November 22, 2021

Via Regulations.gov

Council on Environmental Quality
Attn: Amy B. Coyle
730 Jackson Place, NW
Washington, D.C. 20503

Re: Joint Trades Comments in Response to the Council on Environmental Quality's Proposed Revisions to Regulations Implementing the National Environmental Policy Act (86 Fed. Reg. 55,757) (Oct. 7, 2021).

The American Petroleum Institute ("API"), the American Exploration and Production Council ("AXPC"), the Association of Oil Pipe Lines ("AOPL"), the Alaska Oil & Gas Association ("AOGA") and the International Association of Geophysical Contractors ("IAGC") (collectively, "Associations") respectfully submit the following comments in response to the Council on Environmental Quality's ("CEQ's" or "the Council's") proposal to revise certain portions of recently promulgated regulations implementing the National Environmental Policy Act ("NEPA" or "the Act").[1] The Associations support an effective NEPA process that does not unduly delay projects with a federal nexus.

The goal 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,"[3] through which federal agencies must make decisions. As such, in order to facilitate "fully informed and well-considered" decision making, the NEPA review process must be based on sound science and the best available data, including input provided by project proponents and other

[1] 86 Fed. Reg. 55,757 (Oct. 7, 2021).
[2] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council ("Vt. Yankee")*, 435 U.S. 519, 558 (1978).
[3] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350; *See also Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980)*; Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004); *Vt. Yankee*, 435 U.S. at 558.

stakeholders. Agencies must consider this information fairly, impartially, and without regard for overarching policy preferences or in furtherance of goals unrelated to the discrete decision under review. Indeed, an agency's review must be limited to potential impacts that are proximately caused by the action under review and within the agency's authority to address. Furthermore, because "NEPA's purpose is not to generate paperwork,"[4] NEPA reviews must be reasonably tailored in duration and scope commensurate with the size and complexity of the proposed project.

The Associations supported CEQ's recent regulatory updates to NEPA ("2020 NEPA Regulations") [5] because they were in accord with this fundamental understanding of the Act and its intended purpose. We also supported those aspects of the 2020 NEPA Regulations that allow for more efficient and reasonably circumscribed reviews, not simply based on interests in expediency, but because we view those measures as necessary to reorient NEPA review processes back to the Act's central purpose of improving agency decision making.

The Associations acknowledge that CEQ intends to broadly revisit and revise aspects of the 2020 NEPA Regulations,[6] but in doing so encourage CEO to implement any reforms consistent with our shared goals of avoiding the undue delay, complexity, and inconsistency that have been the unfortunate hallmarks of NEPA reviews for multiple decades. Indeed, we share and support CEQ's long-held interest in implementing NEPA "to reduce paperwork, to reduce delays, and at the same time to produce better decisions which further the national policy to protect and enhance the quality of the human environment."[7]

It is therefore in furtherance of these shared interests, that we respectfully urge CEQ to meaningfully consider that many substantive elements of the 2020 NEPA Regulations not only align with this administration's objectives, but also remain consistent with NEPA's goal of providing for "fully informed and well-considered" agency decision making. We are also compelled to note our deep concern that the Phase I Proposal will not promote, and may in fact undermine, this central goal of the Act. While it is certainly not the outcome that CEQ intends, the Associations believe that CEQ's proposal to rescind portions of the 2020 NEPA Regulations will undercut the clarity and consistency of agencies' NEPA review procedures, and frustrate provisions of the 2020 NEPA Regulations' that would realign and refocus 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.

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[4] 40 C.F.R. § 1500.1(c) (2019).
[5] 85 Fed. Reg. 43,304 (July 16, 2020).
[6] 85 Fed. Reg. 43,304 (July 16, 2020).
[7] 43 Fed. Reg. at 55,983.

The Associations therefore urge CEQ to reconsider its proposal and refrain from finalizing the provisions contained in this proposal. We continue to believe that the 2020 NEPA Regulations provide reasonable and lawful approaches that can address the undue delay and unnecessary complexity associated with NEPA reviews. We also believe these reforms are particularly important as the administration embarks on a historic infrastructure investment that cannot be fully realized without well-functioning NEPA review processes. If CEQ does move forward with portions of this proposal, we urge that any modifications should provide greater regulatory certainty and help improve the NEPA process in a way that remains fully consistent with NEPA's statutory intent. Additionally, 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.

