ is making an unexplained change from this historic practice, and in doing so will both detract from NEPA's core function of focusing on the environmental effects significant to a particular agency action and create unnecessary confusion and delay.

Regulatory clarity is paramount. A lack of clarity not only prolongs the amount of time it takes agencies to complete their NEPA reviews but also introduces litigation risk by providing parties opposed to agency actions and projects increased leeway to challenge agency decision-making—to the detriment of agencies and project developers alike. This is especially true for agencies' analyses of a proposed action's potential environmental effects (and those of the action's reasonable alternatives) and the potential need for mitigation measures.[81] For this reason, the universe of effects and mitigative actions agencies will need to consider must be clear at the outset.

The Phase II Proposal's repeated emphasis on climate change-related effects is counterproductive to the goal of increased regulatory clarity. While climate change may, depending upon the specifics of a particular project, be a consideration as part of informed decision-making, the Phase II Proposal's language and approaches rely on broadly written but ill-defined concepts that are not sufficiently anchored to NEPA's core principles and requirements. Agencies' attempts to implement the Proposal, as currently drafted, would likely result in divergent strategies and would incentivize agencies to venture beyond their traditionally understood statutory bounds out of fear of failing to meet the obligations set forth in the Proposal. Moreover, CEQ's rigid and reflexive over-emphasis on climate change-related effects generally does not take into account the particular circumstances and nuances of particular projects and may unwisely encourage agencies to do the same; this would, in turn, require agencies to give less attention to more relevant potential effects, especially in light of the newly compressed deadlines and page limits. For example, the new language may cause agencies to overly emphasize climate impacts (even if not significant) at the expense of localized impacts (the traditional focus of the NEPA analysis) that *are* significant.

The Associations support the current Administration's goals in reducing GHG emissions. We also share the Administration's goals of reducing Americans' energy bills, promoting energy security

[81] *See* 88 Fed. Reg. at 49,977 (proposed § 1502.14) (describing the comparison of "the reasonably foreseeable environmental effects of the proposed action and the alternatives" as "the heart of the environmental impact statement").

for the United States and our allies, and boosting our ability to build critical energy infrastructure.[82] But we have serious concerns that the Phase II Proposal's approach to analyzing climate change-related effects will do little if anything to advance these goals. Because CEQ's proposed approach is neither effective nor lawful under NEPA, it is likely to stymie, rather than advance, many of the infrastructure projects necessary for the energy transition and the nation's adaption to a changing climate.

The Associations are also concerned that CEQ's novel elevation of climate change and environmental justice, and similarly emphasized categories of potential effects, may be misperceived as grounds to revisit previously approved actions, or may pressure agencies to do so. Such an approach would undermine the durability of the NEPA review process, as developers need assurance that their permits and similar authorizations will not be subject to continual agency review, revision, or revocation or protracted litigation—particularly after projects are already under construction or operational. The Associations strongly urge CEQ to emphasize in any final rulemaking that the Council's approach to climate change-related effects (or other particular categories of effects) should not be construed as providing grounds for challenging already finalized proposed actions, permits, authorizations, and the like. Simply put, regulations that are supposed to implement the ***Builder*** Act should not be used to reopen projects already approved. And if CEQ truly wants to address climate change, it must promote a workable and durable NEPA framework that makes energy transition projects possible on the timeline that this Administration seeks to introduce new infrastructure.

A. CEQ improperly glosses over causation and reasonable foreseeability when discussing climate change-related effects.

When referencing environmental effects, the Phase II Proposal frequently directs agencies to consider "climate change-related effects" or "reasonably foreseeable climate change-related effects." For instance, in proposed Section 1502.16(a)(7), CEQ directs agencies to discuss, as part of its broader discussion of environmental consequences, "[a]ny reasonably foreseeable climate change-related effects, including the effects of climate change on the proposed action and alternatives."[83] Elsewhere, CEQ proposes to amend the definition of "effects" at Section 1508.1(g)(4) to specifically provide that "[e]ffects also include climate change-related effects, including the contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action and its alternatives."[84] More broadly, the Phase II Proposal explicitly calls out "climate change-related effects" (in contrast to many other potential effects) when discussing its statement of policy regarding

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[82] API's Climate Action Framework presents actions that the oil and natural gas industry is taking to accelerate technology and innovation, further mitigate emissions from operations, endorse a carbon pricing policy, advance lower-carbon fuels, and importantly, drive consistent, comparable, and reliable climate reporting. *See* API, *Climate Action Framework* (2021), *available at* https://tinyurl.com/4djmt3sk.

[83] 88 Fed. Reg. at 49,977 (proposed § 1502.16(a)(7)).

[84] *Id.* at 49,967 (proposed § 1500.2(e)) ("Federal agencies shall to the fullest extent possible . . . [u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment, such as alternatives that will reduce climate change-related effects . . . .").

reasonable alternatives,[85] its proposal to identify the "environmentally preferable alternative,"[86] and its definitions of "environmental justice,"[87] and "extraordinary circumstances" for categorical exclusions.[88]

While the Phase II Proposal's frequent invocations of climate change-related impacts gesture at the concept of reasonable foreseeability, the Proposal otherwise ignores NEPA's fundamental principle of causation and the clear limits the Supreme Court has placed on NEPA reviews.[89] And perhaps for a key reason: While it is often possible to quantify a project's direct GHG emissions, the reality is that there is no way to identify incremental, observable climate change-related environmental *effects* legally caused by a discrete proposed action. There is simply no scientific or technical tool that can demonstrate the necessary connection for purposes of a NEPA environmental review. CEQ's apparent willingness to ignore this practical, legal, and scientific reality raises a serious concern for agencies trying to implement this critical step in the NEPA process.

Under NEPA, agencies must evaluate the "reasonably foreseeable environmental effects of the proposed agency action" and "any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented."[90] In line with NEPA's focus on effects "of the proposed action," or "caused by the action" as described in CEQ's NEPA regulations,[91] agencies are only required to analyze "reasonably foreseeable" impacts and effects that bear "a reasonably close causal relationship" to the proposed action, akin to the proximate causation standard in tort law.[92] Outside of the climate change context, project-level environmental impacts may be relatively easy to discern and trace to the proposed action—whether they be construction impacts on aquatic resources or wetlands, increases in particulate dust from construction, or the introduction of invasive species. Agencies have extensive experience identifying and analyzing those types of physical effects on the environment, coupled with the statutory or regulatory authority to take action to address them focused on avoidance, minimization, or compensation.

But climate change presents an acute and altogether different causation problem. Climate change is an inherently global and cumulative challenge stemming from innumerable and widely dispersed sources. The reality is that there is no reliable mechanism for translating project-level GHG emissions (i.e., the emissions from a singular source from among so many) to perceptible, incremental effects on the physical environment, let alone ones that are reasonably foreseeable or that bear a close causal relationship to any individual agency action or any one project. These same limitations are present even when the "source" in question is an entire industrial sector, or even a

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[85] *Id.* at 49,986 (proposed § 1508.1(g)(4)).
[86] *Id.* at 49,977 (proposed § 1502.14(f)).
[87] *Id.* at 49,986 (proposed § 1508.1(k)).
[88] *Id.* at 49,987 (proposed § 1508.1(m)).
[89] *See infra* Section XII.A (urging return to incorporation of causation in CEQ's NEPA regulations); *see also Pub. Citizen*, 541 U.S. at 767.
[90] 42 U.S.C. § 4332(2)(C)(i)–(ii) (emphases added); *see* 40 C.F.R. § 1508.1(g)(1)–(2) (defining direct and indirect effects or impacts to the human environment as those "caused by the action").
[91] 40 C.F.R. § 1508.1(g).
[92] *See Pub. Citizen*, 541 U.S. at 767; *Metro. Edison Company v. People Against Nuclear Energy*, 460 U.S. 766, 773–74 (1983); *see also Sierra Club v. FERC*, 827 F.3d 36, 46–47 (D.C. Cir. 2016) (*Freeport*).

nation.[93] But in the case of individual infrastructure projects that must undergo NEPA review, most notably for projects like oil or natural gas production or transportation facilities,[94] the problem is magnified. The physical effects of anthropogenic climate change stem from the sum total of global GHG emissions, which includes well in excess of 36 gigatons of energy-related CO_2 emissions per year.[95] Any individual infrastructure project's contribution to this total is immeasurably small and cannot result in any identifiable physical differences in the human environment—or even any predictable or foreseeable change in the long-term global GHG levels in the atmosphere, making it a poor fit for analysis under NEPA.

On-the-ground agency experience has already recognized the difficulties inherent in identifying and isolating the potential climate change effects of a project's GHG emissions. For example, FERC has repeatedly documented in EISs that it cannot objectively analyze the physical climate impacts, if any, attributable to any particular project before the agency.[96] BLM has reached similar conclusions, noting in one recent EIS that "[n]o single project alone would measurably contribute to a noticeable incremental change in the global average temperature or to global, local, or microclimates" and that "GHG impacts to global climate change are inherently cumulative."[97]

The Phase II Proposal simply does not grapple with the impossibility of causally connecting project-level GHG emissions to discrete, reasonably foreseeable climate change effects.[98] Moreover, even if such a causal connection could be made, the courts have held that agencies need not take into account climate change-related effects where the agencies lack statutory authority to prevent those effects—i.e., the agency approval "cannot be considered a legally relevant 'cause' of the effect."[99] Yet CEQ nevertheless presses forward by proposing to incorporate "climate

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[93] *See* Ragnhild B. Skeie et al., *Perspective Has a Strong Effect on the Calculation of Historical Contributions to Global Warming*, 12 Env't Rsch. Letters 024022, at 2–4, 7–9 (2017), https://tinyurl.com/dy67xbcz (noting that nation-level attribution efforts are sensitive to, among other things, technical decisions such as the timeframe for the analysis, as well as more normative decisions about the basis for attributing emissions, such as the place of extraction versus place of burning versus place of final consumption).

[94] *See* 42 U.S.C. §§ 4332(2)(C), 4336e(10); 40 C.F.R. § 1508.1(q) (defining "major federal action[s]" generally subject to NEPA review and exceptions).

[95] *See* Int'l Energy Agency, *World Energy Outlook 2022* 35–36 (2022), https://tinyurl.com/yc3w8bua.

[96] *See, e.g.*, FERC, Final Environmental Impact Statement for Equitrans, LP's Ohio Valley Connector Expansion Project, at 4-91, Docket No. CP22-44-000 (Jan. 20, 2023), *available at* https://tinyurl.com/yxmc38wy; FERC, Final Environmental Impact Statement for Alliance Pipeline, L.P.'s Three Rivers Interconnection Project, at 4-62, Docket No. CP21-113-000 (Jan. 13, 2023), *available at* https://tinyurl.com/mrufsrby.

[97] *See* BLM, Final Environmental Impact Statement for Whitewater River Groundwater Replenishment Facility Right of Way Project, at 3.4-6, Doc. No. DOI-BLM-CA-D060-2019-0024-EIS (Aug. 2022), https://tinyurl.com/2s3mdbxw.

[98] In failing to do so, CEQ also fails to effectuate the Builder Act's codification of the concept of reasonable foreseeability as interpreted by the Supreme Court in cases like *Public Citizen* and *Metro Edison*. *See* 43 U.S.C. § 4332(2)(C); *infra* Section XII.A.

[99] *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016); *Freeport*, 827 F.3d at 47; *see also Ctr. for Biological Diversity v. U.S. Army Corps. of Eng'rs.*, 941 F.3d 1288, 1297–98 (11th Cir. 2019) (finding the Army Corps need not consider environmental effects within the control of state and EPA regulators "that it has no authority to prevent"); Fed. Defs.' Resp. to Pls.' Notice of Suppl. Authority at 1–2, *Ctr. for Biological Diversity v. Spellmon*, No. 1:22-cv-02586-CKK (D.D.C. Sept. 26, 2023), ECF No. 117 (asserting that "the scope of an environmental review under NEPA necessarily depends on the nature of the major federal action being reviewed" and agencies lacking "exclusive jurisdiction" over "the major federal action at issue" can "reasonably . . . exclud[e]" those environmental effects that they "do[] not . . . regulate" (citing *Eagle Cnty., Colorado v. Surface Transportation Bd.*, No. 22-1019,

change-related effects" throughout its regulations, without fully acknowledging the tension between the proposed analysis and the important limits of reasonable foreseeability and causation in NEPA analyses. The lack of *any* "rational connection between the facts found and the choices made" is textbook arbitrary and capricious rulemaking.[100] And CEQ proposes to leave it to agencies to attempt to fill in the gap in the casual chain. In doing so, CEQ is setting agencies up for failure. Its proposed approach will only encourage agencies to undertake unreliable, speculative, and scientifically unsound analyses—increasing project timelines and expenses and amplifying litigation risk, without any corresponding benefits to agency information-gathering or decision-making.

Specific Recommendations:

- Provide preamble language reaffirming the Supreme Court's limitations on NEPA analyses to those effects that are reasonably foreseeable and caused by the proposed action, including in the climate context.

B. CEQ should emphasize that agencies need only focus on *significant* effects related to climate change.

CEQ's approach to climate change-related effects also ignores the longstanding Supreme Court directive that agencies are not required to consider *every* resource concern that may produce potential effects,[101] but rather only on those potentially significant effects with a reasonably foreseeable, close causal relationship to a change in the environment and the particular project at issue.[102] This is true for all potential effects evaluated under NEPA, not just climate change. Yet CEQ, when calling out "climate change-related effects" as a specific category of effects to be considered by agencies, the Council often omits mention of "significance" or "significant," instead opting for use of the modifier "any."[103] This combination—over-emphasizing climate change-

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2023 WL 5313815, at *15 (D.C. Cir. Aug. 18, 2023))). There is certainly D.C. Circuit precedent assuming otherwise, *see Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (*Sabal Trail*) (FERC decision was a legally relevant clause "[b]ecause FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment," and climate change impacts should be considered); *Eagle Cnty.*, 2023 WL 5313815, at *15 (similar for Surface Transportation Board's authorization of railway), yet such precedent, as the Eleventh Circuit rightfully observes, relies on assumptions regarding causation and agency authority that are "questionable," "at odds with earlier D.C. Circuit precedent," and "breez[e] past other statutory limits and precedents . . . clarifying what effects are cognizable under NEPA," specifically *Public Citizen* and *Metropolitan Edison*. *See Ctr. for Biological Diversity*, 941 F.3d at 1299–1300.

[100] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see* 5 U.S.C. § 706(2)(A).

[101] *Metro Edison*, 460 U.S. at 772 ("NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment." (emphasis in original)); *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989) (holding a supplemental EIS is warranted "[i]f there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered" (citation omitted)).

[102] *See Metro Edison*, 460 U.S. at 772; *see also Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc*., 462 U.S. 87, 97 (1983) (noting that NEPA "'places upon an agency the obligation to consider every *significant* aspect of the environmental impact of a proposed action'" and that is has "indeed considered environmental concerns in its decisionmaking process" (emphasis added) (quoting *Vt. Yankee*, 435 U.S. at 553)).

[103] *See, e.g.*, 88 Fed. Reg. at 49,977, 49,979 (proposed §§ 1502.14(f), 1502.16(a)(7), 1502.23(c)).

related effects and using "any" in lieu of a specific reference to significance—could give agencies the misguided impression that they should consider all effects related to climate change, regardless of whether they are or potentially could be *significant* effects. As a result, agencies may feel pressure—whether from CEQ by way of this proposal, or by commenters and potential litigants—to engage in rote effects analyses related to climate change that are largely divorced from the particular circumstances of the project or NEPA's requirements for significance (as well as reasonable foreseeability, causation, and the scope of the agencies' decision-making authority).

For example, an agency may go through the lengthy and labor-intensive process of quantifying GHG emissions across all of its proposed actions–even when it has no mechanism to connect GHG emissions to observable, incremental effects on the environment—simply to say that it has met CEQ's mandate as embodied in the Phase II Proposal. In doing so, an agency will likely be forced to give less attention to the significant and localized potential effects of a proposed action (i.e., the effects on which its informed choice among alternatives may ultimately hinge), especially in light of newly compressed EIS and EA deadlines and page limits. CEQ's proposed language therefore encourages agencies to give short shrift to *actual* significant potential effects, in service of checking a box with respect to climate change. In doing so, an agency will inevitably open itself up to judicial challenge, thereby creating additional project delay. This approach will therefore undermine Congress's intent in the Builder Act, and the bipartisan efforts promote infrastructure development and energy transition projects.

Specific Recommendations:

- Revise the proposed regulatory text and emphasize in the preamble of any final rulemaking that agencies should focus attention on *significant* environmental effects, climate change-related or otherwise, rather than simply "any" and all environmental effects that arise or may arise.

- Provide preamble language reaffirming the longstanding focus on *significant* environmental effects, regardless of the type of effect.

C. CEQ wrongly assumes that upstream and downstream climate change-related effects are always attributable to oil and natural gas leasing and infrastructure projects.

Under the guise of a purportedly uncontroversial "example," CEQ asserts, without citing support, that "leases for oil and gas extraction or natural gas pipelines," as categories of proposed actions, "have reasonably foreseeable global indirect and cumulative effects related to GHG emissions."[104] In doing so, CEQ *assumes* (and would incentivize agencies to do the same) that some climate change-related effects are reasonably foreseeable and caused by a particular project without providing any actual analysis to support that assumption. As CEQ is no doubt aware, the question of whether upstream and downstream climate change-related effects are attributable to oil and natural gas leasing and infrastructure projects has been the source of a great deal of recent discussion within agencies and in court decisions. CEQ's example ignores the nuanced discussions

[104] 88 Fed. Reg. at 49,935.

of specifics of particular projects in these agency and court decisions and will create needless confusion in an already complex area of analysis.

As explained below, given the complex and interconnected relationships among upstream, midstream, and downstream activities in the liquids and natural gas industries, courts and agencies have long grappled with how to appropriately and accurately attribute potential GHG emissions to particular oil and natural gas projects and actions within those various segments—an effort that has understandably generated immense conflict and years of litigation. For oil and natural gas leasing, agencies like BOEM, which regulates offshore leasing in the OCS, have had analyze how action and no-action alternatives would impact GHG emissions given consistent demand for oil and natural gas products and the emissions profiles of other producing nations.[105] Similarly, for natural gas pipelines, FERC—an agency with particular expertise in understanding natural gas infrastructure, energy market signals, and the relationships between pipeline infrastructure and upstream and downstream activities—and courts have routinely rejected simplistic assumptions seeking to attribute potential upstream and downstream climate change-related effects to development of natural gas transportation projects.[106] Given that this area of analysis is a source of careful ongoing discussion and evolving case law, CEQ should remove this "example" from any finalized regulation, or at the very least provide a supporting analysis for its conclusion, acknowledge the existing case law on the topic, and explain why it believes its example is consistent with legal precedent.

1. Oil and gas leasing and development

CEQ incorrectly assumes that all federal leasing of oil and gas inevitably causes increased GHG emissions, which then contribute to climate change-related effects.[107] While this may be the case in some circumstances, in other cases, CEQ's overly simplistic example is just factually wrong, particularly when substitution is taken into consideration. For instance, in BOEM's EIS for Gulf of Mexico leases between 2017 and 2022, the agency determined that taking no action (offering no leases) would actually lead to *greater* net GHG emissions worldwide as cleaner domestic sources were replaced by foreign energy sources with greater emissions.[108] BLM came to a similar conclusion in its *Supplemental Environmental Assessment for GHG Emissions Related to Oil and Gas Leasing in Seven States*.[109] As BLM explained, "[a]lthough no new GHG emissions associated with new Federal oil and gas development for the subject leases would occur under the No Action Alternative," demand for oil and gas is expected to increase through 2023.[110] Thus, selecting the no-action alternative would not necessarily reduce the global GHG emissions associated with oil and gas consumption. Just the opposite: reducing domestic supplies of oil and gas "would likely lead to the import of more oil and natural gas from other countries, including countries with lower

[105] *See infra* Section VI.C.1.
[106] *See infra* Sections VI.C.2 and VI.C.3.
[107] 88 Fed. Reg. at 49,935.
[108] *See Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 136–37 (D.D.C. 2022), *vacated on other grounds*, 2023 WL 3144203 (Apr. 28, 2023).
[109] Supplemental Environmental Assessment Analysis for Greenhouse Gas Emissions Related to Oil and Gas Leasing in Seven States from February 2015 to December 2020; DOI-BLM-HQ-3100-2023-0001-EA (Nov. 2022), *available at* https://tinyurl.com/467xbpb4.
[110] *Id.* at 21, 25.

environmental and emission control standards than the United States."[111] Accordingly, the no-action alternative could lead to even more GHG emissions than those associated with the subject leases. In short, CEQ should not make unsupported generalizations with regard to oil and gas leasing.

2. Upstream effects

CEQ's statement regarding upstream effects of oil and natural gas infrastructure is also incorrect as a factual matter and inconsistent with existing case law. For example, in the natural gas pipeline context, FERC has consistently and correctly recognized that upstream natural gas production, and the environmental effects associated with such production (including any associated GHG emissions), "are generally neither caused by a proposed [natural gas transportation project] nor are they reasonably foreseeable."[112] As FERC has observed on numerous occasions, upstream natural gas production would generally occur regardless of any decision made by the agency.[113] Experience bears this out. Additional natural gas pipeline infrastructure is often built in response to changing source basins. But increased system capacity over time does not necessarily mean that aggregate production increases as a result. In fact, by one estimate, if all capacity added to the U.S. natural gas transmission pipeline system since 1995 were used for "incremental production," U.S. natural gas production would have grown by 115 million cubic feet ("MMcf") per year. Yet the reality is that production has grown by slightly less than 18 million MMcf per year.[114] This casts serious doubt on any assumption of a strong relationship between capacity and production; if anything, it is more likely that changing production *patterns* influence transportation infrastructure. Thus, while CEQ appears to tout the supposed upstream effects of oil and natural gas projects as examples of "reasonably foreseeable" effects to be addressed as part of a NEPA review, experience and available data actually indicate the opposite.

Further, shippers of natural gas and oil products—and, by extension, pipeline operators—do not always know in advance the source of production of their products or how it may change over time, making it impossible to identify reasonably foreseeable production-related impacts of a pipeline project, if there are any to assess.[115] Moreover, upstream natural gas production is not properly analyzed by FERC as it falls outside of FERC's statutory authority. As a result, FERC has rightly concluded that it should not analyze environmental impacts of upstream production as part of its NEPA analysis. And FERC's approach is consistent with case law, as courts have routinely upheld the agency's conclusion that its approval of a proposed pipeline project does not

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[111] *Id*. at 26.

[112] *E.g.*, *E. Shore Nat. Gas Co.*, 181 FERC ¶ 61,233, at P 24 (2022); *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at P 59 (2018).