I. ASSOCIATIONS' INTERESTS

API represents nearly 600 member companies involved in all aspects of the natural gas and oil industry, including exploration and production, refining, marketing, and transportation of petroleum and petroleum products in the United States ("U.S."). Together with its member companies, API is committed to ensuring a strong, viable U.S. natural gas and oil industry capable of meeting the energy needs of our nation in an efficient and environmentally responsible manner.

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 relevant here, the proposal for the 2020 NEPA Regulations.

From time to time, API also intervenes as a party in NEPA litigation affecting the interests of its members. And again, as relevant here, API's efforts to advocate through judicial intervention include our recent intervention to defend the 2020 NEPA Regulations.

The AXPC is a national trade association representing 29 of America's largest and most active independent natural gas and crude oil exploration and production companies. The AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts which operate in different segments of the energy industry, such as refining and marketing. The AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce the natural gas and crude oil that allows our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

AOPL is a national trade association that represents owners and operators of oil pipelines across North America before regulatory agencies, in judicial proceedings, and on legislative matters. AOPL members transport approximately 97 percent of the crude oil and refined petroleum products transported through pipelines throughout the U.S., over pipelines that extend more than

225,000 miles in length. AOPL members safely, efficiently, and reliably transport more than 22 billion barrels of crude oil and petroleum products each year. AOPL educates all branches of government and the public about the benefits and advantages of transporting crude oil and petroleum products by pipeline as the safest, most reliable, and most cost-effective method.

AOGA is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefit of all Alaskans. It represents the majority of companies that are exploring, developing, producing, transporting, refining, or marketing oil and gas on the North Slope, in the Cook Inlet, and in the offshore areas of Alaska. AOGA's members have a well-established history of safe, prudent, and environmentally responsible oil and gas activities.

Founded in 1971, the IAGC is the global trade association for the geophysical and exploration industry, the cornerstone of the energy industry. With more than 80 member companies in 50 countries, our membership includes onshore and offshore survey operators and acquisition companies, data and processing providers, exploration and production companies, equipment and software manufacturers, industry suppliers and service providers. The IAGC focuses on advancing the geophysical and exploration industry's freedom to operate. The IAGC engages governments and stakeholders worldwide on issues central to geophysical operations and exploration access, including prioritizing timely, accessible data acquisition throughout the life of the asset; providing predictability and competition; promoting regulatory and fiscal certainty and promulgating risk- and science-based regulations.

Our frequent advocacy in favor of NEPA reform derives from the firsthand experience of our member companies. The Associations' members engage in a wide variety of activities that have a federal nexus triggering NEPA reviews, including exploration and production of oil and gas resources on federal lands and the Outer Continental Shelf ("OCS"), construction of interstate natural gas pipelines and oil 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 to name just a few. 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 herein provide general comments in Section II below on the need for meaningful NEPA reform and the Phase I Proposal's potentially detrimental impact on a wide variety of nationally important projects and approvals due to its proposed elimination of clear and reasonable guideposts to the NEPA review process. In Section III, the Associations then provide detailed responses on the three provisions CEQ proposes to amend through the Phase 1 Proposal. We hope that the Council thoroughly considers these comments and uses them in furtherance of our shared interest in a well-functioning, informed, and collaborative NEPA review process. In total, these

comments represent the views of five trade associations with a combined total of nearly 700 members nationwide.

II. GENERAL COMMENTS

The Associations appreciate and advocate for the careful consideration of potential environmental impacts while allowing for the timely authorization of projects that create jobs, economic activity, and federal, state, and local tax revenue. However, since NEPA was enacted over fifty years ago, and particularly over the past decade, the scope of NEPA reviews has expanded dramatically. This expanded scope has, in turn, lengthened review times, fostered confusion among project sponsors and regulators, and resulted in divergent court decisions. The consequence of this trend toward more expansive project and increasingly site-specific reviews is deepening regulatory uncertainty and the suppression of trillions of dollars of investment in vital infrastructure and other projects.

This was not what Congress intended. NEPA is a procedural statute[8] that Congress expected would facilitate "fully informed and well-considered" agency decisions;[9] it certainly did not intend the Act's procedural mandates to so encumber agencies with extraneous analytical requirements that it would become effectively impossible for agency reviews to culminate in reasonably timely decisions. Indeed, Congress's expectation that NEPA would "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"[10] cannot be reconciled with decades of implementing the Act such that its required reviews are now widely regarded as among the foremost obstacles to developing our nation's most critical energy, transportation, water treatment, and communications infrastructure.