[113] *See Dominion Transmission*, at PP 60–61; *id.* at P 60 (observing that "a number of factors, such as domestic natural gas prices and production costs, drive new drilling").

[114] *See Biden White House Tries to Force FERC's Hand on GHGs*, Arbo (Feb. 7, 2023), https://tinyurl.com/2z2rc6dv.

[115] *See id.* at P 61 ("Here, Dominion holds contracts with two downstream local distribution companies for transportation capacity, neither of which control production. The specific source of natural gas to be transported via the Project is currently unknown and will likely change throughout the Project's operation."); *see also Spire Storage W. LLC*, 179 FERC ¶ 61,123, at P 157 (2022) ("Here, the specific source of natural gas to be stored and transported via the Clear Creek Expansion Project is currently unknown and may change throughout the project's operation. Accordingly, we affirm that the GHG emissions associated with upstream production of gas are not a reasonably foreseeable impact of this project.").

proximately cause any reasonably foreseeable impacts relating to upstream natural gas production, including GHG emissions.[116] Indeed, both FERC and reviewing courts have reached this no-causation conclusion for a range of different projects, including FERC's authorization of (1) LNG export facilities,[117] (2) expansion projects for existing pipeline systems serving a diverse range of shippers,[118] and (3) pipeline projects to serve power plants or other specific users.[119]

Regardless, CEQ does nothing in its Proposal to bridge the proximate causation gap that the Supreme Court requires before an agency considers certain effects under NEPA.

3. Downstream effects

Similarly, the downstream end uses of transported oil and natural gas are rarely reasonably foreseeable effects of pipeline development.[120] As to causation, changing demand patterns—whether changing uses or users, or the need for lower-cost, more reliable transportation pathways—influence the development of transportation infrastructure, not vice versa. As FERC has observed, the approval of a particular pipeline infrastructure project is generally not the legally relevant cause of downstream consumption of the transported product because, among other reasons, consumption would occur regardless of the pipeline's approval.[121] And often times, the ultimate downstream end uses of the transported commodity are not identifiable at the time a new pipeline project is proposed, and are likely to change over the decades-long lifetime of the project. The same is true regarding the extent to which the product will be used for industrial feedstock or other industrial uses, rather than combusted,[122] and the extent to which the product will displace other, potentially higher-emitting energy sources (as compared to a baseline scenario in which the transportation project is not built). Indeed, since 2005, a significant amount of emissions reductions in the U.S. have been due to the switch to natural gas in the fuel mix for electric generation.[123]

These uncertainties and project-specific outcomes, particularly in combination with the often lengthy operational lifetimes of pipeline infrastructure projects, limits the extent to which downstream effects could be considered "reasonably foreseeable" for purposes of NEPA. Moreover, to the extent that downstream uses might be foreseeable, decisions regarding those consumption patterns (and the extent to which those patterns cause GHG emissions) are generally made by (and thus subject to the whims of) Congress, the States, and/or the market more generally—not reviewing agencies, such as FERC whose role is limited to approving or

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[116] *See, e.g.*, *Freeport*, 827 F.3d at 47; *EarthReports*, 828 F.3d at 955–56.
[117] *See Freeport*, 827 F.3d at 47.
[118] *See PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 at PP 197–98 (2018).
[119] *See Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 109 (D.C. Cir. 2022).
[120] *Id.* at 110–11.
[121] *See Dominion Transmission*, 163 FERC at P 63. That is particularly true given the considerable economic literature demonstrating the relative price inelasticity of demand for natural gas. *See* Charles River Assocs., Comments on Methods for Quantifying Incremental Indirect GHG Emissions from New Pipeline Projects at 5, *Certification of New Interstate Natural Gas Facilities*, FERC Docket No. PL18-1-000 (May 26, 2021).
[122] *See Dominion Transmission*, 163 FERC at P 62.
[123] *See* U.S. Energy Info. Admin., *U.S. Energy-Related Carbon Dioxide Emissions, 2021* (Dec. 14, 2022), https://tinyurl.com/33n9xwd8.

authorizing individual projects, or the Army Corps, whose role is limited to authorizing discharges of dredged or fill material to construct pipeline crossings at discrete waterbodies and wetlands.

The D.C. Circuit's decision in *Sabal Trail*, and its progeny, held that GHG emissions from downstream consumption of natural gas may be an "indirect effect" of FERC's approval of a pipeline certificate, in certain circumstances and based on the record of the particular proceedings.[124] *Sabal Trail*, though, dealt with the narrow, discrete issue of whether downstream GHG emissions from a pipeline project designed to serve specifically identified power plants could be "reasonably foreseeable" and legally caused by FERC's approval of the pipeline project.[125] But the possibility that downstream emissions *may* be an indirect effect of a specific project, such as where specific end users of a pipeline are known, does not support a blanket assumption that they will be for all projects under all circumstances. The D.C. Circuit has confirmed as much in the pipeline context, repeatedly and explicitly stating that "downstream emissions are not, 'as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project.'"[126] Further, the panel majority in *Sabal Trail* simply assumed that FERC possessed unlimited authority to grant or deny a pipeline application, including the authority to deny based on downstream GHG emissions from non-jurisdictional entities, i.e., the power plants.[127] This conclusion, however, largely sidestepped the statutory limits on FERC's authority, most notably FERC's lack of jurisdiction over downstream activities, including the authority to mitigate potential emissions from those activities, as the panel majority's dissenting colleague noted.[128] In doing so, *Sabal Trail* is, at the very least, in tension with prior D.C. Circuit precedent finding that FERC need not consider (because it is not the legally relevant cause of) the GHG emissions from non-FERC-jurisdictional third parties.[129] This was a point of contention for the *Sabal Trail* dissent,[130] and at least one reason why *Sabal Trail* has been treated with significant skepticism elsewhere on the federal appellate bench.[131]

Thus, CEQ's apparent assumption that downstream emissions are a reasonably foreseeable result and legally caused by oil and natural gas projects finds little support in case law; therefore, it

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[124] *See Sabal Trail*, 867 F.3d at 1374; *see also Food & Water Watch v. FERC*, 28 F.4th 277, 288 (D.C. Cir. 2022).

[125] *See Sabal Trail*, 867 F.3d at 1363–64 ("Two major utilities, Florida Power & Light and Duke Energy Florida, have already committed to buying nearly all the gas the project will be able to transport."); *id.* at 1371–73 ("The next question before us is whether, and to what extent, the EIS for this pipeline project needed to discuss these "downstream" effects of the pipelines and their cargo.").

[126] *See Food & Water Watch*, 28 F.4th at 288 (quoting *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019)).

[127] *See Sabal Trail*, 867 F.3d at 1373 ("Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines it approves." (citations omitted)). For this point, the panel majority relied almost entirely on a prior D.C. Circuit decision—not involving GHG emissions, downstream or otherwise—that had generally referenced FERC's policy of taking into account environmental considerations. *Id.* (citing *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015)).

[128] *See id.* at 1381–83 (Brown, J., concurring in part and dissenting in part) ("FERC's statutory authority is limited by the fact that the [Florida Power Plant Siting] Board, not FERC, has the 'sole authority' to authorize or prohibit the construction or expansion of power plants in Florida." (quoting *Freeport*, 827 F.3d at 48)).

[129] *See Freeport*, 827 F.3d 36; *Sierra Club v. FERC*, 827 F.3d 59, 67 (D.C. Cir. 2016); *EarthReports*, 828 F.3d at 955–56.

[130] *See Sabal Trail*, 867 F.3d at 1381–83 (Brown, J., concurring in part and dissenting in part).

[131] *See Ctr. for Biological Diversity.*, 941 F.3d at 1300 (observing that *Sabal Trail* "breez[es] past other statutory limits and precedents—such as *Metropolitan* and *Public Citizen*—clarifying what effects are cognizable under NEPA").

should be removed from any finalized regulation. Indeed, it would be more appropriate for CEQ to explicitly acknowledge that natural gas pipelines are examples of areas where the upstream and downstream GHG emissions are *not* reasonably foreseeable (except in very limited circumstances with respect to downstream GHG emissions). Doing so would better encapsulate the actual state of the law and avoid unnecessary confusion for agencies.

Specific Recommendations:

- Remove references to oil and natural gas leasing and natural gas pipelines as examples of projects that "have reasonably foreseeable global indirect and cumulative effects related to GHG emissions" and instead clarify that such projects and actions are examples of areas where the upstream and downstream GHG emissions are *not* reasonably foreseeable, except in very limited circumstances with respect to downstream GHG emissions.

D. CEQ should not direct agencies to discuss a proposed action's conflict or relationship with governmental climate change-related plans.

In proposed Section 1502.16(a)(6), CEQ proposes to require agencies, as part of their discussions of environmental consequences, to discuss "[p]ossible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local plans, policies, and controls for the area concerned, including those addressing climate change."[132] Focusing on CEQ's explicit reference to climate change, the Associations believe that requiring agencies to discuss a proposed action's conflict or consistency with governmental climate change-related plans, policies, and controls is misguided and a misallocation of agency time and resources. The Associations thus urge CEQ to eliminate the language "including those addressing climate change" from proposed Section 1502.16(a)(6).

At present, there are a wide array of governmental (e.g., federal, regional, State, Tribal, local) climate change-related plans, each varying by type (e.g., emissions reduction, energy portfolio requirements, cap-and-trade), timeline, scope, baselines, and numerous other variables. CEQ's proposed approach to require agencies to discuss possible conflicts between proposed actions and the objectives of these many and varied climate change-related plans, policies and controls risks allowing one government body's plan to take precedence over or supersede another, or risks one locality's climate change-related objectives taking priority over another locality's economic or energy objectives. And agencies would likely be caught in the middle, needing to play referee among competing objectives in a particularly fraught area like climate change and emissions reduction. For instance, an agency may be pressured to deny authorization of a right-of-way for a crude oil or natural gas pipeline simply because one or more states traversed by the pipeline have adopted emissions reduction targets, even if other traversed states have prioritized other considerations over climate objectives. This is not a hypothetical problem. FERC, as one example, recently had to wrestle with conflicting state GHG emission policies in its final EIS for the Gas

[132] 88 Fed. Reg. at 49,977 (proposed § 1502.16(a)(6)).

Transmission Northwest XPress Project, which traversed two states that had emissions reduction targets (Washington and Oregon) and one that did not (Idaho).[133]

Moreover, NEPA is focused squarely on reasonably foreseeable significant environmental effects caused by a proposed action—not conflicts or consistency with policy goals such as those associated with GHG emissions reduction targets. CEQ's direction risks encouraging an agency to venture beyond NEPA's narrow mandate and turn a limited project-level NEPA review into a matter of more general policymaking. Not only would this depart from NEPA, but it would also present acute concerns as to agency statutory authority and federalism, as agencies may be thrust into the role of making decisions regarding projects or energy mixes where the authority to make those decisions rests with the states (as was the case with the selection of gas-fired powerplants by the State of Florida in *Sabal Trail*) and where these decisions may not necessarily align with those preferred by another agency.

There are often numerous different pathways available to meet a particular climate change-related objective, plan, or policy—each of which prioritizes or deprioritizes an array of interrelated variables and strategies. As a simple illustration, Princeton University's New Zero America Study outlines five radically different approaches to reaching net-zero emissions by 2050. Some of those pathways involve a large, continued role for oil and natural gas and some do not; some involve massively increased dependence on nuclear energy, while others involve the total elimination of nuclear power by 2050; most involve considerable (though widely varying) levels of geologic CO_2 sequestration.[134] Absent the selection of a particular pathway that sets all of these innumerable variables in stone—something plainly beyond the power of CEQ, any other individual federal agency, or even a collection of agencies—it makes little sense to declare a single project in conflict with, or conversely consistent with, a particular climate change-related objective or plan. And in any event, the federal agency would be acting based on external policy preferences and not any actual impacts on the human environment, i.e., the core purpose of NEPA. If CEQ nonetheless directs agencies to *discuss* potential conflicts in a final rule, it should clarify that NEPA in no way requires agencies to attempt to *resolve* those conflicts, as doing so is clearly beyond the statute's information-forcing mandate.

Specific Recommendations:

- Remove the requirement that agencies discuss possible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local plans, policies, and controls for the area concerned, including those addressing climate change from any final rule, or at the very least, the reference to climate change in the requirement and clarify that agencies are not required to resolve or make permitting decisions based on such perceived conflicts.

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[133] *See* FERC, Final Environmental Impact Statement for Gas Transmission Northwest LLC's GTN Xpress Project at 4-48 to 4-49, Docket No. CP22-2-000 (Nov. 18, 2022).

[134] *See generally* Eric Larson et al., Princeton Univ., *Net-Zero America: Potential Pathways, Infrastructure, and Impacts* (2021), *available at* https://tinyurl.com/37jehv89. The different pathways can be further examined by exploring the tabular data provided at the Net-Zero America study's website (available under the "Explore Data" header).

E. CEQ should not require agencies to use projections or mathematical models neither designed nor suited for NEPA reviews.

In proposed Section 1502.23(c), CEQ proposes that "[w]here appropriate, agencies shall use projections when evaluating the reasonably foreseeable effects, including climate change-related effects," and that such "projections may employ mathematical or other models that project a range of possible future outcomes."[135] CEQ proposes this addition at the same time it eliminates language that "[a]gencies are not required to undertake new scientific and technical research to inform their analyses"[136] and elsewhere suggests that agencies should undertake "new data and analyses" as deemed necessary in their "good judgment."[137]

First, these changes appear to be in tension, if not direct conflict, with the Builder Act, which explicitly states that:

> In making a determination under this subsection, an agency . . . *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.[138]

By clarifying that an agency should not ordinarily be undertaking new scientific or technical research and further emphasizing the need to account for the costs and time of doing so in the context of determining the appropriate level of review, Congress made clear that it does not wish for agencies to become bogged down in their reviews by performing such analysis. But CEQ's proposed changes appear to cut in the other direction.

Second, the Associations are concerned that these revisions will generally encourage agencies to undertake additional scientific and technical analyses of proposed actions that are costly, unnecessary, of questionable scientific validity, and in some circumstances not even achievable. This is especially problematic, given the Phase II Proposal's introduction of new topics of analysis for agencies to consider (e.g., climate change, environmental justice). Agencies may feel pressure to commission new analyses, often at project sponsors' expense, simply to stave off potential litigation. But more importantly, the Associations are concerned that CEQ's explicit reference to "climate change-related effects" may encourage agencies to attempt to model relationships between incremental GHG emissions from a particular project with actual environmental impacts, which just simply is not possible, or to utilize metrics that are neither designed nor suited for NEPA reviews, such as the Interagency Working Group's ("IWG's") social cost of GHG estimates ("SC-GHG estimates"), which CEQ featured prominently in the Interim Climate Guidance and a recent Administration directive to federal agencies.[139] As noted above, *see supra* Section VI.A, there is simply no methodology or process for connecting incremental, observable climate change-related

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[135] 88 Fed. Reg. at 49,979 (proposed § 1502.23(c)).
[136] *Id.* at 49,951; Redline at 42; *see infra* Section XII.F.
[137] 88 Fed. Reg. at 49,951.
[138] Fiscal Responsibility Act, 137 Stat. at 40 (codified at 42 U.S.C. § 4336(b)(3)).
[139] *See* White House, *Fact Sheet: Biden-Harris Administration Announces New Actions to Reduce Greenhouse Gas Emissions and Combat the Climate Crisis* (Sept. 21, 2023), https://tinyurl.com/2rrrwv3n ("The President is directing agencies to consider the SC-GHG in environmental reviews conducted pursuant to the National Environmental Policy Act (NEPA) as appropriate.").

effects to a single, discrete project. And Associations reiterate our collective position that SC-GHG estimates are not appropriate for NEPA reviews.[140]

Moreover, to the extent forward-looking projections and models may help inform sensitivities about potential outcomes based on variable input assumptions, such projections and models cannot be expected to predict future outcomes with sufficient accuracy to provide a sound basis for agency decision-making.

In order for projections to be useful, there must be some mechanism to ensure the accuracy and reliability of the underlying data, inputs, and modeling; an inaccurate or faulty projection or model could not only lead to worse agency decision-making but also protracted litigation over the granular details of such projections and models. It will be difficult for both the agencies and the public to evaluate the accuracy and reliability of many models. Courts are likewise not well equipped to resolve disputes about the specifics of modeling efforts. Without a reliable accountability mechanism for models and their underlying assumptions, this new language will undermine NEPA's information-forcing purpose as well as the Builder Act's streamlining goals.

Specific Recommendations:

The Associations recommend entirely striking proposed Section 1502.23(c). If CEQ nevertheless seeks to retain this subsection, the Associations recommend the following revisions:

> (c) Where appropriate, and consistent with the requirements of § 1502.23(a), agencies ~~shall~~ may use projections when evaluating the reasonably foreseeable effects~~, including climate change-related effects~~. Such projections may employ mathematical or other models that project a range of possible future outcomes, so long as agencies disclose the relevant assumptions or limitations. Agencies are not required to undertake new scientific or technical research or create new models and should not do so if the overall costs and timeframe involved are unreasonable.

F. CEQ should not codify the Interim Climate Guidance.

CEQ requests comment on whether to "codify any or all of its 2023 GHG Guidance," and appears poised to "incorporate some or all of the [Interim Climate Guidance], which would require making additional changes in the final rule to codify the guidance in whole or part"—although these "additional changes" are not defined in any way.[141] Despite calling for comment, CEQ provides neither regulatory text nor even a description of which parts of the Interim Climate Guidance that CEQ contemplates codifying as part of a final rulemaking. Nor does CEQ explain how those potentially codified parts would interact with the larger Phase II Proposal, which touches every Part, in the regulatory sense, of CEQ's NEPA regulations.

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[140] *See* API Interim Climate Guidance Comments, *supra* n.10, at 22–32; LEPA & AXPC Interim Climate Guidance Comments, *supra* n.10, at 14–19.
[141] 88 Fed. Reg. at 49,945.

The Associations, in line with our prior objections to the Interim Climate Guidance,[142] oppose codification or incorporation of the 2023 GHG Guidance, as a whole or in part, in any final rulemaking here. As discussed in our comments, the Associations believe the Interim Climate Guidance, among other things, improperly equates GHG emissions with potential "effects" for purposes of NEPA, without any regard for principles of causation or reasonable foreseeability, or even any environmental impact at all. It needlessly directs agencies to quantify GHG emissions, using unduly speculative and improper "worst case" scenarios and unrealistic "full burn" assumptions and substitution analyses, which then attempt to monetize such emissions using the IWG's SC-GHG estimates, despite such estimates being ill-suited for NEPA reviews. Further, it considers alternatives and mitigation measures that are plainly infeasible, outside of agencies' jurisdiction, or wholly unrelated to the purpose and need of the project under review. And it would more generally "perpetuate and exacerbate the undue delay, complexity, and inconsistency that have been the unfortunate hallmarks of NEPA reviews for decades."[143] Given the systemic problems with the Interim Climate Guidance, the Associations strongly urge CEQ to not directly incorporate it within the NEPA regulatory framework. Doing so would likely create immense confusion among agencies, project sponsors, and members of the public, and would upend longstanding, well-established NEPA principles and norms—such as by potentially creating two markedly different review frameworks depending on whether an effect is climate change-related or not.

Procedurally, the Associations believe any attempt to codify the Interim Climate Guidance as part of final rulemaking here would likely contravene CEQ's APA obligations, as the public would not be afforded any meaningful opportunity to comment on the specifics of CEQ's contemplated, yet unexplained, incorporation of the Interim Climate Guidance. The public cannot be expected at this juncture to read CEQ's mind as to which parts of the guidance may or may not be incorporated in any final rule.

By using terms such as "codify," "amend," and "incorporate" in the context of a proposed legislative rule,[144] CEQ appears to imply that it would turn some or all of the Interim Climate Guidance, which was promulgated as nonbinding guidance,[145] into what it may purport are binding requirements on agencies.[146] The APA requires that all legislative rules, meaning those that impose legally binding obligations or prohibitions or otherwise bind decision-makers,[147] go through public

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[142] *See generally* API Interim Climate Guidance Comments, *supra* n.10; LEPA & AXPC Interim Climate Guidance Comments, *supra* n.10. The Associations also reiterate their recommendation that CEQ rescind the immediate effectiveness of the Interim Climate Guidance, at least until the Council has completed notice and comment.

[143] API Interim Climate Guidance Comments, *supra* n.10, at 3–4.

[144] *See* 88 Fed. Reg. at 49,945 ("CEQ particularly invites comment on whether it should *codify* any or all of its 2023 GHG guidance, and, if so, which provisions of part 1502 or other provisions of the regulations CEQ should *amend*." (emphases added)).

[145] *See* Interim Climate Guidance, 88 Fed. Reg. at 1,197 n.4 ("This guidance is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable.").

[146] *See* 88 Fed. Reg. at 49,967 (proposed § 1500.3(a)) ("This subchapter is applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969.").

[147] *See, e.g.*, *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014) ("An agency action that purports to impose legally binding obligations or prohibitions on regulated parties" or "sets forth legally binding requirements for a private party to obtain a permit or licenses is a legislative rule.").

notice-and-comment rulemaking.[148] Such notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[149]As the D.C. Circuit has explained, "the notice required by the APA, or information subsequently supplied to the public, must disclose *in detail* the thinking that has animated *the form of a proposed rule* and the data upon which that rule is based."[150] Put another way, "an agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible."[151]

Here, CEQ vaguely gestures at potential codification of all or some of the Interim Climate Guidance. Yet the Council provides neither proposed regulatory text encapsulating that codification nor even a description of *which* components of the lengthy and technical Interim Climate Guidance could be codified. Thus, there is neither "detail" nor a "concrete and focused form" of a proposal upon which members of the public could meaningfully comment, criticize, or formulate alternatives.[152] If CEQ were to codify all or part of the Interim Climate Guidance, it would constitute "the first opportunity for interested parties to offer comments that could persuade the agency to modify" regulatory text.[153] This would violate the APA's public notice-and-comment requirements.[154]

VII. CEQ'S INTEREST IN PROMOTING ENVIRONMENTAL JUSTICE SHOULD BE MINDFUL OF NEPA'S BOUNDARIES AND GOALS AS IT INTEGRATES ENVIRONMENTAL JUSTICE INTO NEPA.

The Phase II Proposal makes a concerted effort to emphasize environmental justice, with the aim of ensuring that environmental justice issues "are fully accounted for in agencies' decision-making processes."[155] This emphasis on environmental justice is reflected in CEQ's revisions to the Policy section of its regulations (Section 1500.2), instructing agencies to conduct "meaningful engagement with communities with environmental justice concerns, which often include communities of color, low-income communities, indigenous communities, and Tribal communities."[156]

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[148] 5 U.S.C. § 553(b); *see Nat'l Mining Ass'n*, 758 F.3d at 251 ("Legislative rules generally require notice and comment, but interpretive rules and general statements of policy do not.").
[149] 5 U.S.C. § 553(b)(3).
[150] *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (emphases added).
[151] *Id.* at 36; *see also Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274–75 (D.C. Cir. 1994) (finding that EPA's final definition of "control" for purposes of control of water system service lines "was not prefigured in the proposed rule" and thus the EPA "failed to provide adequate notice that it would adopt a novel definition of control").
[152] *See Home Box Off.*, 567 F.2d at 35–36.
[153] *Am. Water Works Ass'n*, 40 F.3d at 1274.
[154] To the extent CEQ would rely on "the comments [it] receives on th[e] proposed rule" to provide notice or flesh out a final rule, *see* 88 Fed. Reg. at 49,945, the Council should note that an agency cannot use public comments to a proposed rule as a substitute for notice because "[u]nder the standards of the APA, 'notice necessarily must come—if at all—from the Agency.'" *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991) (per curiam) (citation omitted); *see also Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (agency "cannot bootstrap notice from a comment").
[155] 88 Fed. Reg. at 49,928.
[156] *Id.* at 49,967 (proposed § 1500.2(d)).

The Associations share this same commitment to ensuring that environmental justice is a key component of the environmental review process.[157] We support an approach to environmental justice policy and practice embodies the key principles of fair treatment of all persons, regardless of race, color, national origin, or socioeconomic status; meaningful involvement of potentially affected communities as key stakeholders; and a recognition that individual communities may have different and unique priorities and concerns about environmental and socioeconomic burdens and health disparities. Together with our member companies, the Associations are committed to continually improving environmental and social performance, as well as engaging with and investing in local communities and stakeholders. We are committed to working with regulatory agencies, policymakers, and local environmental justice advocates to deepen our understanding of community concerns and to participate collaboratively in addressing and promoting environmental justice. For example, as part of these efforts, API is currently developing a Recommended Practice ("RP") aimed at enhancing public participation, and community engagement processes that can be applied to various projects, including those in the energy sector.

Before proceeding further, the Associations would like to clarify that our concerns with CEQ's chosen approach do not diminish the collective recognition and value of the consideration of environmental justice in environmental reviews. The oil and natural gas industry endeavors to responsibly operate in a way that brings benefits like affordable, reliable, and cleaner energy sources to all populations, while simultaneously reducing the potential for impacts to those populations—regardless of race, color, national origin or income. We strive to understand, discuss and appropriately address community concerns with our operations. We support resolving concerns about potential inequitable impacts on communities and facilitating the involvement of all people. We believe that environmental justice considerations can be addressed throughout the various stages of environmental reviews and permitting of a project, and industry welcomes the opportunity to work with CEQ and individual agencies on issues of importance in this matter and in future regulatory actions. Our industry is working diligently every day to have positive impacts in local communities in which we operate. We are committed to supporting constructive interactions among industry, regulators, and surrounding communities/populations that may be disproportionately impacted and addressing potential inequitable effects. But as previously noted in this letter, by explicitly focusing on certain types of effects, CEQ is moving away from NEPA's mandate and historic practice and introducing unnecessary uncertainty into the process.

As explained in greater detail below, the Associations provide the following recommendations regarding the approach to environmental justice for CEQ's consideration:

- Recognize that agencies have longstanding practices of considering environmental justice under the existing NEPA framework and CEQ and interagency guidance. Where new explicit references to environmental justice are intended to align with the more than 25 years of CEQ and agency practice, CEQ should explicitly denote that alignment. Where the new references are intended to deviate from past CEQ and agency practice, CEQ should

[157] *See* API, *Industry in Action: Focus on Environmental Justice* (2023), https://tinyurl.com/yrycsxh4; *see also* API Interim Climate Guidance Comments, *supra* n.10, at 22 n.104; Energy Associations Phase I Comments, *supra* n.9, at 27–28.

explain how such deviations materially enhance consideration of environmental justice and how agencies should alter their existing approaches going forward.

- Ensure that any finalized regulatory provisions remain firmly tethered to the NEPA framework by focusing consideration on "significant and disproportionately high and adverse effects" on environmental justice communities.

- Explicitly recognize, in keeping with past practice, that it is possible for an effect to have "disproportionately high and adverse effects" on environmental justice communities and yet not be significant within the definition of NEPA.

- Provide a clear, workable definition of "environmental justice" and "environmental justice communities" designed for the NEPA process.

- Consider follow-on guidance, subject to stakeholder and public input, to provide principles-based frameworks for new terms such as "meaningful engagement" and "equitable access" that allow agencies flexibility in interpreting and implementing such concepts.

A. CEQ should explain how the new references to environmental justice fit into the existing NEPA practices and procedures.

As with many other areas of the Phase II Proposal, CEQ should recognize that it is not writing on a blank canvas: While CEQ's regulations have not previously explicitly referenced environmental justice, agencies and the Associations' members have been incorporating environmental justice considerations into project planning and the NEPA review process for more than 25 years based on CEQ's longstanding Environmental Justice Guidance and an interagency working group set of recommendations.[158] NEPA's requirements to consider the reasonably foreseeable environmental effects of a proposed project (as well as reasonable alternatives and mitigation measures) apply across the board to all communities, which necessarily include environmental justice communities. And even though NEPA does not draw distinctions among potentially affected communities, this has not prevented agencies and applicants from working to ensure meaningful public engagement with these communities to ensure consideration of their unique challenges.

Nor has it prevented agencies from considering and analyzing potential disproportionate effects on particular communities as they arise for a particular project. Many of our members have received information requests and other requests for response from reviewing agencies, such as FERC, that are squarely focused on environmental justice, stakeholder engagement, and disproportionate impacts—evidence that agencies take environmental justice concerns

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[158] *See* 88 Fed. Reg. at 49,931 n.54 ("Consideration of environmental justice . . . has long been part of NEPA analysis."); *see also* CEQ, *Environmental Justice: Guidance Under the National Environmental Policy Act* (Dec. 10, 1997), https://tinyurl.com/yvck6vwf [hereinafter "CEQ EJ Guidance"]; Fed. Interagency Working Grp. on Env't Just. & NEPA Comm., *Promising Practices for EJ Methodologies in NEPA Review* (Mar. 2016), https://tinyurl.com/2mxzn96m [hereinafter "Promising Practices"].

seriously.[159] BLM similarly integrates environmental justice into their NEPA review processes.[160] Due consideration of environmental justice is also evident in EPA's environmental justice guidance for CCUS/Class VI Underground Injection Control ("UIC") permits that was recently updated in August 2023 to expand on environmental justice screening, community engagement and burden impact assessment criteria for the EPA Regional Offices, states, tribes and territories to follow when reviewing Class VI well permit applications.[161] Class VI wells used to inject CO_2 will also require review under NEPA when associated with Federal grant funding or when impacting endangered species, historic properties, or low-income communities. Furthermore, as directed by President Biden's Justice40 Initiative, Federal agencies, such as DOE and the Army Corps, require the screening, engagement and assessment of disadvantaged communities in the "Community Benefits Plan" component of the grant funding application process.[162]

Courts have likewise reviewed and assessed the adequacy of agencies' environmental justice analysis for an array of projects under the existing NEPA framework.[163] Numerous judicial decisions have specifically listed environmental justice concerns alongside other typical areas of concern for NEPA analyses (e.g., air quality, surface and ground waters, geology, agricultural), demonstrating that consideration of environmental justice fits within the existing NEPA framework.[164]

While the Phase II Proposal is heavy on references to environmental justice, it is very light on any explanation of how these references are intended to work in practice. Indeed, the Phase II Proposal does not acknowledge, much less explain, how these new references are intended to align or deviate from decades of agency practice—including practices upheld by the courts. The Associations view many of CEQ's proposed revisions relating to environmental justice as attempts to codify longstanding efforts by agencies, project sponsors, and courts to address environmental justice concerns. We request that CEQ clarify in any finalized regulation that the new explicit references to environmental justice are intended to align with long-standing practice. If CEQ

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[159] *See, e.g.*, *Transcontinental Gas Pipe Line Co., LLC*, 184 FERC ¶ 61,066 at PP 31–38 (July 31, 2023); *Driftwood Pipeline LLC*, 183 FERC ¶ 61,049 at PP 64–76 (April 21, 2023).

[160] *See* BLM, *Addressing Environmental Justice in NEPA Documents: Frequently Asked Questions* (2022), *available at* https://tinyurl.com/ywu56er9;

[161] *See* Memorandum from Radhika Fox, Assistant Administrator, Office of Water, U.S. EPA to Regional Water Division Directors, Regions I-X (Aug. 17, 2023), https://tinyurl.com/ytkaun8k.

[162] *See* DOE, *About Community Benefits Plans*, https://tinyurl.com/mr3bhump (last visited Sep. 25, 2023); Memorandum from Michael L. Connor, Assistant Secretary of the Army for Civil Works, to Commanding General, U.S. Army Corps (Mar. 22, 2022), *available at* https://tinyurl.com/3ce654b7.

[163] *See, e.g.*, *Sabal Trail*, 867 F.3d at 1368–71 (interstate natural gas pipelines); *Latin Ams. for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin.*, 756 F.3d 447, 475–77 (6th Cir. 2014) (bridge); *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 232–33 (5th Cir. 2006) (housing development); *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 688–89 (D.C. Cir. 2004) (airport improvement); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003) (railway line); *Coal. for Healthy Ports v. U.S. Coast Guard*, No. 13-cv-5347, 2015 WL 7460018, at *25–*27 (S.D.N.Y. Nov. 24, 2015) (bridge improvement); *Protect Our Communities Found. v. Salazar*, No. 12-cv-2211-GPC PCL, 2013 WL 5947137, at *15 (S.D. Cal. Nov. 6, 2013) (utility-scale wind power project), *aff'd sub nom. Backcountry Against Dumps v. Jewell*, 674 F. App'x 657 (9th Cir. 2017).

[164] *See, e.g.*, *Friends of Cap. Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1064 (D.C. Cir. 2017) (light rail system improvement); *Kentucky Coal Ass'n, Inc. v. Tennessee Valley Auth.*, 804 F.3d 799, 804 (6th Cir. 2015) (fuel switching from coal to natural gas); *Hoosier Env't Council v. U.S. Army Corps of Engineers*, 722 F.3d 1053, 1063 (7th Cir. 2013) (interstate highway); *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 429 (4th Cir. 2012) (dams and impoundments).

intends for any new references to deviate from longstanding practice and guidance, then it should explicitly acknowledge where and how it is doing so, and explain (with record support) why past practice has been insufficient to address NEPA's mandate, as required by the APA.[165] CEQ should also explain how any proposed new definitions, references, materials and variables are to be used in NEPA analysis. Otherwise, CEQ will only create confusion, inconsistency, and litigation risk as agencies look to apply the new language—undermining the bipartisan purpose behind the Builder Act, and squandering this historic opportunity to invest in our nation's future.

B. CEQ should revise its definition of "environmental justice" so that its terminology more closely aligns with that used in NEPA.

CEQ's proposed approach relies on an imprecise and potentially unwieldy definition of "environmental justice" and an undefined reference to "communities with environmental justice concerns" that is insufficiently tethered to NEPA's mandate to focus on significant impacts. The Associations are concerned that this approach will invite confusion as to agencies' responsibilities and obligations under NEPA. Such regulatory confusion will only lead to litigation and other delays, including projects that provide community benefits. The Associations explain these concerns below and recommend constructive edits we believe will more effectively integrate environmental justice into the larger NEPA framework.

The Phase II Proposal uses the same definition of "environmental justice" as contained in Executive Order 14,096:

> *Environmental justice* means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision making and other Federal activities that affect human health and the environment so that people:
>
> (1) Are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and
>
> (2) Have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.[166]

The Associations largely agree with the spirit and much of the language of this proposed definition, and we recognize that finding a useful, consistent definition of environmental justice is a challenge,

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[165] An agency must explain its departure from prior precedent and "may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Fox Television*, 556 U.S. at 515; *see also State Farm*, 463 U.S. at 43.

[166] 88 Fed. Reg. at 49,986–87 (proposed § 1508.1(k)); *see* Exec. Order No. 14,096, *Revitalizing Our Nation's Commitment to Environmental Justice for All*, 88 Fed. Reg. 25,251, 25,253 (Apr. 21, 2023).

especially given the evolving nature of the topic and diversity of stakeholders and community groups often involved in crafting a meaningful yet workable definition.

The proposed definition, though, is adapted from the definition provided by an Executive Order intended to encompass Administration policy across the breadth of environmental and civil rights statutes, meaning the definition was not written for direct integration into NEPA.[167] The proposed definition thus uses language that may on the one hand have generally understood meanings in common parlance, but on the other hand have particularized meanings when inserted into the NEPA context. The Associations thus recommend several revisions intended to better integrate the proposed definition of "environmental justice" into the larger NEPA framework.

First, the proposed definition refers to "human health and environmental effects" and "cumulative impacts." These phrases have acquired particular meanings in the NEPA context to reflect relevant considerations such as causation, reasonable foreseeability, and significance.[168] And NEPA has long been understood to focus on *significant* effects, as distinct from a catalog of every imaginable effect that may arise from a proposed action, however slight.[169] By simply adopting the definition from Executive Order 14,096, CEQ glosses over much of this underlying nuance, which is likely to result in confusion as agencies attempt to determine which environmental justice-related effects are legally relevant to their environmental analyses.

Second, CEQ uses "disproportionate and adverse," rather than the "disproportionately high and adverse" language used in the longstanding and still in-effect Executive Order 12,898, as well as CEQ and interagency guidance.[170] Agencies and courts have developed experience understanding and applying the "disproportionately high and adverse" standard within the greater NEPA framework.[171] CEQ's proposed modification, though, risks upending this practice and sweeping in any effect, regardless of its context, intensity, or duration, so long as it is disproportionately borne by a particular community and adverse in nature. As noted above, NEPA is focused on significant effects, and agencies' and the public's resources should not be overly diluted by attention to all sorts of insignificant effects that may arise.

Third, CEQ requests comment as to its decision to use "cumulative impacts" rather than "cumulative effects," and explains that it chose the former because "cumulative impacts," based

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[167] *See* Exec. Order No. 14,096, 88 Fed. Reg. at 25,252, 25,253 (characterizing the order as embodying a "whole-of-government" and "government-wide" approach to environmental justice).

[168] *See, e.g.*, *Pub. Citizen*, 541 U.S. at 763–64, 767, 769–70 (describing and interpreting NEPA's and CEQ's regulations' use of "effects" and "cumulative impacts").

[169] *See* 42 U.S.C. § 4332(2)(C) (requiring an environmental review of major federal actions "significantly affecting the quality of the human environment"); *id.* § 4336(b)(1), (2) (requiring an EIS for proposed agency actions that have "reasonably foreseeable significant effects on the quality of the human environment," and requiring only an EA for those that do not have significant effects); *see also Methow Valley*, 490 U.S. at 349 ("[NEPA] ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning *significant* environmental impacts . . . ." (emphasis added)).

[170] *See* Exec. Order No. 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 11, 1994); CEQ EJ Guidance, *supra* n.158; Promising Practices, *supra* n.158.

[171] *See, e.g.*, *Sabal Trail*, 867 F.3d at 1368–71; *Latin Ams. for Soc. & Econ. Dev.*, 756 F.3d at 465; *Red Lake Band of Chippewa Indians v. U.S. Army Corps of Eng'rs*, 636 F. Supp. 3d 33, 59 (D.D.C. 2022); *Coal. for Healthy Ports*, 2015 WL 7460018, at *25–*27.

on an EPA publication, "has a meaning in the context of environmental justice relating to the aggregate effect of multiple stressors and exposures on a person, community, or population," and thus is "sufficiently distinct from the general meaning of cumulative effects under the NEPA regulations."[172] While the Associations acknowledge that terms in the environmental justice context could have acquired new and evolving meanings, we nevertheless believe that introducing an *additional* definition (and attendant set of factors) will only increase the potential confusion as agencies move to implement any final rulemaking and determine what exactly agencies should consider with respect to a proposed project and its potential effects.[173] The Associations thus urge CEQ to maintain both linguistic *and* substantive consistency by using "effects" rather than "impacts."

Fourth, CEQ uses the term "equitable access," although it does not provide any regulatory definition or explanation in the preamble of the Proposal. CEQ similarly does not define "meaningful engagement" for purposes of proposed Section 1500.2. Like with much of NEPA, the details are critical so that agencies, project proponents, and interested commenters understand what is expected of agencies. "Equitable access" and "meaningful engagement" are open-ended terms that could be subject to varying and competing definitions or understandings. The Associations recommend that CEQ consider promptly providing principles-based frameworks for "equitable access" and "meaningful engagement" in follow-on guidance, subject to stakeholder and public input. We believe principles-based frameworks—in lieu of a rigid regulatory definitions—would allow agencies flexibility in interpreting and implementing the concepts of "equitable access" and "meaningful engagement."

Fifth, and finally, the definition appears to direct agencies to examine whether "people"—although it is not clear if this means individual persons, particular communities, or all persons in a potentially affected environment—can be "*fully protected* from disproportionate and adverse human health and environmental effects (including risks) and hazards." A call for "full protection" from adverse effects and risk would be a notable departure from NEPA's mandate, which recognizes that there may be environmental effects "which cannot be avoided."[174] And even CEQ's proposed definition of "mitigation" recognizes that some environmental effects can only be minimized or reduced, rather than entirely avoided.[175] The reality is that, for many projects, risk management (i.e., identifying, evaluating, and prioritizing risks to minimize, monitor, and control the probability of occurrence), rather than complete risk avoidance, is the only reasonable or feasible path forward, especially in the context of potential environmental risks. This is why courts examine whether an agency took the requisite "hard look" at mitigation measures, some of which may only minimize potential effects, not whether it entirely avoided those effects.[176] And even if

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[172] 88 Fed. Reg. at 49,961.

[173] *Id.* at 49,929 (noting the decision to revise the NEPA regulations to change the word "impact" to "effect" "[f]or greater consistency and clarity").

[174] 42 U.S.C. § 4332(2)(C)(ii).

[175] 88 Fed. Reg. at 49,987–88 (proposed § 1508.1(w)).

[176] *See, e.g.*, *Indian River Cnty., Fla. v U.S. Dep't of Transp.*, 945 F.3d 515, 533–35 (D.C. Cir. 2019) (finding agency's mitigation analysis and efforts for passenger railway project, which "ameliorate[d]" potential adverse effects and only reduced the risk of pedestrian harm attributable to the "epidemic" of informal or illegal railway crossings along the corridor, "complie[d] with the requirements of NEPA").

NEPA did allow for "full protection" from such harms, it is not clear how, as a technical matter, agencies would measure or determine such protection.

In line with the above concerns, as well as those described below, the Associations recommend the following revisions to the definition of "environmental justice" at Section 1508.1(k) in order to more effectively integrate its underlying concepts into the NEPA framework:

> *Environmental justice* means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision making and other Federal activities that significantly affect human health and the environment so that people:
>
> (1) Are ~~fully~~ protected from disproportionately high and adverse significant human health and environmental effects (including risks) and hazards, based on the intensity, extent, and duration of those effects and hazards (see Section 1501.3(d)), ~~including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers~~; and
>
> (2) Have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.

The Associations believe these recommended revisions will better align with NEPA's language and goals and provide agencies with added clarity when implementing any final rulemaking. The Associations also propose corresponding "disproportionately high and adverse" edits in the proposed revisions that follow.

C. CEQ should clarify the meaning and intent behind the phrase "communities with environmental justice concerns."

Throughout the preamble and proposed regulatory text, CEQ refers to "communities with environmental justice concerns." CEQ has not defined this phrase, other than to state that it "intends that phrase would mean communities that do not experience environmental justice as defined in § 1508.1(k)" and invited comment on whether, and how to define the phrase.[177] This proposed phrase provides no guidance to agencies or project proponents, which will create unnecessary confusion and arbitrary application, particularly given the nebulous definition of environmental justice as proposed by CEQ. It may also water down CEQ's intention to focus on environmental justice communities that are disproportionately impacted by creating confusion about how to apply the phrase. CEQ should provide guardrails around what would be considered as a "community with environmental justice concerns". For example, only communities that could potentially experience significant effects from a proposed Federal action should be in scope.

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[177] *See* 88 Fed. Reg. at 49,960.

D. CEQ should emphasize that agencies need only focus on *significant* effects related to environmental justice.

As noted above, NEPA is focused squarely on consideration of significant environmental effects, as well as reasonable alternatives and mitigation measures aimed at addressing those significant effects.[178] And CEQ has previously gone to great lengths to flesh out of the contours of the requisite "significance" analysis according to an effect's intensity, context, and duration,[179] and even here seeks to further refine the concept.[180] Indeed, the interagency working group's Promising Practices document repeatedly acknowledges that "an agency may determine that impacts are disproportionately high and adverse, *but not* significant within the meaning of NEPA. In other circumstances, an agency may determine that an impact is both disproportionately high and adverse and significant within the meaning of NEPA."[181]

As currently drafted, however, the portions of the Phase II Proposal addressing environmental justice emphasize "disproportionate and adverse" effects but do not sufficiently communicate under what circumstances such an effect is "significant" for purposes of NEPA. The Associations are concerned that agencies will gain the erroneous impression that they must either equate "disproportionate and adverse" and "significant," or expend agency attention and resources on "disproportionate and adverse" effects on environmental justice communities even when doing so would not be commensurate with the insignificance of the effects. As at least one court has recognized, "[e]nvironmental justice impacts—like all other potential impacts evaluated under NEPA—must be significant before further analysis or the preparation of an EIS is required," meaning a finding that a proposed action "would not result in any significant adverse impacts on *any* community . . . obviate[s] the need for further study of environmental justice impacts."[182] The Associations thus believe CEQ's approach, as currently drafted and potentially interpreted by implementing agencies, would be contrary to NEPA and would encourage agencies to unnecessarily dedicate time and resources to effects that while potentially disproportionate, are not ultimately significant.

In line with the above, the Associations recommend the following revisions to the Phase II Proposal to better emphasize that significant effects *may* include environmental justice-related effects, but not always, and that agencies should make an independent significance determination prior to dedicating additional time and resources to further analyzing those effects:

- **§ 1501.3(d)(2)(ix)**: "The degree to which the action may have significant and disproportionately high and adverse effects on ~~communities with~~ environmental justice ~~concerns~~ communities."