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[8] *See* 42 U.S.C. § 4332(2)(C) (agency obligation under NEPA is only to prepare detailed statement on "adverse environmental effects which cannot be avoided"); *See also, Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976) ("The procedural duty imposed upon agencies by this section is quite precise . . . ."); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, (435 U.S. 519, 558 (1978) (NEPA's "mandate to the agencies is essentially procedural); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) ("NEPA . . . simply guarantees a particular procedure, not a particular result."); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 n.34 (1978) ("NEPA essentially imposes a procedural requirement on agencies, requiring them to engage in an extensive inquiry as to the effect of federal actions on the environment . .).

[9] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council ("Vt. Yankee")*, 435 U.S. 519, 558 (1978).

[10] 42 U.S.C. § 4331(a) (emphasis added).

Despite decades of CEQ guidance and related case law, the NEPA review process has overall remained unnecessarily complex, unreasonably time-consuming, and uncertain, which in turn acts as an impediment to investment in critical infrastructure; the development, delivery, and storage projects urgently needed to facilitate the growth of a changing energy market; and countless investments urgently needed to improve the resiliency, health, and economic wellbeing of underserved communities.

Evidence that NEPA reviews continue to be unnecessarily complex and unduly protracted can be found in CEQ's most recent calculations of the length of Environmental Impact Statements ("EISs") and the time agencies require to complete those statements. CEQ calculates that the average length of a final NEPA EIS has risen to 661 pages with an average of 1,042 pages of appendices.[11] Strikingly, this expansion in length has continually increased since NEPA's enactment and has done so despite CEQ's issuance of a directive over 40 years ago to agencies that EISs should normally be less than 150 pages, with at most 300 pages for proposals of "unusual scope or complexity."[12]

As explained in Section III below, the ever-expanding size of EISs is often attributed to highly attenuated and speculative alternatives and effects, the analysis of which do not further meaningful project review. 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 in legal challenges.

Indeed, NEPA is, by far, the most litigated environmental statute.[13] It is viewed by many groups as an effective tool to impede or potentially fully preclude projects that facilitate industrial or commercial activities that the litigants oppose. Quite often, litigants lack any credible objection to the agency analyses but pursue challenges that can significantly delay or halt the projects they oppose.

As previously noted, this type of vexatious litigation is often successful in not only substantially delaying or halting the challenged project, but also in provoking agencies to extend subsequent reviews so they produce more unnecessary analysis. Nonetheless, with frustratingly circularity,

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[11] Council on Environmental Quality, Length of Environmental Impact Statements (2013-2018), (June 12, 2020).
[12] 40 C.F.R . § 1502.7 (1978).
[13] James E. Salzman and Barton H. Thompson, Jr., *Environmental Law and Policy* 340 (5th ed. 2019) (''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.'').

irrespective of how protracted the process or how detailed the review, it will surely be challenged, thereby effectively assuring that subsequent NEPA reviews are even longer and more detailed. It is therefore unsurprising that CEQ now estimates that it takes an average of 4.5 years to complete an EIS.[14]

The Associations supported the 2020 NEPA Regulations because we believed they provided long-overdue regulatory reforms that, if dutifully implemented by agencies, could reorient the NEPA review process back to the Act's core purpose of improving agency decision making, and away from the litigation-fueled dysfunction and delay that have become the statute's hallmarks. While it is certainly not the outcome that we believe CEQ intends, the Associations are concerned that CEQ's proposal to rescind portions of the 2020 NEPA Regulations will undercut the clarity and consistency of agencies' NEPA review procedures, and frustrate the federal government's ability to implement NEPA "to reduce paperwork, to reduce delays, and at the same time to produce better decisions which further the national policy to protect and enhance the quality of the human environment."[15]

Therefore, in furtherance of our shared interest in well-functioning NEPA review processes that facilitate "fully informed and well-considered" agency decisions, the Associations respectfully urge CEQ to refrain from finalizing the Phase I Proposal. If CEQ decides to proceed with this rulemaking, the Associations urge CEQ to consider retaining key elements of the 2020 NEPA Regulations or otherwise take steps to attend to many of the same concerns that the 2020 reforms were intended to address.