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[178] *See supra* n.169 and associated text.
[179] *See* 40 C.F.R. § 1508.27 (2019) (defining "significantly" according to the context and intensity of a potential effect).
[180] *See* 88 Fed. Reg. at 49,969 (proposed § 1501.3(d)); Redline at 11–12.
[181] *See* Promising Practices, supra n.158, at 33, 38 (emphasis added). *See also* 184 FERC ¶ 61,066 at ¶¶35.
[182] *Coal. for Healthy Ports*, 2015 WL 7460018, at *27 (emphasis in original); *cf. Sabal Trail*, 867 F.3d at 1369 (finding agency's conclusion "the project would not have a 'high and adverse' impact on *any* population, meaning, in the agency's view, that it could not have a '*disproportionately* high and adverse' impact on any population, marginalized or otherwise" to be reasonable (emphasis in original)).

- **§ 1502.16(a)(14)**: "The potential for significant and disproportionately high and adverse human health and environmental effects on ~~communities with~~ environmental justice ~~concerns~~ communities."

- **§ 1505.3(b)**: "The lead or cooperating agency should, where relevant and appropriate, incorporate mitigation measures that address or ameliorate significant adverse human health and environmental effects of proposed Federal actions ~~that~~ with disproportionately high and adverse~~ly affect~~ effects on ~~communities with~~ environmental justice ~~concerns~~ communities."

- **§ 1508.1(g)(4)**: "Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, such as significant and disproportionately high and adverse effects on ~~communities with~~ environmental justice ~~concerns~~ communities, whether direct, indirect, or cumulative. . . ."

The Associations also urge CEQ to further clarify in the preamble of any final rulemaking that environmental justice-related impacts are only relevant for NEPA purposes where they are disproportionately high and adverse *and* significant. Relatedly, CEQ should emphasize that the same principles of reasonable foreseeability and causation apply equally to environmental justice-related effects as to all other effects.[183]

E. CEQ should emphasize longstanding temporal limits to cumulative effects analyses, even for environmental justice.

The proposed definition of "environmental justice" indicates that relevant considerations for agencies to consider may be "cumulative impacts of environmental and other burdens,"[184] and further suggests that environmental justice-related effects can be cumulative (along with direct and indirect).[185] The Associations recognize and agree that inherent in the concept of environmental justice is the recognition that certain communities have historically and unfairly shouldered a disproportionate share of society's environmental burdens, often over a significantly lengthy period of time. And the Associations agree that, under the existing regulatory regime and depending upon the particular project, an agency may need to consider the present effects of historical disproportionate environmental burdens within a particular environmental justice community when assessing whether to approve a project that may affect that same community.

But the Associations are concerned that given CEQ's apparent attempt elsewhere to differentiate traditionally understood "cumulative effects" from the newly introduced concepts of

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[183] *See supra* Section VI.A and *infra* Section XII.A.
[184] 88 Fed. Reg. at 49,986 (proposed § 1508.1(k)(1)); *see id.* at 49,961 (construing "cumulative impacts" as the "aggregate effect of multiple stressors and exposures on a person, community, or population").
[185] *Id.* at 49,986 (proposed § 1508.1(g)(4)) ("Effects include . . . disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative.").

environmental justice and "cumulative impacts,"[186] the presently open-ended nature of the newly introduced concepts could be wrongly interpreted by agencies to call for an unnecessarily expansive historical baseline, potentially discouraging needed present or future development, or to require that project sponsors mitigate historical environmental burdens on environmental justice communities, regardless of any nexus to the proposed project or when doing so would not be in proportion to the proposed project or its own effects. We thus urge CEQ, as explained below, to clarify that the same or similar temporal limits applicable to cumulative effects, as used in NEPA, are also applied to environmental justice-related impacts.

The Associations understand a cumulative impacts analysis as having temporal limits regarding the universe of effects to be considered by an agency. As CEQ has long recognized, "[t]he environmental analysis required under NEPA is forward-looking, in that it focuses on the potential impacts of the proposed action that an agency is considering."[187] To the extent agencies look at past actions, the focus is on the "present effects of past action that are, in the judgment of the agency, relevant and useful because they have a significant cause-and-effect relationship with the direct and indirect effects of the proposal for agency action and its alternatives."[188] Agencies are not required to consider or even "catalogue or exhaustively list and analyze all individual past actions."[189] The approach to past actions as part of a cumulative impacts analysis is thus not ever-expansive and open-ended, but rather directly tied to present conditions and the potential effects of the proposed action.

The Associations accordingly urge CEQ to clarify in any final rulemaking that its inclusion of cumulative effects as part of an environmental justice analysis are subject to the same or similar temporal limits as traditionally understood cumulative effects. We also urge CEQ to emphasize that any risk and health assessments or similar projections be scientifically sound, as required under Section 1502.23(a). We believe the above-described clarifications will help ensure that agencies are not unduly encouraged to undertake cumulative effects analysis not sufficiently tethered to the proposed action at hand.

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[186] *See id.* at 49,961 ("The proposed definition of environmental justice uses the phrase 'cumulative impacts,' rather than the phrase 'cumulative effects,' which are used elsewhere in the proposed regulations. That is because the phrase 'cumulative impacts' has a meaning in the context of environmental justice relating to the aggregate effect of multiple stressors and exposures on a person, community, or population. . . . CEQ views the evolving science on cumulative impacts as sufficiently distinct from the general meaning of cumulative effects under the NEPA regulations . . . .").

[187] Memorandum from James L. Connaughton, Chairman, Council on Env't Quality, to the Heads of Fed. Agencies, on Guidance on the Consideration of Past Actions in Cumulative Effects Analysis, at 1 (June 24, 2005), https://tinyurl.com/mr6tdtd2.

[188] *Id.* at 2.

[189] *Id.*; *see also Kleppe*, 427 U.S. at 413–14 ("Cumulative environmental impacts are, indeed, what require a comprehensive impact statement. But determination of the extent and effect of these factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.").

VIII. CEQ'S APPROACH TO NEPA'S ALTERNATIVES ANALYSIS WILL UNDULY DIVERT AGENCY ATTENTION FROM ASSESSING REASONABLE AND MEANINGFUL ALTERNATIVES.

As CEQ recognizes, the alternatives analysis "is the heart of the [EIS]."[190] But the alternatives analysis should be limited to alternatives that are technically and economically feasible and, importantly, achieve the purpose and need of the proposed action as articulated by the project sponsor in its permit application.[191] Congress reemphasized this point by specifically stating in the Builder Act that agencies must consider:

> [A] reasonable range of alternatives to the proposed agency 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*.[192]

If not appropriately limited based on these principles, the agency's NEPA review would not only violate the Builder Act but may also cause an agency to consider alternatives that are irrelevant, infeasible, or beyond the statutory reach of the agency. Such an expansive alternatives analysis would detract from NEPA's purposes of advancing fully informed and well-considered agency decision-making and facilitating public understanding of the proposed action and its reasonable alternatives.

Yet the Phase II Proposal's approach to alternatives analysis, as currently drafted, may in fact lead to unnecessarily expansive and speculative alternatives analyses. For instance, the Proposal's discussion of "alternatives not within the jurisdiction of the lead agency" may create the misimpression that agencies should consider alternatives over which they have no control or authority to pursue. For another, the concept of an "environmentally preferable alternative" would similarly create new complexity as well as a new opportunity for needless litigation. The Associations' concerns are described in more detail below.

A. CEQ should eliminate its proposed language regarding consideration of extra-jurisdictional alternatives.

CEQ proposes that agencies may also include "reasonable alternatives not within the jurisdiction of the lead agency."[193] This added language is unnecessary and contrary to NEPA and applicable case law. A proposed action must necessarily be within the scope of statutory authority conferred on an agency by Congress—i.e., an action that the agency is statutorily able to pursue. By extension, alternatives outside the jurisdiction and control of the agency cannot be "reasonable" and they should not be considered. As has been stressed throughout these comments, NEPA is a procedural statute that does not confer substantive authority; the statute cannot authorize an agency

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[190] 88 Fed. Reg. at 49,977 (proposed § 1502.14).
[191] *See, e.g.*, 42 U.S.C. § 4332(2)(C)(iii); *Vt. Yankee*, 435 U.S. at 551 ("Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved."); *City of Alexandria*, 198 F.3d at 869 (stating that "a reasonable alternative is defined by reference to a project's objectives.").
[192] Fiscal Responsibility Act, 137 Stat. at 38 (emphasis added) (codified at 42 U.S.C. § 4332(2)(C)(iii)).
[193] 88 Fed. Reg. at 49,977 (proposed § 1502.14(a)).

to pursue an action that is otherwise not authorized or expressly foreclosed by its governing statute. Despite CEQ's apparent contrary contention, an extra-jurisdictional alternative, by its very nature, cannot be "reasonable."

The Associations acknowledge that CEQ's *Forty Most Asked Questions* guidance has long provided that agencies should consider alternatives outside of their jurisdiction where "reasonable."[194] But this requirement is much narrower than it appears on its face; as explained by the D.C. Circuit, an alternative outside of the jurisdiction of the reviewing agency may be reasonable "in the context of a coordinated effort to solve a problem of national scope."[195] In those rare instances, while the reviewing agency ultimately may only be able to provide a partial or piecemeal solution, "other agencies might be able to provide the remainder of the solution," making it more appropriate to consider a broader range of solutions to a national concern.[196] Yet the D.C. Circuit similarly recognizes that "[s]uch a holistic definition of 'reasonable alternatives' would, however, make little sense for a discrete project within the jurisdiction of one federal agency."[197] Numerous other courts have likewise excused agencies from needing to consider alternatives that would have required action outside of the agency's authority or control, such as state action or additional legislation, because such alternatives were simply not reasonable under the circumstances of the proposed action.[198]

CEQ asserts that it is including the proposed language regarding extra-jurisdictional alternatives to address "relatively infrequent occurrence[s]" such as "program-level decisions" or where agencies "anticipate funding for a project not yet authorized by Congress."[199] Yet ensuring explicit coverage for a few, rare instances of extra-jurisdictional alternatives does not warrant the broad regulatory language that CEQ has proposed here and does not "strike a balance" as the Council suggests.[200] The broad proposed language could be misconstrued by agencies or stakeholders as affirmatively permitting agencies to consider a plethora of alternatives that are beyond the statutory reach of the agency. Such an approach would be counterproductive to NEPA's purpose of supporting informed decision-making and instead would incentivize increasingly speculative and hypothetical alternative analyses more akin to mere paperwork exercises than generators of decision-useful information. To use the CEQ's Interim Climate Guidance to illustrate, CEQ

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[194] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981) [hereinafter "Forty Most Asked Questions"].
[195] *City of Alexandria*, 198 F.3d at 869; *see Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 835–36 (D.C. Cir. 1972) ("When the proposed action is an integral part of a coordinated plan to deal with a broad problem," such as a proposed program for offshore oil and gas lease sales, "the range of alternatives that must be evaluated is broadened.").
[196] *City of Alexandria*, 198 F.3d at 869. The *Forty Most Asked Questions* provides a similar limitation, listing the following as the only example of a reasonable alternative outside an agency's jurisdiction: "Alternatives that are outside the scope of what Congress has approved or funded . . . because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies." Forty Most Asked Questions, 46 Fed. Reg. at 18,027.
[197] *City of Alexandria*, 198 F.3d at 869; *see Morton*, 458 F.2d at 835 (observing that the "scope" of the proposed action at issue, a program for offshore oil and gas leases, was "far broader than that of other proposed Federal actions discussed in impact statements, such as a single canal or dam").
[198] *See, e.g.*, *Center for Food Safety v. Vilsack*, 718 F.3d 829, 842 (9th Cir. 2013); *Farmland Pres. Ass'n v. Goldschmidt*, 611 F.2d 233, 239–40 (8th Cir. 1979); *Sierra Club v. Lynn*, 502 F.2d 43, 62–63 (5th Cir. 1974); *Shasta Res. Council v. U.S. Dep't of Interior*, 629 F. Supp. 2d 1045, 1059–60 (E.D. Cal. 2009).
[199] 88 Fed. Reg. at 49,948.
[200] *Id.* at 49,949.

suggests that it may be reasonable for an agency to include "clean energy alternatives to proposed fossil fuel-related projects."[201] This obligation, however, would not only be contrary to the well-settled NEPA principle that an applicant's purpose and need drives identification of reasonable alternatives but would also not generate actionable or decision-useful information where the reviewing agency has no authority or jurisdiction to demand that a project proponent pivot towards a clean energy alternative to its proposed fossil fuel project. Moreover, such a pivot may or may not be technically or economically feasible or consistent with the project proponent's business model.

Instead, CEQ should strike the language and explain in the preamble of a final rulemaking that agencies could consider an extra-jurisdictional alternative only in those very limited circumstances that CEQ claims provides the need for this provision (e.g., where an agency anticipates funding for a project not yet authorized by Congress). This change would strike an appropriate balance of general prohibition with limited and narrow exceptions.

Specific Recommendations:

- The Associations recommend that CEQ's proposed language in Section 1502.14(a) regarding extra-jurisdictional alternatives—"Agencies also may include reasonable alternatives not within the jurisdiction of the lead agency"—should be eliminated. This would better align Section 1502.14(a) with the Builder Act and ensure that agencies are not unduly incentivized to consider alternatives wholly untethered from the purpose and need of the proposed action and the applicant's goals.

B. CEQ should eliminate its proposed requirement that agencies identify the "environmentally preferable alternative" to a proposed action outside of the record of decision.

In Section 1502.14, CEQ proposes to instruct agencies to not only identify a reasonable range of alternatives to a proposed action but also "[i]dentify the environmentally preferable alternative or alternatives."[202] What exactly constitutes the "environmentally preferable alternative" appears to hinge on broad consideration of national policy:

> The environmentally preferable alternative will best promote the national environmental policy expressed in section 101 of NEPA 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 rights of Tribal Nations that have been reserved

[201] Interim Climate Guidance, 88 Fed. Reg. at 1,204.
[202] *Id.* at 49,977 (proposed § 1502.14(f)).

> through treaties, statutes, or Executive Orders; or causing the least damage to the biological and physical environment.[203]

And CEQ proposes that the environmentally preferable alternative should not only be identified in the record of decision ("ROD")[204] (as has long been the case[205]) but also in the EIS itself.[206]

The considerations highlighted by CEQ are often relevant to the analysis of the reasonably foreseeably impacts of a proposed action and its reasonable alternatives and are often considered as part of a comparative analysis among a proposed action, its reasonable alternatives, and the no-action alternative. But CEQ's proposal to go beyond a standard comparative alternatives analysis to identify in an EIS the alternative that "maximiz[es] environmental *benefits*," without regard for foundational NEPA considerations (e.g., purpose and need, significance of environmental effects, feasibility, potential mitigation), goes well beyond the requirements of NEPA. The key point of an EIS is to focus agency attention on potentially significant effects, not determining how to maximize benefits.[207] The Associations believe CEQ's proposed requirement for agencies to identify in the EIS the "environmentally preferable alternative," as defined above, is misguided and risks making NEPA less information-forcing and more outcome-forcing and thus recommend elimination of the proposed requirement. Moreover, requiring agencies to identify the "environmentally preferable alternative" from the outset and not tied to a pending decision or evaluation of significant effect(s) could lead to extraneous effort being expended by agencies with limited resources.

Both the pre-2020 Regulations and 2020 Regulations required agencies to identify in the ROD "the alternative or alternatives which were considered to be environmentally preferable."[208] Yet in describing how agencies "may discuss preferences among alternatives" more generally, the relevant considerations included "economic and technical considerations and agency statutory missions" as well as "consideration of national policy."[209] This approach reflects the common-sense approach that an "environmentally preferable alternative" for purposes of NEPA is not strictly limited to purely environmental considerations; rather, it should also be viewed in light of economic, technical, and legal considerations.[210] And that approach is consistent with the focus on a proposed action's purpose and need when identifying reasonable alternatives, as described above.

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[203] *Id.*; *see also id.* at 49,987 (proposed § 1508.1(*l*)) ("Environmentally preferable alternative means the alternative or alternatives that will best promote the national environmental policy as expressed in section 101 of NEPA.").
[204] *Id.* at 49,981 (proposed § 1505.2(b)).
[205] *See* 40 C.F.R. § 1505.2(b) (2019); 2020 Regulations, 85 Fed. Reg. at 43,369 (§ 1505.2(b)).
[206] 88 Fed. Reg. at 49,976–77 (proposed § 1502.12).
[207] *See* 42 U.S.C. § 4332(2)(C).
[208] *See* 40 C.F.R. § 1505.2(b) (2019); 2020 Regulations, 85 Fed. Reg. at 43,369.
[209] *Id.* (emphasis added).
[210] *See* 42 U.S.C. § 4332(2)(C)(iii) (requiring a detailed statement as to "a reasonable range of alternatives to the proposed agency action . . . that are technically and economically feasible, and meet the purpose and need of the proposal"); *see also id.* § 4331(a) (describing "the continuing policy of the Federal Government," *inter alia*, "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").

Now, CEQ seeks to eliminate any reference to an environmentally preferable alternative that is informed by economic, technical, or legal considerations. In this way, CEQ's proposed revision cannot truly "provide agencies flexibility to rely on their discretion and expertise to strike an appropriate balance in identifying the environmentally preferable alternative."[211] Instead, agencies appear to be cabined to a narrow subset of considerations relating to the "maximiz[ation of] environmental benefits" (e.g., mitigation of climate change, advancing environmental justice, biological protection), at the expense of non-environmental considerations that have long been part of the NEPA process (e.g., socioeconomics and economic development, energy security, technical feasibility). This will necessarily result in an incomplete and one-sided analysis, rather than one that is "fully informed and well considered."[212] Additionally, requiring agencies to identify the "environmentally preferable alternative" in an EIS—before a pending decision or evaluation of potentially *significant* effects—could lead to extraneous effort being expended by agencies with limited resources.

Worse, CEQ's emphasis on environmental *benefits* and identifying the alternative that "will best promote the national environmental policy" risks discounting the purpose and need of a proposed action, long a key consideration of the NEPA review process.[213] As the D.C. Circuit has recognized, "[a]n agency cannot redefine the goals of the proposal that arouses the call for action; 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."[214] Yet, CEQ is now attempting to reorient agencies' focus away from the project's purpose and an applicant's goals (and even an agency's objectives under its governing statute), and towards how to "maximiz[e] environmental benefits." This is particularly concerning in light of the fact that CEQ has already de-emphasized the goals of an applicant when determining the "purpose and need." Such an approach does not comport with NEPA or applicable case law—nor does it accord with congressional intent behind the Builder Act.

In light of the above concerns, the Associations strongly urge CEQ to (1) revise its definition of "environmentally preferable alternative" to more closely align with its longstanding regulatory meaning and the text of NEPA Section 101 and (2) retain the existing regulations' identification of the "environmentally preferable alternative" *only* in the ROD.

Specific Recommendations:

To the extent CEQ moves to finalize the requirement, the Associations recommend that the definition of "environmentally preferable alternative" provided at proposed Section 1502.14(f) be revised to more accurately reflect the national environmental policy goals embodied by NEPA Section 101:

> The environmentally preferable alternative is the reasonable alternative (see Section 1508.1(ff)) that will best promote the national environmental policy expressed in section 101 of NEPA to

[211] 88 Fed. Reg. at 49,949.
[212] *See Vt. Yankee*, 435 U.S. at 558.
[213] *See infra* Section XII.B.
[214] *Citizens Against Burlington*, 938 F.2d at 199 (emphasis in original).

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~~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 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~~.

Without such revisions, the identification and discussion of the environmentally preferable alternative will be one-sided and construed as an attempt to place a thumb on the scale in favor of alternatives that advance certain goals or environmental benefits to the detriment of others, and will fail to take into account the project proponent's purpose. The proposed definition in Section 1508.1(*l*) should be similarly aligned with this proposed revision.

IX. THE PHASE II PROPOSAL INSUFFICIENTLY IMPLEMENTS KEY COMPONENTS OF THE BUILDER ACT AND INSTEAD FRUSTRATES CONGRESSIONAL INTENT.

Through the Builder Act, as contained in the FRA, Congress responded to many of the longstanding concerns of NEPA as a hindrance to infrastructure and project development, introducing changes to increase efficiency and predictability and generally streamline the NEPA process. While the Associations believe further comprehensive permitting reform is necessary, especially in light of concerns with this Phase II Proposal, *see infra* Section XIV, we nevertheless support many of the NEPA amendments introduced by the Builder Act.

We are concerned, however, that the Phase II Proposal fails to fully and faithfully capture the language of and intent behind many of the Builder Act's amendments to NEPA—and at times appears to circumvent congressional language in order to advance unrelated policies. Rather than streamline the NEPA process, CEQ's chosen forms of implementation will instead likely exacerbate inefficiencies, elongate delays, and impose additional burdens that ultimately undercut the Builder Act. Discrepancies between the Builder Act and the Phase II Proposal will likely lead to regulatory confusion and litigation—the two primary drivers for project delay. Additionally, CEQ must also consider how the Builder Act's time and page limits will be met in light of all of the new substantive requirements that CEQ proposes to add. Put simply, CEQ is demanding that agencies do more in less time and fewer pages. This will likely be a recipe for additional delay and legal challenges.

While this section focuses on CEQ's implementation of the Builder Act specifically, the Associations also urge CEQ to consider more broadly how to streamline and better align agencies' NEPA regulations and procedures with the Builder Act going forward. The Associations' specific concerns and proposed revisions are described below.

A. EIS and EA deadlines

The Builder Act prescribed deadlines for completion of EAs (1 year) and EISs (2 years),[215] and the Associations support CEQ's incorporation of those deadlines at Section 1501.10.[216] The Associations further support the requirement that lead agencies annually submit reports on missed deadlines for EAs and EISs.[217] However, the Associations believe CEQ's proposed implementation warrants additional clarification, and we propose revisions aimed at ensuring proposed projects do not continue to be bogged down in spite of the new deadlines.

1. Start dates

With regard to when the period begins for purposes of determining the deadlines, the Phase II Proposal incorporates the Builder Act's amendments in requiring the clock to start after the sooner of "[1] the date on which the agency determines that NEPA requires an environmental impact statement or environmental assessment for the proposed action; [2] the date on which the agency notifies an applicant that the application to establish a right-of-way for the proposed action is complete; and [3] the date on which the agency issues a notice of intent for the proposed action."[218] Only the third option, however, provides a clear, unambiguous start date. The first two, by contrast, appear to provide an agency great latitude in determining when an EA/EIS is necessary or when an application is deemed "complete." This discretion increases the risk that a project will be subject to additional time for review beyond the statutorily limited 1- or 2-year period, or that particular classes of projects will be treated differently for purposes of review time.[219]

The Associations recommend that CEQ take additional steps to clarify precisely when a "determination" occurs or an application is deemed "complete." For instance, CEQ could revise Section 1501.10 to include a procedure whereby a project sponsor could notify the lead agency that it believes an EA/EIS is required for the proposed action, or that its right-of-way application is complete, which would then shift the burden onto the agency to explain why it disagrees with the sponsor within a set number of days (e.g., 30 days). If the agency does not disagree, or the time period lapses without an agency response, the start date for purposes of the EA/EIS deadline will be deemed the date of sponsor's notification. If there is a disagreement between the project sponsor and agency, CEQ could serve as adjudicator and be required to resolve the dispute within a period

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[215] 42 U.S.C. § 4336a(g).
[216] 88 Fed. Reg. at 49,972 (proposed § 1501.10).
[217] *Id.* at 49,973 (proposed § 1501.10(b)(4)).
[218] *Id.* at 49,973 (proposed § 1501.10(b)(3)).
[219] To illustrate the need for the utmost clarity when it comes to timing, consider the ongoing uncertainty with regard to waiver of permitting authority under Clean Water Act Section 401, which gives a state the opportunity to exercise its delegated authority to act upon requested water quality certifications "within a reasonable period of time (which shall not exceed one year) after receipt of [a] request." 33 U.S.C. § 1341(a)(1). EPA's implementing regulations provided a trigger for when the waiver "clock" starts that uses similarly generic language as proposed here: "Written notification from the licensing or permitting agency to the Regional Administrator of the failure of the State or interstate agency concerned to act on such request for certification within a reasonable period of time after receipt of such request, as determined by the licensing or permitting agency (which period shall generally be considered to be 6 months, but in any event shall not exceed 1 year)." 40 C.F.R. § 121.16 (2019). Lingering questions about when exactly the clock starts led to significant and lengthy litigation. *See, e.g.*, *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019); *N.C. Dep't of Env't Quality v. FERC*, 3 F.4th 655, 669 (4th Cir. 2021); *Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179, 1183 (D.C. Cir. 2022).

of time (e.g., 30 days). As another potential revision, on the agency side, CEQ could implement a requirement whereby an agency must notify an applicant that its right-of-way application for the proposed action is "complete" or what specific information is required in order for it to be complete within a set number of days, and require a written form of notification to the sponsor that the agency has determined an EIS or EA will be required.

The Associations believe that providing hard deadlines for agencies to make determinations regarding completeness or the necessity of an EA or EIS, as well as reasonable mechanisms for project sponsors to move agency action forward, will go far in ensuring that Congress's deadlines are meaningful and that projects are not subject to the same delays that have long plagued the NEPA process.

2. Deadline extensions and consultations with project sponsors

The Phase II Proposal allows agencies to extend the presumptive deadlines "in writing and in consultation with any applicant or project sponsor."[220] While CEQ's proposed language largely reflects the Builder Act's inclusion of a consultation requirement,[221] the Associations urge the Council to clarify the proposed consultation requirement to ensure that project sponsors are not completely at the mercy of agency delay. As currently drafted, there are no meaningful constraints, beyond mere "consultation," on an agency's authority to continually extend project deadlines without proper explanation for the extensions. Moreover, there are neither temporal limits nor limits on the number of extensions that could be imposed on a particular project. At the very least, CEQ should clarify that the "in writing" component requires an agency to explain the reason for the proposed extension of the deadline and further provide project sponsors a reasonable opportunity to cure any purported defects attributable to the sponsor that the agency cites as justification for an extension of the deadline. Additionally, the Associations recommend that agencies should be prohibited from extending a deadline absent consent from either the project sponsor or, if necessary, CEQ. Alternatively, project sponsor or CEQ approval could be required for deadline extensions beyond a certain amount of time (e.g., 90 days).

Specific Recommendations:

In line with the above suggestions, the Associations propose the following revisions to Section 1501.10(b)(1) and (2):

> . . . unless the lead agency extends the deadline in writing and in consultation with any applicant or project sponsor and establishes a new deadline that provides only so much additional time as is necessary to complete the [EA/EIS]. When providing an applicant or project sponsor written notification, the lead agency should explain the basis for the proposed extension, provide a schedule for

[220] 88 Fed. Reg. at 49,972–73 (proposed § 1501.10(b)(1) & (2)).
[221] 42 U.S.C. § 4336a(g)(2) ("A lead agency that determines it is not able to meet the deadline described in paragraph (1) may extend such deadline, in consultation with the applicant, to establish a new deadline that provides only so much additional time as is necessary to complete such environmental impact statement or environmental assessment.").

> completion of the [EA/EIS] in the additional time deemed necessary, and, if the delay is based on any defects or gaps in the proposal or related information, specifically identify all such defects or gaps and provide a reasonable opportunity for the applicant or project sponsor to cure those that are within the applicant or project sponsor's authority to cure.

The Associations also recommend including the following as paragraph (b)(3)—and accordingly moving the currently proposed paragraphs (b)(3) and (b)(4) to paragraphs (b)(4) and (b)(5), respectively:

> (3) Deadlines cannot be extended absent written consent from either the applicant or project sponsor or the Council.

3. Schedules and schedule revisions

Section 1501.10 of the Phase II Proposal provides that "[w]here applicable, the lead agency shall establish the schedule and make any necessary updates to the schedule in consultation with and seek the concurrence of joint lead, cooperating, and participating agencies, and in consultation with project sponsors or applicants."[222] Section 1501.10 further requires lead agencies to establish schedules of "milestones" for the EA and EIS process, such as publication of the notice of intent, issuance of a draft EIS, and public comment periods.[223] While these revisions are steps in the right direction, the Associations nevertheless believe more can be done to better effectuate the need for, and congressional intent in favor of, more efficient and predictable NEPA reviews. For instance, while milestones like publication of the notice of intent or completions of draft and final EISs are helpful in establishing a generalized schedule, further granularity as to the stages of the review process would both help ensure that agencies meet their presumptive deadlines and assist project sponsors internally manage project development timelines, and help the agency to spot delays and get back on track earlier in the process if early milestones are not met. To this end, CEQ's *A Citizen's Guide to NEPA*, particularly Figure 1, provides a useful framework for those stages where a clearly defined schedule could be beneficial.[224] Using *A Citizen's Guide to NEPA*, those stages could include (including those already proposed):

- For EAs, the decision to prepare an EA; issuance of the draft EA, where applicable, and associated period for public comment; issuance of the final EA; and issuance of the decision on whether to issue a FONSI or issue a notice of intent to prepare an EIS.

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[222] 88 Fed. Reg. at 49,972 (proposed § 1501.10(a)); *see id.* at 49,973 (proposed § 1501.10(c)) ("[T]he lead agency shall develop a schedule for completion of environmental impact statements and environmental assessments as well as any authorizations required to carry out the action. The lead agency shall set milestones for environmental reviews, permits, and authorizations required for implementation of the action, in consultation with any project sponsor or applicant and in consultation with and seek the concurrence of all joint lead, cooperating, and participating agencies, as soon as practicable.").

[223] *Id.* at 49,973 (proposed § 1501.10(e) & (f)).

[224] *See* CEQ, *A Citizen's Guide to NEPA: Having Your Voice Heard* 8 (Jan. 2021), https://tinyurl.com/439eczmf.

- For EISs, the publication of the notice of intent to prepare an EIS; period for scoping and associated period for public comment; issuance of the draft EIS and associated period for public comment; issuance of the final EIS; and the record of decision.

CEQ should also consider adding milestones related to the periods for cooperating and participating agency review. Agencies could then provide 60- to 90-day deadlines for each of those stages, as necessary to complete the various review stages within the applicable time limit. The Associations urge CEQ to expand the list of "milestones" to include the above-identified stages.

Additionally, the Associations urge CEQ to require that schedules be updated monthly for EAs and quarterly for EISs; these periodic status updates would provide agencies, project sponsors, and the public the most updated schedule for a proposed action. Such updates could be posted on the lead agency's website (or similar portal), and would not require any sort of public comment. We believe these modifications will promote predictability and agency accountability.

Specific Recommendations:

The Associations propose that the list of schedule "milestones" provided at Section 1501.10(e) and (f) be expanded in line with the lists provided above. The Associations also propose the following edits to Section 1501.10(h):

> (h) For environmental impact statements and environmental assessments, agencies shall make schedules for completing the NEPA process publicly available, such as on their website or another publicly accessible platform. If agencies make subsequent changes to the schedule, agencies shall publish revisions to the schedule and explain the basis for substantial changes. Following publication of the initial schedule for a proposed action, agencies shall make an updated schedule publicly available on their website at the beginning of each calendar month for environmental assessments and at the beginning of each quarter for environmental impact statements.

B. EIS and EA page limits

The Builder Act prescribed page limits for both EIS and EA documents (150 and 75 pages, respectively),[225] a measure plainly intended to rein in the lengths of NEPA documents and channel agency attention to the most important issues of a particular proposed action. The length of NEPA documents have unfortunately ballooned over the years. A 2020 CEQ report that examined over 650 final EISs issued between 2013 and 2018 found that the average and median page lengths were 661 and 447 pages, respectively; the upper quartile of EISs were about 750 pages or longer.[226] Worse, the appendices to final EISs, which are not subject to CEQ's recommendations on page limits, had average and median lengths of 1,042 and 423 pages, respectively.[227] The lengths of

[225] 42 U.S.C. § 4336a(e).
[226] *See* Length of EISs, *supra* n.15, at 1.
[227] *Id.* at 3.

NEPA documents are a reflection of agencies' efforts to comply with the ever-growing list of regulatory requirements, guidance documents, and Executive Orders, as well as to potentially stave off legal challenges from project opponents exploiting any potential weakness in an agency's environmental analysis, no matter how minor. But as CEQ has long recognized, bulky documents are often "not read and not used by decisionmakers," meaning that "the only way to give greater assurance that EISs will be used is to make them usable and that means making them shorter."[228]

The Associations support the Phase II Proposal's incorporation of the Builder Act's page limits in Section 1501.5(g) and 1502.7,[229] as well as CEQ's statement in the preamble that it "strongly encourages agencies to prepare concise" environmental documents.[230] The Associations also support CEQ's decision to exclude maps, diagrams, graphs, tables, and other graphical representations from the definition of "page" for purposes of the page limits.[231] That said, the Associations believe there are areas for further refinement for any final rulemaking.

First, the Phase II Proposal incorporates the Builder Act's provision that an EIS for a proposed action of "extraordinary complexity" is subject to a 300-page (not 150-page) limit.[232] Yet, CEQ neither defines "extraordinary complexity" nor provides guardrails in the preamble to guide agencies in determining when a lengthier EIS would be appropriate. For the default 150-page limit to be meaningful, and to prevent agencies from unnecessarily designating more and more projects as extraordinarily complex, the Associations recommend that any final rulemaking more clearly stake out standards or guardrails to trigger the "extraordinary complexity" threshold, or direct agencies to identify in their implementing regulations the specific categories of actions or appropriate factors that the agency will use when setting its own standards for "extraordinary complexity," pursuant to Section 1507.3, given the varied types of projects and proposed actions each agency considers. As examples, agencies could be limited to designating only a certain percentage of proposed actions as extraordinarily complex or link the trigger to a quantitative metric appropriate under the circumstances. CEQ or agencies could also provide examples of projects that should not ordinarily be deemed "extraordinarily complex."

Second, while incorporating the Builder Act's page limits, the Phase II Proposal excludes from those limits "any citations or appendices."[233] Although this exemption is provided for by the Builder Act,[234] the Associations are concerned that the exemption combined with CEQ's urging for agencies to "plac[e] technical analyses in appendices" will encourage agencies to simply reshuffle their NEPA documents to meet the page limits, rather than meaningfully reduce the length of such documents. Page limits represent more than an arbitrary target for agencies to meet; the point is that agencies should be more thoughtful and efficient in their NEPA reviews, as evinced through shorter, more concise documents. The Associations recommend that CEQ, in any

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[228] Implementation of Procedural Provisions, 43 Fed. Reg. at 55,983.
[229] 88 Fed. Reg. at 49,970, 49,976 (proposed §§ 1501.5(g), 1502.7).
[230] *Id.* at 49,946.
[231] *Id.* at 49,964, 49,988 (proposed § 1508.1(z)).
[232] *Id.* at 49,976 (proposed § 1502.7); *see* 42 U.S.C. § 4336a(e)(1)(B) ("An environmental impact statement for a proposed agency action of extraordinary complexity shall not exceed 300 pages, not including any citations or appendices.").
[233] 88 Fed. Reg. at 49,970 (proposed §§ 1501.5(g) and 1502.7).
[234] 42 U.S.C. § 4336a(e).

final rulemaking, either revise Sections 1501.5(g) and 1502.7 to provide (or, alternatively, include a clear recommendation to agencies in the preamble) that appendices should be as concise as possible under the particular circumstances of the proposed action so that the Builder Act's page limits are not circumvented.

Third, and a more generalized comment reflective of our overarching concerns with other components of the Phase II Proposal, the Associations are concerned that CEQ has not sufficiently considered how the statutorily required page limits will interact (potentially in unforeseen and adverse ways) with the substantive and more expansive requirements contained in the Proposal. The Phase II Proposal would require new or greater consideration of climate change-related and environmental justice-related effects, as well as potentially a wider range of alternatives and mitigation measures—the kinds of "new inquiries" that have typically "bog[ged] down agency action."[235] At the same time, though, CEQ is (at Congress's direction) limiting the length of NEPA documents and compressing their deadlines, thus increasing the risk that an agency will be incentivized or forced to give short shrift to some potential effects (or alternatives or mitigation measures) over others. Such an outcome not only undermines NEPA's dual purposes of informing the agencies and the public, but also elevates the risk of dilatory litigation. Put another way, CEQ is unreasonably asking agencies to do more analysis with fewer pages and less time at their disposal. The Associations thus urge CEQ to reconsider the merit of piling new and additional regulatory obligations on agencies, many of questionable value in the decision-making process, given these newly enacted statutory limits on pages and time.

C. Project sponsor preparation of environmental documents

The Builder Act directs agencies to "prescribe procedures to allow a project sponsor to prepare an environmental assessment or an environmental impact statement under the supervision of the agency."[236] This is a critical improvement to the NEPA review process because its leverages a project sponsor's resources and knowledge of the proposed action to create substantial efficiencies in the environmental review process by directly preparing environmental documents, rather than having them prepared by a federal agency or third-party contractor operating according to a federal agency's often overburdened and overextended timeline.

CEQ's implementation of this Builder Act provision, however, could go further. CEQ directs agencies to include in their NEPA regulations procedures for sponsor preparation of environmental documents.[237] But beyond that, the Council largely leaves implementation in the hands of agencies, concluding simply that "the [FRA] amendments to NEPA make clear that agencies must establish procedures for project sponsors to prepare environmental documents, not the CEQ regulations."[238] The Associations believe CEQ is well-positioned to provide agencies guidance as to how to best effect project sponsor involvement in the preparation of environmental documents.

For instance, CEQ should stress that, based on the Builder Act and congressional intent, agencies *must* allow project sponsors the option to prepare environmental documents, under the supervision

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[235] *Ctr. for Biological Diversity*, 941 F.3d at 1296.
[236] 42 U.S.C. § 4336a(f).
[237] 88 Fed. Reg. at 49,985 (proposed § 1507.3(c)(12)).
[238] *Id.* at 49,956.

of the lead agency in circumstances where there is a project sponsor. In practice, this could take the form of a right of first refusal, whereby a project sponsor has the initial option to decide whether it will prepare an environmental document under the supervision of the agency. Only when a project sponsor declines to do so would the agency prepare the document itself or use a third-party contractor. This approach recognizes the Builder Act's intent for greater project sponsor participation in the preparation of environmental documents. There are, of course, instances where there may not be a project sponsor or where it may be infeasible for the project sponsor to prepare the documents, such as multi-year offshore OCS oil and gas leasing. Regardless of the approach, the agency remains responsible for the accuracy and scope of the contents, through review and direction to the preparer. The Associations believe a modification like this would help fully realize the efficiencies under the Builder Act.

X. CEQ SHOULD REFRAIN FROM COMPLICATING OR LIMITING THE AVAILABILITY OF CATEGORICAL EXCLUSIONS.

Associations emphasize again at the outset that Congress has clearly indicated its bipartisan support for streamlining the NEPA process through the recent Builder Act amendments. As CEQ recognizes, categorical exclusions are a key regulatory mechanism for promoting efficiency and predictability in the NEPA process by allowing agencies to exclude categories of proposed actions that normally do not have any significant effect on the human environment.[239] In a world of limited resources, time, and administrative capacity, efficiency is paramount, perhaps more so in the infrastructure project development space. And time spent reviewing federal actions that will not have any significant environmental impacts is time that cannot be spent reviewing those that might. Congress recently reaffirmed the importance of categorical exclusions by codifying this practice.[240] As a result, effective implementation of the categorical exclusion process is fundamental to implementing the intention behind this Builder Act amendment, enabling timely construction of infrastructure and projects necessary to ensure our energy security and a well-planned and affordable energy transition.

With respect to categorical exclusions, the Associations generally support CEQ's efforts in the Phase II Proposal to amend Section 1501.4 to (1) allow agencies to jointly establish categorical exclusions;[241] (2) establish categorical exclusions through land use plans, decision documents, or equivalent programmatic decisions;[242] and (3) apply the categorical exclusions that other agencies use for their own activities.[243] The Associations believe these changes help align CEQ's

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[239] *Id.* at 49,937 ("CEQ views CEs to be an important mechanism to promote efficiency in the NEPA process where agencies have long exercised their expertise to identify and substantiate categories of actions that normally do not have a significant effect on the human environment.").
[240] *See* 42 U.S.C. §§ 4336(a)(2) & (b)(2), 4336c.
[241] 88 Fed. Reg. at 49,969 (proposed section 1501.4(a)) ("Agencies may establish categorical exclusions individually or jointly with other agencies.").
[242] *Id.* at 49,970 (proposed section 1501.4(c)) ("In addition to the process for establishing categorical exclusions under § 1507.3(c)(8) of this subchapter, agencies may establish categorical exclusions through a land use plan, a decision document supported by a programmatic environmental impact statement or programmatic environmental assessment, or other equivalent planning or programmatic decision . . . .").
[243] *Id.* (proposed section 1501.4(e)) ("An agency may apply a categorical exclusion listed in another agency's NEPA procedures to a proposed action or a category of proposed actions consistent with this paragraph.").

regulations with congressional intent for wider use of categorical exclusions within and across agencies.

Notwithstanding support for the above changes, the Associations are concerned that other changes will only serve to complicate or deter agencies from using categorical exclusions, across the board or for particular classes of projects, and are likely to subject the issuance of particular exclusions to dilatory litigation. In particular, the Associations object to the requirement that any mitigation included as part of a categorical exemption be legally enforceable and subject to monitoring, recommend the inclusion of a deadline by which an agency must decide on an application for a categorical exclusion, and recommend clarifying edits in line with the Builder Act to streamline the process for utilizing categorical exclusions. The Associations' concerns are described in detail below.

First, the Associations object to CEQ's proposal that the mitigation measures included as part of a categorical exclusion must be binding, enforceable, and subject to monitoring.[244] While the Associations agree that mitigation measures are a valuable tool to ensure that environmental effects are not significant, we nevertheless urge CEQ to recognize that, for many of the same reasons described above, *see supra* Section V, legally binding and enforceable mitigation is contrary to NEPA, an unsupported departure from longstanding CEQ practice, and not practical for the thousands of individual actions authorized pursuant to categorical exclusions on an annual basis. NEPA's mandate is procedural, and thus the statute is an inappropriate vehicle to require any mitigation, much less legally binding mitigation.[245]

CEQ's proposed mitigation requirements are not legally supportable, and CEQ should clarify that the requirements for a categorical exclusion may be met simply through confirmation that its use for a particular action does not individually or cumulatively result in significant effects. Agencies may still choose to encourage mitigation measures, or even require them in instances where the agency has statutory authority and specifically states its legal basis for doing so. But where an agency can reasonably foresee implementation of mitigation measures that would ensure significant effects do not occur, the agency should be able to rely on the existence of those measures for purposes of a categorical exclusion, even if the mitigation measures are not necessarily binding and enforceable. For instance, an agency should not be precluded from establishing or applying a categorical exclusion in instances where mitigation measures are reasonably foreseeable but outside of the agency's or applicant's control, such as stormwater controls or flood protection undertaken by non-federal government entities or other developers in the area being developed.

Second, the Associations recommend that CEQ provide a deadline of 60 days by which an agency must reach a decision on an application to use a categorical exclusion. Categorical exclusions are intended to speed up the NEPA review process by providing an expedited review process for certain proposed actions and projects, especially smaller projects or those that are environmentally

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[244] *Id.* at 49,970 (proposed § 1501.4(d)(3)) ("Categorical exclusions . . . may [i]nclude mitigation measures that, in the absence of extraordinary circumstances, will ensure that any environmental effects are not significant, *so long as a process is established for monitoring and enforcing any required mitigation measures, including through the suspension or revocation of the relevant agency action[.]*" (emphasis added)).

[245] *See, e.g.*, *Methow Valley*, 490 U.S. at 350–52; *Citizens Against Burlington*, 938 F.2d at 206.

beneficial. To that end, the Associations believe a clear, enforceable deadline by which an agency must act on an application for a categorical exclusion will minimize delays while providing greater predictability and certainty.

Third, with respect to agencies' application of other agencies' categorical exclusions, CEQ proposes to add redundant or unnecessary requirements beyond what the Builder Act requires, which will likely only make it more difficult for agencies to avail themselves of those exclusions. For instance, CEQ proposes to require that the "borrowing agency" both "[c]onsult with the agency that established the categorical exclusion to ensure that the proposed application of the categorical exclusion is appropriate" (paragraph 2) and "evaluate the proposed action or category of proposed actions for extraordinary circumstances" (paragraph 3).[246] This requirement in paragraph 3 is not contained in the Builder Act.[247] And CEQ does not explain why the required agency-to-agency consultation to ensure that application of the exclusion is "appropriate" would not also be sufficient to ensure that the proposed action "fall[s] within the bounds of the [categorical exclusion]."[248] There appears to be little daylight between "appropriate" and "within the bounds" to warrant two separate requirements to use the categorical exclusion. The Associations thus recommend eliminating paragraph 3 of Section 1501.4(e).

For another, CEQ would require the borrowing agency "[p]rovide public notice of the categorical exclusion that the agency plans to use for the proposed action or category of proposed actions."[249] While the Builder Act requires agencies to "identify to the public the categorical exclusion that the agency plans to use for its proposed actions,"[250] this does not contemplate the type of public notice and comment that CEQ appears to allude to by using the term "public notice." The Associations urge CEQ to clarify in any rulemaking finalizing proposed Section 1501.4 that "public notice" as used in subsection (e)(4) does not require any sort of public comment period prior to application of the categorical exclusion. Instead, agencies could simply post the notice on a website. Elsewhere, CEQ should revise its proposed regulations to more faithfully align with the Builder Act, such as by emphasizing that agencies may "adopt" another agency's categorical exclusions, not simply "apply" them.[251]

The Associations believe the above revisions will ensure that categorical exclusions are more (not less) readily available for a wider array of projects, effectuating congressional intent and ensuring projects are not subject to needless delay.

Specific Recommendations:

- Eliminate any requirement that mitigation measures included in a categorical exclusion be legally enforceable or subject to monitoring.

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[246] 88 Fed. Reg. at 49,970 (proposed § 1501.4(e)(2), (3)).
[247] *See* 42 U.S.C. § 4336c.
[248] 88 Fed. Reg. at 49,937.
[249] *Id.* at 49,970 (proposed § 1501.4(e)(4)).
[250] 42 U.S.C. § 4336c(3).
[251] *Id.* § 4336c.

- Provide a 60-day deadline within which an agency must reach a decision as to an application to use a categorical exclusion.

- Eliminate or clarify the inapplicability of requirements beyond what is required by the Builder Act—such as additional agency-to-agency consultation, as well as formal public notice and comment.

XI. THE PROPOSED "INNOVATIVE APPROACHES" FRAMEWORK IS LIKELY TO RESULT IN MORE, NOT LESS, UNCERTAINTY AND LITIGATION.

In Section 1506.12 of the Phase II Proposal, CEQ introduces the concept of "innovative approaches to NEPA review," whereby an agency may apply to use an "innovative approach" to NEPA compliance that "follow[s] procedures modified from the requirements" of CEQ's NEPA regulations.[252] CEQ contemplates that innovative approaches could be available to address "extreme environmental challenges," examples of which include

> sea level rise, increased wildfire risk, or bolstering the resilience of infrastructure to increased disaster risk due to climate change; water scarcity; degraded water or air quality; disproportionate and adverse effects on communities with environmental justice concerns; imminent or reasonably foreseeable loss of historic, cultural, or Tribal resources; species loss; and impaired ecosystem health.[253]

CEQ explains that the concept of "extreme environmental challenges" is distinct from the concept of "emergencies" as proposed Section 1506.11 and may have "longer time horizon[s]" than those characteristic of emergencies.[254]

While the Associations generally support CEQ's efforts in the Phase II Proposal to promote considerations of efficiency and expediency for *all* projects subject to NEPA, we nevertheless have concerns regarding the availability of the "innovative approaches" mechanism for any projects, let alone those preferred by a particular Administration at a given point in time. If "innovative approaches" that except projects from the CEQ regulations are needed to make it possible to efficiently complete NEPA reviews for those projects, then it suggests that the standard NEPA review process is itself in need of further reform. We also have concerns about the legal foundation of the program, which may create additional delay for and invite litigation against the very projects that the program is designed to advance. For example, the extent to which a project actually addresses one of the "extreme environmental challenges" identified by CEQ or the legality of the "innovative approach" selected for such a project would both be fodder for those seeking to challenge the project's approval in court. And as past experience has shown, private litigants have and will challenge both traditional and energy transition projects alike.[255] Agencies will similarly

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[252] 88 Fed. Reg. at 49,984 (proposed § 1506.12).
[253] *Id.* at 49,984 (proposed § 1506.12(a)); *id.* at 49,957 ("As another example, it might be appropriate for an agency to determine that a forest ecosystem presenting a high risk of severe wildfire that could threaten water supplies presents extreme environmental challenges, even though restoration activities would take many years to complete.").
[254] *Id.* at 49,957.
[255] *See supra* n.6 and accompanying text.

struggle to determine whether a specific project should qualify and how to deviate from their ordinary NEPA procedures on a project-by-project basis. Put simply, the proposed approach is likely to create uncertainty, delay, and legal vulnerability for the very projects that CEQ is attempting to promote. A far better approach would be to maintain an outcome-neutral set of NEPA regulations that streamlines the process for *all* federal actions subject to NEPA's requirements. The Associations' concerns and recommendations are explained in more detail below.

First, CEQ does not address the legal basis for the innovative-approaches framework. NEPA applies to all "major Federal actions"—subject to narrow and explicit exclusions for categorically excluded projects, nondiscretionary agency action, and the like.[256] Yet, CEQ now appears to propose a mechanism to exempt certain projects from particular NEPA requirements, so long as such exemption or project—it is not entirely clear from the preamble or proposed regulatory text—would address an "extreme environmental challenge." NEPA does not expressly provide CEQ such exemption authority, and the Council, for its part, does not point to any such authority. Worse, while CEQ proposes to publish its decision regarding an agency's proposed innovative approach, the Council does not propose that such a determination, prior to finalization, would be subject to any sort of public notice and comment.[257]

To be sure, an agency's authority to regulate via rules of general application generally "entails a concomitant authority to provide exemption procedures in order to allow for special circumstances."[258] Yet this exemption power is understood "to afford case-by-case treatment taking into account circumstances peculiar to individual parties in the application of a general rule to particular cases."[259] More categorical exemptions "from the clear commands of a regulatory statute," by contrast, are generally "not favored."[260] Yet that appears to be what CEQ is contemplating here—a seemingly broad, categorical exemption for classes of projects or regulatory procedures tied in some way to the ill-defined yet expansively constructed concept of "extreme environmental challenges." Relatedly, the broader the scope of an innovative approach (e.g., the more regulatory requirements exempted, the more projects encompassed by the exemption), the more likely it is to be deemed "an agency statement of general or particular applicability and future effect" subject to APA rulemaking requirements,[261] which the proposed innovative-approaches framework would not presently satisfy. The well-worn procedures provided by the APA (e.g., public notice, opportunity for comment) are precisely intended to avoid the types of "inherently arbitrary" and "ad hoc determinations" that the innovative-approaches framework, as presently proposed, is likely to invite.[262] The CEQ's preamble explanation does not grapple with these thorny questions of legal authority or compliance with the APA, making any

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[256] 42 U.S.C. § 4332(2)(C); *see id.* § 4336(a) (threshold exclusions); *see also* 40 C.F.R. § 1500.1(a), 1501.1.
[257] 88 Fed. Reg. at 49,984 (proposed § 1506.12(d), (e)).
[258] *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972); *see Ala. Power Co. v. Costle*, 636 F.2d 323, 357 (D.C. Cir. 1979) (recognizing power of agency to grant dispensation from general rule via "case-by-case treatment").
[259] *Alabama Power Co.*, 636 F.2d at 357.
[260] *Id.*; *see also Pub. Citizen v. FTC*, 869 F.2d 1541, 1557 (D.C. Cir. 1989) ("While agencies may safely be assumed to have discretion to create exceptions at the margins of a regulatory field, they are not thereby empowered to weigh the costs and benefits of regulation at every turn; agencies surely do not have inherent authority to second-guess Congress' calculations.").
[261] *See* 5 U.S.C. §§ 551(4) & (5), 553.
[262] *See Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

finalization of the innovative-approaches framework vulnerable to legal challenge. And, in turn, any project availing itself of an innovative approach would be at risk for needless delay.

As noted above, litigants routinely challenge even seemingly environmentally beneficial projects under NEPA. As a result, it is likely that CEQ's proposed "innovative approaches" provisions will be challenged, including in the context of their application to particular projects. If CEQ retains these provisions in any final rule, it should therefore provide a reasoned legal justification for the provisions. In addition, CEQ should at the very least amend proposed Section 1506.12 such that an agency's application to use an innovative approach is subject to public notice and comment in accordance with the APA.

Second, it is not clear what types of "modification[s]" from the NEPA process CEQ thinks will maintain "compliance with NEPA,"[263] nor why those "modifications," if they maintained compliance, would not be broadly applicable. The examples that the Council provides are, at best, abstract and conclusory:

> Examples of innovative approaches that could be the basis for a request include new ways to use information technology; cooperative agreements or work with local communities; methods more fully incorporating, while protecting, Indigenous Knowledge; new ways to work with project proponents and communities to advance proposals; and innovative tools for engaging the public and providing public comment opportunities, which could enhance participation from communities with environmental justice concerns.[264]

It is not readily apparent how "new ways to use information technology" or "new ways to work with project proponents and communities to advance proposals" could excuse a particular NEPA regulatory requirement while maintaining compliance with NEPA more generally. The Associations make this point not to criticize but rather to emphasize that the innovative-approaches framework, as currently crafted, provides insufficient guidance or criteria as to how agencies can actually implement the framework without opening themselves up to additional litigation. It is almost inevitable that a party will challenge any attempt by an agency to excuse a NEPA regulatory requirement via some novel "innovative approach." Neither proposed Section 1506.12 nor the Phase II Proposal preamble, in the Associations' view, provide sufficient guidance to help agencies preempt or establish an administrative record sufficient to defend such a judicial challenge.

Third, given the nature of the types of "extreme environmental challenges" that CEQ contemplates could trigger the innovative-approaches framework (e.g., sea level rise, climate-change resiliency, effects on environmental-justice communities), it appears that the framework is designed to advance certain classes of projects favored by the current Administration. Again, the Associations stress our view that NEPA does not differentiate between federal actions or projects that are favored and disfavored under then-current policy preferences and that CEQ should ensure a streamlined, efficient environmental review process inclusive of all types of projects. Rather than

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[263] 88 Fed. Reg. at 49,984 (proposed § 1506.12(a), (c)(1)).
[264] *Id.* at 49,958.

attempting to provide an escape valve for particular categories of projects, the Associations urge CEQ to instead focus on identifying those parts of the NEPA process that are in most need of "innovative approaches" and further reform its generally applicable regulations and guidelines to consistently implement such approaches across all projects.

To the extent CEQ moves forward with the innovative approaches mechanism, though, we urge CEQ to stress in the preamble of the final rulemaking that the mechanism could, at an agency's discretion, be available for a wider array of projects aimed at addressing what CEQ describes as "extreme environmental challenges." Such projects could include critical minerals leasing and development, emissions reduction technologies (e.g., carbon capture and sequestration, direct air capture), projects that ensure reliable and affordable energy access (including to environmental justice communities), and other types of projects designed to promote our energy transition and energy security. Projects like those described squarely address many of the "challenges" identified by CEQ, and the Council should make every effort to communicate as such to agencies. Otherwise, agencies will be left to attempt to determine on a piecemeal, project-by-project basis how to address and implement broader national environmental policies and priorities.

XII. CEQ SHOULD RETAIN OR REINTRODUCE KEY IMPROVEMENTS INTRODUCED BY THE 2020 REGULATIONS.

Like with the Phase I Proposal, CEQ's Phase II Proposal eliminates many of the much-needed regulatory reforms introduced by the 2020 Regulations. Many of these process improvements have assumed added importance in light of the deadlines and page limits introduced by the Builder Act. The Associations believe the components discussed below advance the key principles of transparency, predictability, efficiency, and durability in the NEPA review process, and we strongly urge CEQ to either reintroduce or retain those components.

A. CEQ should restore codification of principles regarding causation articulated by the Supreme Court, especially in light of its proposed expansion of the effects analysis.

The Supreme Court and Congress have both made clear that the consideration of "effects" under NEPA should be limited to only those effects which have a reasonably close causal relationship to the proposed action. In line with our comments above regarding climate change-related effects, *see supra* Section VI.A, the Associations strongly urge CEQ to restore language from the 2020 Regulations that codified key NEPA precedent—most notably the Supreme Court's decisions in *Department of Transportation v. Public Citizen*[265] and *Metropolitan Edison Company v. People Against Nuclear Energy*[266]—clarifying that under NEPA, an agency's analysis of effects are properly limited to those effects (no matter if direct, indirect, or cumulative) that (1) are the reasonably foreseeable result of the agency's action *and* (2) "have a reasonably close causal relationship to the proposed action or alternatives."[267] When agencies consider potential effects that do not have the requisite causation connection to the proposed action (or its alternatives), agencies not only delay consideration of more relevant effects but also confuse the public about

[265] 541 U.S. 752 (2004).
[266] 460 U.S. 766 (1983).
[267] 2020 Regulations, 85 Fed. Reg. at 43,343, 43,375 (§ 1508.1(g)).

the most likely effects of the proposed action and/or its alternatives. The Associations thus urge CEQ to reconsider its elimination of the 2020 Regulations' language on causation and reincorporate that language. These revisions are particularly appropriate in light of Congress's recent decision to enshrine this judicially articulated limitation in the Builder Act.

For an agency's impact analysis to be meaningful, the agency must focus squarely on information that informs the agency's discretion pursuant to the agency's organic statutes, i.e., those statutes authorizing the agency to make those decisions that trigger NEPA review. Those statutes typically prescribe the scope of the agency's authority to act, the criteria by which to act, and the ability of the agency to exercise discretion. NEPA does not modify these or any other aspects of those statutes. Instead, NEPA simply imposes a discrete procedural obligation on federal agencies to consider the environmental effects "*caused* by the [agency] action."[268]

Because NEPA does not provide direction as to when an effect is "caused" by an action, the Supreme Court and lower courts have clarified that an agency's effects analysis is constrained by principles of reasonable foreseeability and causation. *First*, an effect must be the "reasonably foreseeable" result of the proposed action, which has been construed as meaning "that the [effect] is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[269] Where the significance of an effect that is attributable to an agency action is not reasonably foreseeable—qualitatively or quantitatively—it is not required to be considered under NEPA because it does not contribute to the agency's decision-making process.[270]

Second, but just as important, the Supreme Court has repeatedly explained that NEPA requires a "reasonably close causal relationship between a change in the physical environment and the effect at issue."[271] This longstanding requirement is rooted in *Metropolitan Edison*, decided more than thirty years ago, and reaffirmed and further clarified (unanimously) two decades later in the *Public Citizen* decision.[272] Specifically, *Public Citizen* clarified that NEPA's approach to causation is analogous to the "doctrine of proximate cause from tort law," meaning that "'but for' causation is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations."[273] Where a federal agency "has no ability categorically to prevent" an environmental effect, that agency is not "the legally relevant cause" of the effect.[274] Reasonable foreseeability

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[268] *See* 40 C.F.R. § 1508.1(g) (emphasis added); 40 C.F.R. § 1508.8 (2019).
[269] *Sierra Club v. Marsh*, 976 F.2d 763 (1st Cir. 1992); *see Freeport*, 827 F.3d at 47; *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005).
[270] *See Friends of Cap. Crescent Trail*, 877 F.3d at 1064 ("Baseless speculation is unhelpful and agencies need not foresee the unforeseeable.") (citations and internal quotation marks omitted); *cf. Pub. Citizen*, 541 U.S. at 767 ("[I]nherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decision-making process.").
[271] *Metro. Edison*, 460 U.S. at 774. Twenty years after *Metropolitan Edison*, courts were still challenged by the question of causation, likely prompting the Supreme Court to reaffirm the need for a "reasonable close causal relationship" between the proposed action and a potential effect. *See Pub. Citizen*, 541 U.S. at 767.
[272] CEQ has attempted to limit *Public Citizen's* holding and discussion of causation by cabining the decision to its particular facts. *See, e.g.*, Phase I Regulations, 87 Fed. Reg. at 23,465 (". . . *Public Citizen*, which dealt with a unique context in which an agency had no authority to direct or alter an outcome . . . ."). The Associations disagree with this characterization of *Public Citizen*, as the Court was speaking generally about the requirements of NEPA Section 102.
[273] *Pub. Citizen*, 541 U.S. at 767.
[274] *Id.* at 769.

and causation, as interpreted by the courts, thus work together to properly define the universe of impacts relevant to a NEPA review, ensuring that an agency's impacts analysis is focused squarely on those effects meaningful to a fully informed and well-considered decision.

The 2020 Regulations' explicit incorporation of reasonable foreseeability and the need for "a reasonably close causal relationship to the proposed action or alternatives" was thus an appropriate codification of the Supreme Court's NEPA precedent.[275] In fact, CEQ explicitly referenced *Public Citizen* and *Metropolitan Edison* in explaining that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA" and that the applicable standard is more "analogous to proximate cause in tort law."[276] By basing the revisions on the Supreme Court's bedrock interpretations of NEPA itself, the 2020 Regulation provided agencies with the clear instruction necessary to properly, legally, and consistently implement NEPA.

The Builder Act makes clear that Congress also supports these long-recognized judicial interpretations of NEPA's limits by directly incorporating the concept of reasonable foreseeability into NEPA's bedrock language.[277] By explicitly incorporating reasonable foreseeability (aligned with the existing judicial backdrop interpreting the concept), combined with the measures introduced by the Builder Act to streamline the NEPA review process, Congress clearly effectuated an intent to tighten the connection between a proposed agency action and a potential effect. This also aligns with the intent of Congress and this Administration to advance, rather than stymie, an array of critical infrastructure and energy transition projects ordinarily subject to NEPA review.[278]

Through the Phase I rulemaking and now the Phase II Proposal, however, CEQ has moved and continues to move in the opposite direction of Supreme Court precedent like *Public Citizen* and *Metropolitan Edison*, the 2020 Regulations, and even the most recent voice of Congress in the Builder Act—in the process, decreasing the efficiency and predictability of the NEPA review process. Through the Phase I rulemaking, CEQ eliminated the 2020 Regulations' codification of the causation requirement, finding that it "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

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[275] *See* 2020 Regulations, 85 Fed. Reg. at 43,343; *see Encino Motorcars*, 579 U.S. at 220–21 (recognizing agency authority to change a longstanding interpretation of an ambiguous statute). The 2020 Regulations also represented an opportunity to clarify a causation standard that had not be interpreted consistently with Supreme Court precedent. *Compare Pub. Citizen*, 541 U.S. at 767–68 (explaining that NEPA requires a "reasonably close causal relationship between the environmental effect and the alleged cause." (citations omitted)), *with Sabal Trail*, 867 F.3d at 1373–74 (FERC's certification of three interstate natural gas pipeline projects was "legally relevant cause" of downstream power plant carbon emissions and that the emissions were required to be considered in as part of the NEPA analysis, even though another regulatory body authorized the siting of the power plant and thereby broke the causal chain.); *see Ctr. for Biological Diversity*, 941 F.3d at 1299–1300 (stating that the holding in "*Sabal Trail* is at odds with earlier D.C. Circuit cases correctly holding the occurrence of a downstream environmental effect, contingent upon the issuance of a license from another agency with the sole authority to authorize the source of those downstream effects, cannot be attributed to the [agency]; its actions cannot be considered a legally relevant cause of the effect for NEPA purposes.").

[276] 2020 Regulations, 85 Fed. Reg. at 43,343 (citing *Public Citizen*, 541 U.S. at 767–68, and *Metro. Edison*, 460 U.S. at 774).

[277] *See* 42 U.S.C. § 4332(2)(C)(i), (ii) (requiring consideration of "the reasonably foreseeable environmental effects" of the proposed action).

[278] *See supra* Section III.

read to limit agency discretion," meaning *Public Citizen*.[279] CEQ then went on to conclude that apparently agencies simply need to look to "reasonable foreseeability and the rule of reason" when conducting an effects analysis.[280] But rather than constrain agency discretion, the 2020 Regulations properly focused an agency's review of alternatives and environmental effects on those effects that were most relevant and meaningful to the application under review. And now with the Phase II Proposal, CEQ appears to further confound issues by not incorporating the recent clarifying voice of Congress and instead emphasizing additional potentially attenuated effects (e.g., climate change-related effects, environmental justice-related effects) without any real regard for whether the type of reasonably close causal relationship between those effects and the proposed action, as required by precedent like *Metropolitan Edison* and *Public Citizen* or the Builder Act, exists. Without clearly defined limits governing an agency's effects analysis, agencies will likely be required to either conduct analyses of increasingly attenuated and irrelevant effects or defend against baseless litigation over hypothetical, attenuated, or de minimis environmental effects.

CEQ has the opportunity with the Phase II rulemaking to reincorporate the key NEPA principle that to warrant consideration under NEPA, an effect must have "a reasonably close causal connection" akin to proximate causation. In doing so, CEQ will improve the efficient evaluation of reasonably foreseeable environmental effects *caused by* proposed actions and improve the public's understanding of those effects at the same time. To the extent that CEQ is concerned that this rulemaking is an improper vehicle to reintroduce language from the 2020 Regulations that agencies should consider effects that bear a "reasonably close causal relationship to the proposed action," CEQ could nevertheless use the preamble of the final rulemaking to emphasize the importance of the causation principle.

B. CEQ should restore the 2020 Regulations' articulation of purpose and need.

The 2020 Regulations updated Section 1502.13 (Purpose and Need) to incorporate principles espoused in case law 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."[281] The 2020 Regulations added similar language to the definition of "reasonable alternatives" at Section 1508.1, emphasizing that a reasonable alternative was one that, "where applicable, meet[s] the goals of the applicant,"[282] a longstanding tenet of NEPA. As part of the Phase I Proposal, CEQ proposed to eliminate (and ultimately did eliminate) those references to agency authority and an applicant's goals.[283] CEQ's rationale was that the elimination "address[ed] the ambiguity created by the 2020 rule language" and would prevent agencies from "misconstruing th[e] language to require agencies to prioritize an applicant's goals over other potentially relevant factors, including effectively carrying out the agency's policies and programs or the public interest."[284]

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[279] Phase I Regulations, 87 Fed. Reg. at 23,465.
[280] *Id.*
[281] 2020 Regulations, 85 Fed. Reg. at 43,365 (§ 1502.13).
[282] *Id.* at 43,376 (§ 1508.1(z)).
[283] *See* 40 C.F.R. §§ 1502.13, 1508.1(z).
[284] Phase I Regulations, 87 Fed. Reg. at 23,458.

The Associations voiced concerns and objections to the proposed elimination,[285] and reiterate and reincorporate those concerns here. Now given CEQ's proposed revisions to its regulations governing alternatives analyses,[286] the Associations strongly urge CEQ to reconsider its prior decision in the Phase I rulemaking and restore the 2020 Regulations' articulation of a "purpose and need" reflective of an applicant's goals and an agency's authority.

Notwithstanding that NEPA requires consideration of only *reasonable* alternatives,[287] in response to litigation pressure, many agencies have undertaken analyses of alternatives that are so unreasonable or infeasible that they are inconsistent with Congress's intent that NEPA's procedural and analytical requirements be implemented in a way that facilitates better informed and well-considered decision-making.[288] Some agencies have needlessly undertaken analyses of alternatives that are wholly untethered from the objectives of the applicants seeking agency authorization or entirely outside the jurisdiction or control of the agency. Because these types of alternatives cannot or will not be implemented, agency consideration of these alternatives needlessly squanders valuable agency and project proponent resources, prolongs reviews, and most importantly, does not result in improved agency decision-making. Further, allowing such an onerous approach to NEPA review would not further the administration's goals of promoting needed investment in energy and other infrastructure-intensive industries.

As properly understood, when an agency responds to an applicant's request for authorization, the agency's action is necessarily shaped by both its statutory authority (i.e., what types of actions it can legally pursue or approve) and the goals of the project for which the applicant requests the federal action. These considerations inform both the analysis of the proposed action itself, namely in delineating its purpose and need, as well as the reasonable range of alternatives to that action that merit analysis.[289] Importantly, an agency's delineation of purpose and need must be reasonable and aligned with the purpose and need of the proposed action, not simply an agency's preferred policies; "the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them."[290] This is so because NEPA provides no authority for agencies to introduce new or additional substantive requirements, or any general public interest standard, or for an agency to supplement that authority granted by their governing statutes.[291]

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[285] *See* API Phase I Comments, *supra* n.9, at 12–17; PAO Phase I Comments, *supra* n.9, at 1.
[286] *See supra* Section VIII.
[287] *See* 40 C.F.R. §§ 1502.1, 1502.14; *Citizens Against Burlington*, 938 F.2d at 196; *Beyond Nuclear v. U.S. Nuclear Regul. Comm'n*, 704 F.3d 12, 19 (1st Cir. 2013).
[288] *See Pub. Citizen*, 541 U.S. at 768–69.
[289] *See, e.g.*, *Citizens Against Burlington*, 938 F.2d at 196 (identifying "the needs and goals of the parties involved in the application" and the "agency's statutory authorization to act" as "factors relevant to the definition of purpose"); *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1230 (9th Cir. 2014) (stating that the "statutory context" and the manner in which an agency defines a project's goals are relevant to the reasonableness of a statement of purpose).
[290] *Citizens Against Burlington*, 938 F.2d at 196; *see id.* at 199 ("An agency cannot redefine the goals of the proposal that arouses the call for action; 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." (emphasis in original)).
[291] *See supra* Section IV; *see also Methow Valley*, 490 U.S. at 333 (finding it "inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed mitigation plan"); *Sierra Club v. Sigler*, 695 F.2d 957, 967 (5th Cir. 1983) ("[E]ach agency must mesh the requirements of NEPA with its own governing statute as far as possible.")

But contrary to CEQ's characterization in the final Phase I rulemaking, when an agency responds to an applicant's proposal, it is not blindly following the desires of the applicant, to the detriment of all other considerations relevant under NEPA or the agency's governing statute. The agency is instead relating the aspects of an applicant's project to the array of factors the agency must consider as part of its governing statute or NEPA. It is the interrelation of the applicant's proposal and goals with the agency's statutory authority that defines purpose and need.

Accordingly, courts have long deemed an applicant's goals as materially informative, but not necessarily all-controlling, to the agency's decision pursuant to its relevant statutory authority.[292] The 2020 Regulations' revisions to the purpose and need provision incorporated this caselaw and this principle.[293] The reality that such a standard is sensitive to the circumstances of a given project or the product of ever-developing agency and judicial interpretation does not by itself create the type of "ambiguity" to have warranted outright elimination of the 2020 language. Nor does the standard, as CEQ suggested, create any misimpression that an agency would need to "blindly adopt[] the applicant's goals."[294]

Likewise, it is only appropriate that an analysis of a reasonable range of alternatives to encompass those alternatives that achieve the purpose and need, as informed by an applicant's goals, for which agency action is sought in the first place. "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."[295] Put more simply, "Congress did not expect the agencies to determine for the applicant what the goals of the applicant's proposal should be."[296] Otherwise, agencies may feel compelled to analyze alternatives increasingly untethered from the project initially put before the agency, or from the agency's statutory objectives.

This longstanding principle is supported by the new language introduced in the Builder Act. With regard to the reasonable range of alternatives to the proposed agency action, the Builder Act

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[292] *See, e.g.*, *Citizens Against Burlington*, 938 F.2d at 199; *HonoluluTraffic.com*, 742 F.3d at 1230; *Beyond Nuclear*, 704 F.3d at 19; *Del. Riverkeeper Network v. U.S. Army Corps of Eng'rs*, 869 F.3d 148, 157 (3d Cir. 2017) (stating that an alternatives analysis involves looking to "the range of projects that could achieve the same goal as the proposed project"); *Coal. for Advancement of Regional Transp. v. Fed. Highway Admin.*, 576 Fed. App'x. 477, 487 (6th Cir. 2014) ("Agencies should consider . . . 'the needs and goals of the parties involved' and the 'views of Congress' as far as the agency can determine them and define a purpose and need 'somewhere within the range of reasonable choices.'" (quoting *Citizens Against Burlington*, 938 F.2d at 196)); *Webster*, 685 F.3d at 422–24 (providing that "[i]n deciding on the purposes and needs for a project, it is entirely appropriate for an agency to consider the applicant's needs and goals" and considering whether agency's purposes and needs were consistent with statutory authorization); *Nat. Res. Def. Council, Inc. v. FAA*, 564 F.3d 549, 568 (2d Cir. 2009) (finding that agency appropriately considered applicant goals and statutory mandate); *Env't. L. and Pol'y Ctr. v. U.S. Nuclear Regul. Comm'n*, 470 F.3d 676, 682–83 (7th Cir. 2006) (finding that while "blindly adopting the applicant's goals is 'a losing proposition' because it does not allow for the full consideration of alternatives required by NEPA," an agency need not "disregard a private applicant's purpose for a project if that purpose is sufficiently broad to allow consideration of reasonable alternatives" (quoting *Simmons v. U.S. Army Corps. of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997))).

[293] 2020 Regulations, 85 Fed. Reg. at 43,330 (citing *Citizens Against Burlington*, 938 F.2d at 196).

[294] *Env't L. and Pol'y Ctr.*, 470 F.3d at 683.

[295] *Citizens Against Burlington*, 938 F.2d at 199 (emphasis in original); *see also Del. Riverkeeper Network*, 869 F.3d at 157; *Env't L. and Pol'y Ctr.*, 470 F.3d at 683.

[296] *Citizens Against Burlington*, 938 F.2d at 199.

instructs agencies to include alternatives "that are technically and economically feasible and meet the purpose and need of the proposal."[297] This congressional emphasis on technically and economically feasible alternatives indicates a desire to focus on the purpose of the project applicant, and those alternatives which can actually, as a practical matter, meet the applicant's purpose and need. CEQ's role is to faithfully implement the language of the statute, not pursue other goals.

As an illustration, if a private applicant is seeking a federal right-of-way to transport material across federal land from Point A to Point B—and the agency has the requisite authority to grant that desired right-of-way—it would be reasonable for the agency to consider and analyze alternative routes from Point A to Point B. Such alternatives would likely be within the agency's authority to grant the right-of-way and would satisfy the stated purpose for the application, i.e., to transport material between Points A and B. The agency likely could not, however, consider the reasonably foreseeable environmental effects of regulatory actions that might, as examples, eliminate the demand for the transported material at Point B, or require the recipients at Point B to use a different energy commodity that the agency deems to be an adequate substitute (e.g., solar energy in lieu of natural gas or oil). The agency lacks the authority to take these actions, and the actions would not respond to the need driving the application.

The Associations therefore strongly urge CEQ to reincorporate the 2020 Regulations' articulation of purpose and need, especially as it relates to alternatives analyses—whether as part of this rulemaking or part of a future rulemaking.

C. CEQ should retain existing regulatory language recognizing that environmental reviews pursuant to other statutes may fulfill NEPA's purpose and function.

In two places, CEQ proposes to eliminate language introduced by the 2020 Regulations that recognizes that other statutes besides NEPA compel environmental reviews of proposed actions (e.g., project approvals, permit applications, funding requests) and reaches the common-sense conclusion that agencies need not conduct duplicative reviews for the same action. In particular, CEQ proposes to cut from Section 1500.1(a) language providing 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,"[298] as well as language from Sections 1501.1(a)(6) and 1507.3(d)(6) providing that, depending on the circumstances, "another statute's requirements [may] serve the function of agency compliance with [NEPA]."[299] For the latter proposed elimination, CEQ asserts that the language could be "construed to expand functional equivalence beyond the narrow contexts in which it has been recognized" and that "the more appropriate and prudent approach is for agencies to establish mechanisms in their agency NEPA procedures to align processes and requirements from other environmental laws with the NEPA process."[300] The Associations believe CEQ's proposed elimination of the functional-

[297] *See* Fiscal Responsibility Act, 137 Stat. at 38 (codified at 42 U.S.C. § 4332(2)(C)(iii)).
[298] 40 C.F.R. § 1500.1(a); *see* 88 Fed. Reg. at 49,966; Redline at 2.
[299] 40 C.F.R. §§ 1501.1(a)(6), 1507.3(d)(6); *see* Redline at 8, 66.
[300] 88 Fed. Reg. at 49,934

equivalence language from its regulations is wholly unnecessary and that the language should be retained.

In the period between the passage of NEPA and CEQ's promulgation of its 1978 implementing regulations, courts recognized that certain statutes already required environmental reviews that conformed with NEPA's purpose and function,[301] and continued to do so after promulgation of the 1978 regulations.[302] Those courts recognized the common-sense conclusion that what matters is not whether an agency uses particular terms or jumps through one set of procedural hoops over another, but rather whether, when an agency conducts its non-NEPA environmental review, "all of the five core NEPA issues [are] carefully considered."[303] The conclusion also stems from the recognition that NEPA, a "general statute forcing agencies to consider the environmental consequences of their actions and to allow the public a meaningful opportunity to learn about and to comment on the proposed actions," is often superseded by "more specific statute[s] directly governing" agencies' permitting or approval processes.[304] CEQ cites many of these cases in recognizing the long lineage of the functional-equivalence exemption, as well as statutory pincites specifically exempting certain EPA actions.[305]

CEQ's proposed removal of the functional-equivalence language and emphasis on the precedence of NEPA's procedural requirements over all other statutes "would be a legalism carried to the extreme."[306] Worse, CEQ apparently urges agencies to "align processes and requirements from other environmental laws with the NEPA process." In other words, CEQ appears to flip the functional-equivalence process on its head—requiring the specific statute to align with the general statute. By encouraging agencies to engage in duplicative environmental analyses, CEQ would be, contrary to its stated intent with its Phase II Proposal, mandating a "rote paperwork exercise" and "de-emphasiz[ing] the Act's larger goals and purposes," in the process wasting valuable agency (and the project proponent's) time and resources. CEQ should retain language that recognizes that other environmental reviews may fulfill the purpose and function of NEPA.

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[301] *See, e.g.*, *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 n.130 (D.C. Cir. 1973); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 383–87 (D.C. Cir. 1973); *Env't Def. Fund, Inc. v. EPA*, 489 F.2d 1247, 1254–57 (D.C. Cir. 1973); *South Terminal Corp. v. EPA*, 504 F.2d 646, 676 (1st Cir. 1974); *Indiana & Michigan Elec. Co. v. EPA*, 509 F.2d 839, 843 (7th Cir. 1975); *State of Wyo. v. Hathaway*, 525 F.2d 66, 71–73 (10th Cir. 1975).

[302] *See, e.g.*, *State of Ala. ex rel. Siegelman v. EPA*, 911 F.2d 499, 503–05 (11th Cir. 1990); *W. Neb. Res. Council v. EPA*, 943 F.2d 867, 871–72 (8th Cir. 1991).

[303] *Env't Def. Fund*, 489 F.2d at 1256 (listing those "five core NEPA issues" as "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"); *see State of Ala. ex rel. Siegelman*, 911 F.2d at 504 ("Although NEPA says that 'all agencies' must comply with its terms, most circuits have already recognized—in some instances, as many as seventeen years ago—that an agency need not comply with NEPA where the agency is engaged primarily in an examination of environmental questions and where 'the agency's organic legislation mandate[s] specific procedures for considering the environment that [are] functional equivalents of the impact statement process.'" (citation omitted) (alterations in original)).

[304] *State of Ala. ex rel. Siegelman*, 911 F.2d at 504 ("If there were no RCRA, NEPA would seem to apply here. But RCRA is the later and more specific statute directly governing EPA's process for issuing permits to hazardous waste management facilities.").

[305] *See* 88 Fed. Reg. at 49,934.

[306] *See Env't Def. Fund*, 489 F.2d at 1256 (internal quotation marks and citation omitted).

D. CEQ should retain the existing public participation and exhaustion requirements.

CEQ proposes to eliminate Section 1500.3(b), which requires that interested participants to a NEPA review raise objections and comments "on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment" within prescribed comment windows set forth by the agency in its notice of intent and publication of the draft EIS.[307] As of now, comments not submitted within those prescribed windows are deemed "forfeited as unexhausted."[308] CEQ asserts that the exhaustion requirements "establish[] an inappropriately stringent exhaustion requirement for public commenters and agencies" and are otherwise legally untenable.[309] CEQ effectively proposes to leave the issue of exhaustion to judicial discretion.[310] The Associations disagree with such an approach and urge CEQ to retain the existing exhaustion requirements at Section 1500.3, or alternatively with slight modification (as described below), in order to minimize unnecessary delay and allow for greater predictability with regard to project review deadlines and milestones.

Exhaustion is a beneficial mechanism for generating informative public comments as early in the project review process as possible, as well as conserving agency resources and cutting down on speculative claims if litigation arises. As CEQ has previously recognized, timely submission of comments helps promote informed decision-making and "ensure[s] that the agency has adequate time to consider the commenter's input as part of the agency's decision-making process."[311] For NEPA in particular, administrative exhaustion requirements are also consistent with judicial precedent emphasizing the importance of structured public participation that allows agencies to consider information and objections prior to parties assuming a litigation posture.[312] And agencies often incorporate regulatory exhaustion requirements even where the agency's governing statute does not specifically provide for exhaustion, whether it's the Army Corps in connection with Clean Water Act Section 404 permitting,[313] or the EPA in connection with permitting under various environmental statutes.[314]

The time limits prescribed by the Builder Act also heighten the need for an orderly project review process. With the imposition of two-year and one-year deadlines for the preparation of EISs and EAs, respectively, along with the provision of a right for project sponsors to petition for judicial review if those deadlines are not met,[315] agencies will need more (not less) authority and tools to keep NEPA reviews on track. If a dilatory stakeholder can wait to provide information or raise an objection until close to the statutorily prescribed deadline, the agency would then be stuck between disregarding the stakeholder's comment and risk litigation from that stakeholder, or disregarding

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[307] 40 C.F.R. § 1500.3(b); *see* 88 Fed. Reg. at 49,931–32; Redline at 3–4.
[308] 40 C.F.R. § 1500.3(b)(3); *see id.* § 1505.2(b).
[309] 88 Fed. Reg. at 49,931–32.
[310] *Id.* at 49,931.
[311] 2020 Regulations, 85 Fed. Reg. at 43,318.
[312] *See Pub. Citizen*, 541 U.S. at 764 ("Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [party's] position and contentions,' in order to allow the agency to give the issue meaningful consideration." (citing *Vt. Yankee*, 435 U.S. at 553)).
[313] *See* 33 C.F.R. § 331.12.
[314] *See* 40 C.F.R. § 124.19.
[315] 42 U.S.C. § 4336a(g).

the deadline and risk litigation from the project sponsor. An exhaustion requirement helps mitigate this problem. And courts have often found that reasonable but strict comment deadlines with forfeiture implications are permissible under the APA, especially in light of congressionally imposed deadlines for agency action, like those imposed by the Builder Act for EIS and EA documents.[316]

CEQ's rationales for eliminating the exhaustion requirement are either misplaced or do not warrant the requirement's wholesale elimination. *First*, CEQ questions whether it "has the authority under NEPA to set out an exhaustion requirement that bars parties from bringing claims on the grounds that an agency's compliance with NEPA violated the APA, pursuant to 5 U.S.C. 702."[317] While the Associations understand CEQ's hesitation, we believe its concerns are misplaced. CEQ is authorized pursuant to longstanding executive order to issue regulations to federal agencies implementing NEPA,[318] and CEQ's regulations and interpretations of NEPA are generally afforded "substantial deference."[319] The administrative exhaustion framework is accordingly a directive from CEQ *to federal agencies*, issued pursuant to CEQ's authority and based on its expertise, regarding when and under what circumstances a submitted comment should be deemed forfeited as untimely filed. The administrative exhaustion requirement smartly embodies the exhaustion doctrine that courts have developed over time,[320] but it does not, as CEQ seemingly suggests, purport to interpret the APA to bar or otherwise prevent a court from hearing a cause of action. While courts typically will not entertain an argument or issue that was forfeited or waived,[321] they are not entirely precluded from doing so as part of an APA challenge to a NEPA review, at least in the absence of a contrary congressional directive. Thus, CEQ's concerns as to the legality of or legal basis for the exhaustion requirement rely on a misguided perspective as to what precisely the exhaustion requirement achieves. And worse, by simply referring to a supposed lack of authority, CEQ disregards the benefits to agencies, project sponsors, and stakeholders of a clearly communicated and defined exhaustion requirement.

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[316] *See, e.g.*, *Omnipoint Corp. v.* FCC, 78 F.3d 620, 629–30 (D.C. Cir. 1996) (finding a one-week comment period "sufficient" in light of a "congressional mandate to implement [the agency action] without administrative or judicial delays" (internal quotation marks and citation omitted)); *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 772 (D.C. Cir. 1988) (finding an agency-imposed fifteen-day comment period reasonable and in compliance with the APA, especially in light of congressional deadlines of "ninety days to report and forty-five more days to enact a final rule"); *Petry v. Block*, 737 F.2d 1193, 1200–01 (D.C. Cir. 1984) (similar).

[317] 88 Fed. Reg. at 49,931.

[318] *See* Exec. Order No. 11,991 (authorizing CEQ to "[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA]").

[319] *See, e.g.*, *Andrus*, 442 U.S. at 358.

[320] *See* 2020 Regulations, 85 Fed. Reg. at 43,317–18 (noting that the exhaustion requirement "*reinforces* the principle that parties may not raise claims based on issues they themselves did not raise during the public comment period" and citing case law for the point (emphasis added)).

[321] *Cf. Sims v. Apfel*, 530 U.S. 103, 108 (2000) (noting that "it is common for an agency's regulations to require issue exhaustion" and "when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues"). Even the two district court cases cited by CEQ in support of its proposed rescission, *see* 88 Fed. Reg. at 49,931 (citing *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of Interior*, 929 F. Supp. 2d 1039, 1045–46 (E.D. Cal. 2013)); *Wyo. Lodging and Rest. Ass'n v. U.S. Dep't of Interior*, 398 F. Supp. 2d 1197, 1210 (D. Wyo. 2005), recognize that NEPA incorporates the typical administrative exhaustion principle.

Second, CEQ asserts that the administrative exhaustion requirement "is at odds with longstanding agency practice."[322] CEQ notably does not cite to any such longstanding agency practice, much less any that has been formalized, and instead broadly alludes to agency "discretion to consider and respond to comments submitted after a comment period ends."[323] While an agency could certainly except a late-filed comment from forfeiture, the Associations believe that CEQ should not encourage agencies to do so as a matter of routine, and instead limit such exceptions to those already clearly established in caselaw in order to promote the types of efficiencies and streamlining that Congress intended through the Builder Act. The Council notably does not address whether the Builder Act, including its requirement of specific deadlines, warrant a correspondingly more structured and predictable approach to administrative exhaustion than agencies may have previously undertaken.

Specific Recommendations:

The Associations urge retention of the administrative exhaustion requirements at existing Section 1500.3(b). To the extent that CEQ is concerned that the administrative exhaustion requirement is too stringent,[324] the Associations propose the following language to the existing Section 1500.3(b)(3) that would provide parties the opportunity to submit late-filed comments if there are reasonable grounds for the tardiness:

> For consideration by the lead and cooperating agencies, State, Tribal, and local governments and other public commenters must submit comments within the comment periods provided, and comments shall be as specific as possible (§§ 1503.1 and 1503.3 of this chapter). Comments or objections of any kind not submitted, including those based on submitted alternatives, information, and analyses, shall be forfeited as unexhausted, unless there was reasonable ground for failure to timely raise a comment or objection.

If CEQ nevertheless decides to completely eliminate the 2020 Regulations' exhaustion framework, the Associations urge that the Council reiterate in clear terms in the final rulemaking, as it does in the proposed rulemaking, that a federal agency or interested party is not limited from raising forfeiture arguments during the course of litigation.[325] For many of the same reasons as above, agencies should continue to retain the flexibility to avail themselves of judicially imposed or equitable exhaustion as necessary under the circumstances for a particular project.

Relatedly, the Associations urge CEQ to retain the following language in Section 1500.3(c): "It is the Council's intention that any allegation of noncompliance with NEPA and the regulations in

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[322] 88 Fed. Reg. at 49,931.
[323] *Id.*
[324] *Id.*
[325] *Id.* ("[N]othing in this revision would limit the positions the Federal Government may take regarding whether, based on the facts of a particular case, a particular issue has been forfeited by a party's failure to raise it before the agency, and removing this provision does not suggest that a party should not be held to have forfeited an issue by failing to raise it. By deleting the exhaustion requirements, CEQ does not take the position that plaintiffs may raise new and previously unraised issues in litigation.").

this subchapter should be resolved as expeditiously as possible."[326] CEQ finds this language "inappropriate" because NEPA regulations "cannot compel members of the public or courts to resolve NEPA disputes."[327] True, but the Council undersells the communicative benefit of expressing CEQ's instruction (in the case of agencies) and desire (in the case of courts and members of the public) to take proactive steps to resolve disputes in the NEPA review process, even if the results are only modest. In some instances, heading off a NEPA dispute sooner rather than later could save years in litigation-related delay. Timely resolution of NEPA reviews and litigation has always been in the interest of federal agencies, project sponsors, and the public, and perhaps more so in light of congressional and Administration goals expressed in legislation like the IIJA and IRA and Builder Act.

Additionally, and related to public participation, CEQ uses the term "interested persons" in its requirements related to public engagement and scoping (e.g., public notification, outreach, availability of information) with much greater frequency than prior sets of regulations.[328] The Council, however, does not define the scope of "interested persons." The Associations are concerned that an overly broad understanding of the term could potentially provide a foothold for challenges, whether before the agency or in a court, that an agency did not meaningfully engage with *all* "interested persons" (e.g., failed to mail information to the complainant), no matter if the particular complainant lacks a connection to the particular project or action at issue. The Associations thus recommend that CEQ provide some sort of clarifying definition to limit the scope of "interested persons," at the very least for purposes of discrete, individual projects, to those with a connection to the project or could potentially be impacted by it. Introducing new and ill-defined terms into a longstanding framework like NEPA will otherwise create unnecessary confusion in the process, which can result in delays or unwarranted litigation risk.

E. CEQ should retain the existing cost transparency measures.

The Associations disagree with CEQ's proposal to eliminate from Section 1502.11(g) the requirement from the 2020 Regulations that agencies disclose the estimated total costs (including agency personnel hours and contractor costs) in preparing draft and final EISs on the covers of those documents.[329] The cost-transparency requirement furthers the informational goals of NEPA and encourages greater efficiency in conducting NEPA reviews. Its elimination, by contrast, would undermine CEQ's stated intent to promote greater transparency and public participation in the NEPA process.[330]

NEPA imposes costs not only on project sponsors and applicants but also on consumers who ultimately pay project costs through the goods and services they purchase and on federal agencies themselves, who must dedicate significant resources and personnel time at every stage of the lengthy NEPA process. Government-wide, a 2003 NEPA Task Force calculated that a typical EIS document can cost between $250,000 and $2 million for the agency to produce—or approximately

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[326] 40 C.F.R. § 1500.3(c); *see* Redline at 4.
[327] 88 Fed. Reg. at 49,932.
[328] *See id.* at 49,968, 49,972, 49,975, 49,985 (proposed §§ 1501.1(b), 1501.9(d)(iii)(F), 1502.4(c), 1507.3(c)(11)).
[329] *See* 88 Fed Reg. at 49,947; Redline at 36.
[330] *See* 88 Fed. Reg. at 49,929 ("CEQ's proposed revisions to the regulations emphasize the importance of transparency and public engagement . . . .").

$400,000 and $3.3 million using today's dollars. And the Department of Energy, one of the few agencies that at one point provided at least some project-specific cost data, estimated that between 2003 and 2012, the median and average contractors' costs for its EISs (not including costs associated with federal personnel time) was $1.4 million and $6.6 million, respectively; these median and average costs do not reflect the wide range of costs, the highest of which was $85 million.[331] But even with these sparse reports and disclosures, it was "difficult" prior to the 2020 Regulations "to extract NEPA cost data from agency accounting systems."[332] The 2020 Regulations thus represented a shift towards *greater* transparency, allowing project sponsors, outside experts, and the public to truly assess the efficacy of NEPA's costs—in other words, whether agencies are effectively and efficiently allocating and maximizing their limited resources in pursuit of their statutory mission. Such cost data is thus, contrary to CEQ's characterization, plainly "germane" and "useful" for the public.[333] The Associations thus urge retention of the cost-transparency requirements in Section 1502.11(g).

CEQ asserts that the cost-transparency requirement should be eliminated in light of agencies' comments that "agencies typically do not estimate total costs, that [costs] are difficult to monitor especially when project sponsors and contractors are bearing some of the cost, that the methodology for estimating costs is inconsistent across agencies, and that providing these estimates would be burdensome."[334] But these comments are exactly why greater cost transparency is necessary. If agencies are in fact needing to allocate millions to tens of millions of dollars towards the preparation of an EIS, then there should be more rigid cost accounting within and across agencies as a means to promote accountability, provide an incentive to reduce duplication of reviews, and potentially allow agencies to share and communicate the cost-saving measures they have implemented. Moreover, to the extent CEQ is truly concerned that disclosure of preparation costs on the cover of a draft or final EIS could lead to public confusion,[335] the Council could alternatively direct agencies to place the cost disclosures in a prominent place inside the document alongside a brief narrative explaining which costs are included or excluded from the total. The Associations also note that CEQ's argument would apply equally to other areas of agencies' NEPA analyses where they are asked to quantify a great many types of costs or benefits of a particular project.

F. CEQ should retain regulatory language providing that agencies are not *required* to undertake new scientific and technical research.

The Associations oppose CEQ's proposed elimination of the instruction in Section 1502.23 that "[a]gencies are not required to undertake new scientific and technical research to inform their analyses."[336] CEQ's chief rationale for the elimination is that commenters to the 2020 Regulations voiced concern that the language "could limit agencies to 'existing' resources and preclude

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[331] *See* U.S. Gov't Accountability Off., GAO-14-370, *National Environmental Policy Act: Little Information Exists on NEPA Analyses* 13 (2014), *available at* https://tinyurl.com/3k8b8p38.
[332] *Id.* at 12.
[333] 88 Fed. Reg. at 49,947.
[334] *Id.*
[335] *Id.* ("Requiring that they be included on the cover could incorrectly lead the public and decision makers to believe that those costs relate to the proposed action addressed in the EIS.").
[336] 40 C.F.R. § 1502.23; *see* 88 Fed. Reg. at 49,951; Redline at 42.

agencies from undertaking site surveys, conducting investigation, and performing other forms of data collection, which have long been standard practice when analyzing an action's potential environmental effects and may be necessary for agencies to understand particular effects."[337] Notably, CEQ does not cite to any particular instance of an agency concluding that Section 1502.23 precluded it from undertaking additional analyses. This is likely because an instruction that an agency is "not required" to undertake additional analyses cannot reasonably be read as *prohibiting* additional analyses. Thus, CEQ's rationale for eliminating the instruction is baseless. And to the extent there is concern over agency confusion, CEQ could instead simply use the preamble to distinguish between baseline data gathering and surveys, which are routinely required in support of NEPA review, from development of new scientific studies and methodologies, which have never been demanded by NEPA.

Moreover, eliminating the instruction may encourage already overburdened agencies to conduct additional analyses, if only to stave off potential litigation or pursue preferred policy objectives. It is not reasonable for agencies to deploy limited resources to develop novel, additional research, and few projects could remain viable when faced with lengthy or open-ended research delays. But without an express backstop like that provided by Section 1502.23, agencies may nevertheless feel pressure to conduct additional research. NEPA has long accommodated the realities that agencies have limited resources and often must make decisions in spite of lingering unknowns,[338] and CEQ should continue to do so. As one court has observed, "[t]here are an infinite number of tests that could be performed, or studies conducted, prior to this sort of transaction. [The agency] is not required to perform all of them."[339]

As previously noted, this proposal is also in tension with new language from the Builder Act, which states, in the context of determining the appropriate level of review:

> In making a determination under this subsection, an agency . . . *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.[340]

Given that Congress has spoken clearly as to when new scientific and technical research is to *limit* the circumstances under which it is required, CEQ's regulations should likewise be clear that ordinarily agencies are not required or expected to undertake such research consistent with the Builder Act.

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[337] 88 Fed. Reg. at 49,951.

[338] *See, e.g.*, *City of Williams v. Dombeck*, 151 F. Supp. 2d 9, 23 (D.D.C. 2001) (holding that the Forest Service did not violate NEPA by failing to apply the plaintiffs' preferred methodology, where the plaintiffs did "not demonstrate[] that the Forest Service's methodology violated agency regulations or were somehow beyond agency discretion").

[339] *See WildEarth Guardians v. Bernhardt*, 501 F. Supp. 3d 1192, 1212 (D.N.M. 2020) ("There are an infinite number of tests that could be performed, or studies conducted, prior to this sort of transaction. BLM is not required to perform all of them.").

[340] Fiscal Responsibility Act, 137 Stat. at 40 (codified at 42 U.S.C. § 4336(b)(3)).

G. CEQ should clarify the standard for "connected actions" to ensure a clear, uniform standard.

With respect to connected actions, CEQ proposes at Section 1501.3(b) to require agencies to evaluate "in a single review, proposals or parts of proposals that are related closely enough to be, in effect, a single course of action."[341] But CEQ goes on to propose that agencies

> also shall consider whether there are connected actions, which are closely related Federal activities or decisions that should be considered in the same NEPA review that: (1) [a]utomatically trigger other actions that may require NEPA review; (2) [c]annot or will not proceed unless other actions are taken previously or simultaneously; or (3) [a]re interdependent parts of a larger action and depend on the larger action for their justification.[342]

This latter category closely aligns with the treatment of connected actions in the pre-2020 Regulations.[343] Yet the former category—"proposals or parts of proposals that are related closely enough to be, in effect, a single course of action"—appears drawn from a different section of the pre-2020 Regulations regarding the scope of major federal actions requiring the preparation of EISs.[344] The Associations are concerned that the juxtaposition of these two categories will create confusion as to when actions are connected and thus reviewed as part of a single environmental review; agencies and interested commenters may wrongly presume there to be two independent criteria.

Specific Recommendations:

Given CEQ's apparent intent behind its revisions to Section 1501.3 to ensure connected actions are reviewed in the same environmental document, the Associations recommend the following revisions to Section 1501.3:

> (b) *Scope of action and analysis.* If the agency determines that NEPA applies, the agency shall consider the scope of the proposed action and its potential effects to inform the agency's determination of the appropriate level of NEPA review. ~~The agency shall evaluate, in a single review, proposals or parts of proposals that are related closely enough to be, in effect, a single course of action.~~ The agency also shall consider, in a single review, whether there are proposals or parts of proposals that are connected actions, which are closely related Federal activities or decisions that ~~should be considered in the same NEPA review that~~:

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[341] 88 Fed. Reg. at 49,969 (proposed § 1501.3(b)).
[342] *Id.*
[343] *See* 40 C.F.R. § 1508.25(a)(1) (2019).
[344] *Id.* § 1502.4(a) ("Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.").

(1) Automatically trigger other actions that may require NEPA review;
(2) Cannot or will not proceed unless other actions are taken previously or simultaneously; or
(3) Are interdependent parts of a larger action and depend on the larger action for their justification.

H. CEQ should retain language regarding significant issues and effects, rather than pivoting to new subjective evaluations of "importance."

In several places in the Phase II Proposal, CEQ would replace the well-understood term "significant" with "important." As CEQ explains, this allegedly benign change is intended to make the language of the regulations consistent throughout, using "significant" only when attached to "effects."[345] But the difference is critical in a few key instances where changing the term "significant" to "important" will lead to uncertainty and increased litigation risk. As the Associations have repeatedly noted, clarity is critical to the NEPA process and absolutely necessary to fulfill the congressional mandate in the Builder Act. The Associations are concerned that CEQ will undermine the intention to make NEPA more efficient by introducing ambiguous new terms in the place of longstanding terminology.

First, CEQ proposes to swap out "significant" for "important" in Section 1500.4(b) so that CEQ's directive that agencies prepare concise and informative documents "discussing only briefly issues other than *significant* ones" would now direct agencies to "discuss[] only briefly issues other than *important* ones."[346] The word "important" injects a not previously defined level of subjectivity regarding what is of most concern to a particular individual, as opposed to "significance," which although still relying on some degree of subjective judgment, is determined by application of regulatorily defined factors and has been subject to numerous judicial decisions interpreting its meaning. Given that the intent of Section 1500.4 is generally to ensure that agencies not waste time detailing effects that are not deemed significant, regulatory language should reflect that purpose. CEQ should not change "significant" to "important" and should instead change "issues" to "effects," so that agencies are directed to "discuss only briefly those *effects* other than *significant* ones." Similar changes are warranted in Section 1500.4(f) regarding scoping, and Sections 1502.1a and 1502.2 to change the focus from "important issues" to "significant effects."

Second, CEQ would exchange "significant" for "important" in the key criteria for determining when a supplemental EIS is needed. Section 1502.9(d)(1) sets out the two circumstances in which a supplemental EIS is required. Under the existing language, the second circumstance occurs when there are "*significant* new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[347] The Proposal would change "significant" to "substantial or important."[348] Again, "important" and "substantial" are inherently subjective terms that are not grounded by established meanings and administrative and judicial interpretations like "significance" in the NEPA context, and thus would likely call on decision-makers to apply

[345] 88 Fed Reg. at 49,932.
[346] *Id.* at 49,968 (emphases added) (proposed § 1500.4(b)); Redline at 5.
[347] 40 C.F.R. § 1502.9(d)(1)(ii).
[348] 88 Fed. Reg. at 49,976 (proposed § 1502.9(d)(1)(ii)); Redline at 35.

personal value judgments. What is "important" enough to trigger a supplemental EIS may differ from one person to the next. This language will lead to confusion and litigation. Instead, supplementation should be tied to new circumstances or information with the potential to cause *significant* effects not previously considered, which is consistent with the case law.[349] Thus, CEQ should not revise the language of Section 1502.9 as proposed and should instead retain the concept of "significance."

Specific Recommendations:

CEQ should retain the language regarding "significance" as opposed to adding a new and undefined standard of "importance" and should change "issues" to "effects" as follows:

- Section 1500.4(b) should read that agencies shall prepare analytical, concise, and informative environmental documents . . . "[d]iscussing only briefly ~~issues~~ effects other than ~~important~~ significant ones."

- Section 1500.4(f) should read that "[a]gencies shall prepare analytical, concise, and informative environmental documents by . . . [u]sing the scoping process to identify ~~important environmental issues~~ resources that may be significantly affected and are deserving of study and to deemphasize ~~unimportant issues~~ the study of resources where effects may not be significant, narrowing the scope . . . ."

- Section 1502.1(b) should provide: ". . . Agencies shall focus on ~~important environmental issues~~ significant environmental effects and reasonable alternatives and shall reduce paperwork and the accumulation of extraneous background data."

- Section 1502.2(b) should provide: "Environmental impact statements shall discuss effects in proportion to their significance. There shall be only brief discussion of other than ~~important issues~~ significant effects."

- Section 1502.9(d)(1)(ii) should provide that the second criteria for determining whether to prepare a supplemental environmental document is whether "[t]here are substantial ~~or important~~ new circumstances or information relevant to environmental concerns and bearing on the proposed action or its significant effects."[350]

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[349] *Marsh*, 490 U.S. at 374, 377 ("If there remains 'major Federal action' to occur, and if the new information is sufficient to show that the remaining action will '*affect the quality of the human environment' in a significant manner* or to a significant extent not already considered, a supplemental EIS must be prepared." (emphasis added) (citation omitted)).

[350] Note that CEQ uses "substantial changes" as part of the first criteria for determining whether to supplement and existing environmental document, indicating that "substantial new circumstances" also provides adequate direction to agencies.

XIII. CEQ SHOULD CLARIFY THAT AN AGENCY'S EXISTING NEPA REGULATIONS WILL CONTINUE TO REMAIN IN EFFECT UNTIL THE AGENCY IMPLEMENTS ANY FINAL VERSION OF THE PHASE II PROPOSAL.

Given the strong desire of both Congress and the Administration to encourage streamlined NEPA reviews and the efficient permitting of much-need infrastructure, it is of the utmost importance that CEQ provide clarity about which versions of both CEQ's regulations and agencies' own implementing regulations apply to each federal action going forward. It is of the utmost importance that these proposed changes do not undermine the Builder Act by stymying projects already under review. CEQ proposes that any finalized Phase II Proposal would "apply to any NEPA process begun after" the effective date of the finalized rulemaking.[351] And CEQ explains that once its rulemaking is finalized and issued, "Federal agencies would not need to redo or supplement a completed NEPA review (e.g., where a CE determination, FONSI, or ROD has been issued) as a result of the issuance of this rulemaking."[352]

This clarification, while helpful to some extent, does not explain how agencies should handle pending or newly submitted project applications during the interim period between the effective date of a final CEQ rulemaking and the effective date of an agency's corresponding revisions of its own regulations to align with the finalized Phase II Proposal. And beyond formally submitted or pending actions, there may be in some instances a pre-filing process—before any formal application is filed—where resource reports have already begun being prepared, or agencies have begun interagency discussions. Without further clarification, projects caught in this "gray area" could be subject to conflicting requirements at the agency-review stage—especially so for agencies utilizing field or regional offices to handle project applications, and thus potentially subject to *intra*-agency conflict. Moreover, confusion as to the applicable regulations at the agency-review stage could lead to increased litigation risk, as parties would litigate not only an agency's compliance with applicable regulations, but also what regulations were applicable in the first place. Any delay brought about by such regulatory uncertainty could subsequently delay issuance of a final agency decision, ultimately imposing additional monetary and time burdens on both agencies and project sponsors.

Specific Recommendations:

Some of CEQ's overarching goals with the Phase II Proposal are to "provide[] for efficient and effective environmental reviews" and "enhance clarity and certainty for Federal agencies, project proponents, and the public."[353] In line with these goals, the Associations strongly urge CEQ to clarify that:

- An agency's NEPA regulations and procedures currently in effect at the time any Phase II Proposal is finalized will continue to be effective until the agency finalizes new regulations and procedures, pursuant to proposed Section 1507.3, to align with the finalized Phase II Proposal.

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[351] 88 Fed. Reg. at 49,984 (proposed § 1506.13).
[352] *Id.* at 49,958.
[353] *Id.* at 49,928.

- When an agency initiates revisions to its NEPA regulations and procedures to implement the final version of this Phase II Proposal, those revisions should be subject to public notice and comment, as required by the agency's governing statutes and the APA.

- The NEPA regulations and procedures presently governing a particular application will continue to govern the project—up to and through the reviewing agency's final decision and any judicial challenges to that decision and throughout the project's operational life.

The Associations believe that the approach outlined above will promote efficiency, fairness, and reliance. The reality is that once CEQ finalizes any Phase II Proposal, a pending project application could be at one of many different stages in the NEPA process—e.g., agency coordination and analysis, EA, notice of intent and scoping, draft EIS and public comment, final EIS, supplemental EIS. The Associations believe that no matter the stage, neither agencies nor project sponsors should be forced to substantially alter or effectively restart the NEPA review process midstream; to do so would only invite further delays and costs.

Relatedly, and as noted above,[354] the Associations strongly urge CEQ to emphasize in any final rulemaking that the Council's revisions to its NEPA regulations and imposition of additional requirements should not be construed (by agencies or others) as providing grounds for challenging already finalized proposed actions, permits, authorizations, and the like. Assurances as to the durability of authorizations and permits are key to the ongoing durability of the NEPA review process, as developers need assurance that their permits and similar authorizations will not be subject to continual agency review, revision, or revocation or protracted litigation—particularly after projects are already under construction or operational.

XIV. THE ASSOCIATIONS' NUMEROUS CONCERNS WITH THE PHASE II PROPOSAL UNDERSCORE THE NEED FOR ADDITIONAL BIPARTISAN PERMITTING REFORM IN CONGRESS.

The Phase II Proposal, at its core, reflects CEQ's effort to expand NEPA beyond its limited mandate and well-established bounds. As discussed throughout this letter, NEPA is a procedural, information-forcing statute aimed at achieving fully informed and well-reasoned agency decision-making. The Proposal, however, seeks to inappropriately incorporate substantive, outcome-forcing requirements, often in ways that venture well beyond the text of NEPA or longstanding agency implementation and judicial interpretation. The Proposal does so even in light of the Builder Act, which clearly evinces congressional intent for a more efficient, timely, predictable, and durable NEPA regime. The Phase II Proposal in many respects runs counter to this congressional intent.

The Proposal also evinces an intent to use NEPA as a means to advance Administration-preferred projects, especially in the energy sector. Congress has long exercised singular authority over national energy policy through statutes ranging from the Federal Land Policy and Management Act, Natural Gas Act, Mineral Leasing Act, and Outer Continental Shelf Lands Act, and has more recently through the IIJA, IRA, and FRA. And out of respect to federalism, Congress has left other decisions to the states, such as what specific energy mix they seek for their residents. On the federal

[354] *See supra* p. 22.

side, while these and other similar statutes authorize agencies to make a variety of decisions that impact America's approach to energy development, agencies must do so within the context of the broad national energy policy goals and outcomes that only Congress can prescribe. The Phase II Proposal attempts to upend the comprehensive and cohesive energy policymaking role entrusted to Congress by devolving national energy policy decisions to the scores of discrete actions that will be undertaken by dozens of agencies with widely varied expertise and authority. This policy devolution is not permissible; national energy policy decisions must be made through appropriate legislation—not individualized NEPA reviews.[355]

Additionally, the Phase II Proposal represents the third attempt to substantively amend CEQ's NEPA regulations since 2020 (not including the Interim Climate Guidance), after decades of minimal change. The regulatory pendulum that NEPA has become, with each successive Administration issuing different (and often divergent) regulations and guidance documents, is unsustainable and undermines the certainty that project developers need to make significant capital investments in energy projects that can take years to develop. While NEPA regulatory reform had long been overdue, the ever-changing regulatory backdrop has become untenable.

The Phase II Proposal, the next iteration of the regulatory pendulum, further underscores the need for comprehensive, bipartisan statutory permitting reform. While the Associations believe the Builder Act significantly improved NEPA in many respects, we nevertheless believe that more is necessary in order to ensure a transparent, timely, consistent, and durable permitting process that can form the foundation of a secure, reliable, and affordable energy present and energy future. The Associations will continue to work across industry sectors and political parties to achieve meaningful and enduring permitting reform in Congress.

XV. CONCLUSION

The Associations appreciate the opportunity to provide these comments on CEQ's Phase II Proposal. As noted throughout, the Associations have long supported NEPA regulatory reform at CEQ and individual agencies because we believe that such reforms could provide necessary clarity, efficiency, and consistency for stakeholders, regulators, and the public, while remaining true to NEPA's central goal of facilitating "fully informed and well-considered" agency decisions.[356] For these same reasons, we supported and continue to support the reforms contained in the 2020 Regulations—many of which were embodied in the Builder Act and are now law. The Associations' support for those reforms is not simply based on interests in expediency, but rather our belief that the public interest would be best served by regulatory reforms that reorient NEPA back to the Act's central purpose of improving agency decision-making in a fair, legal, and neutral manner.

Although the Associations are generally aligned with CEQ in its efforts to further revise its NEPA regulations to streamline the NEPA process without undermining its information-forcing purpose or sacrificing agency flexibility, we do not similarly share CEQ's view that the Phase II Proposal would accomplish those goals. Indeed, we are concerned that CEQ's efforts will not promote, and

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[355] *See Metro. Edison*, 460 U.S. at 777 ("The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements." (footnote omitted)).
[356] *Vt. Yankee*, 435 U.S. at 558.

may in fact undermine, NEPA's central purpose of facilitating "fully informed and well-considered" decisions. While that is certainly not the outcome CEQ intends, the Associations nevertheless believe the Phase II Proposal—and its attempt to combine portions of the pre-2020 and 2020 Regulations with wholly new and additional requirements—will ultimately upend decades of implementation experience, frustrate efforts (including those of Congress) to address widely recognized NEPA implementation problems, and continue to mire projects (including those essential to the energy transition) in unnecessarily protracted agency reviews and litigation. As it stands, the Proposal would also conflict with NEPA, as interpreted by the Courts, and violate the APA.

Accordingly, the Associations respectfully urge CEQ to revise its Phase II Proposal to fully and faithfully implement the Builder Act and congressional intent. Moreover, any final rulemaking should take into consideration and incorporate all of the Associations' recommendations described herein. Regardless of the approach CEQ ultimately takes, the Associations ask the Council to view these comments as reflecting our sincere interest in engaging with CEQ constructively in pursuit of regulatory reforms that will advance NEPA reviews in a timely manner and without unduly delaying construction of our nation's most critical energy, transportation, water treatment, and communications infrastructure. Doing so will help ensure that the much-needed projects for our energy transition and energy security are able to be completed in a timely and affordable manner.