A well-functioning and informed NEPA process is essential regardless of administration or the policy goals being pursued. For example, the Phase I Proposal was published in the midst of a changing energy market in which the U.S. had become a net exporter of natural gas,[16] the resilience of the country's electric grid remains a significant policy concern,[17] and the importance of natural gas in bolstering the reliability of the electric grid is increasingly well-recognized.[18] These energy infrastructure needs have taken on renewed urgency in light of recent extreme weather events and

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[14] Council on Environmental Quality, Environmental Impact Statement Timelines (2010-2018), (June 12, 2020).
[15] 43 Fed. Reg. at 55,983.
[16] *See* https://www.eia.gov/todayinenergy/detail.php?id=42176; *See also* https://www.eia.gov/outlooks/steo/.
[17] *See, e.g., Technical Conference to Discuss Climate Change, Extreme Weather, & Electric System Reliability*, FERC (last updated Apr. 22, 2021), https://ferc.gov/news-events/events/technical-conference-discuss-climate-changeextreme-weather-electric-system.
[18] *1999 Certificate Policy Statement* at 25.

FERC's continued examination of the reliability and resilience of the bulk power system.[19] Further, the U.S. Energy Information Administration's 2021 Annual Report demonstrates that 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 resources.[20]

The U.S. also remains poised to serve the growing global need for natural gas and to provide important optionality in the market through U.S. liquid natural gas ("LNG") exports.[21] Since 2018, four U.S. LNG export facilities in the lower 48 states have entered service, bringing the total number currently in operation to six, and several more are under construction or proposed and approved. NEPA reform is critical to these new LNG export projects because they will very likely require additional interstate pipeline facilities, whether compressor stations or new laterals, to transport sufficient quantities of natural gas to their facilities. Without regulations to promote robust and functional NEPA review processes, important energy infrastructure projects such as these are unlikely to be constructed according to timeframes that reflect the urgency with which they are needed.[22]

A well-functioning and fully informed NEPA review process is similarly essential to the Infrastructure Investment and Jobs Act ("IIJA") that President Biden signed into law on November 15, 2021.[23]

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[19] *See supra* note 7.

[20] U.S. Energy Info. Admin., *Annual Energy Outlook 2021 with projections to 2050* at 7 (Feb. 2021).

[21] As the economic response to the pandemic has stabilized, so has global demand for natural gas. *See, e.g*., Jeremiah Shelor, EIA's *Natural Gas Price Forecast Ticks Up to $3.05 on Exports, U.S. Demand*, Nat. Gas Intel. (May 11, 2021), https://www.naturalgasintel.com/eias-natural-gas-price-forecast-ticks-up-to-3-05-on-exports-u-s-demand/.

[22] While this paragraph is necessarily focused on natural gas, robust and efficient NEPA reviews are similarly important for crude oil production projects as well as interstate oil pipeline construction. These types of projects are particularly important right now given the current energy price volatility.

[23] *See* https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/11/15/remarks-by-president-biden-at-signing-of-h-r-3684-the-infrastructure-investment-and-jobs-act/.

This major component of President Biden's "Build Back Better" domestic infrastructure agenda contains approximately $550 billion in new infrastructure spending, over current spending levels, for a total of $1.2 trillion over the next five years. According to the White House, the IIJA will:

> rebuild America's roads, bridges and rails, expand access to clean drinking water, ensure every American has access to high-speed internet, tackle the climate crisis, advance environmental justice, and invest in communities that have too often been left behind. The legislation will help ease inflationary pressures and strengthen supply chains by making long overdue improvements for our nation's ports, airports, rail, and roads.[24]

Even a cursory review of the specific funding provisions of the IIJA reveal the significant extent to which these proposed infrastructure improvements will necessitate a well-functioning and efficient NEPA review processes:

- "$110 billion in additional funding to repair our roads and bridges and support major, transformational projects;"

- "$89.9 billion in guaranteed funding for public transit over the next five years — the largest Federal investment in public transit in history;"

- "$17 billion in port infrastructure and waterways and $25 billion [for] airports;"

- "$66 billion in additional rail funding to eliminate the Amtrak maintenance backlog, modernize the Northeast Corridor, and bring world-class rail service to areas outside the northeast and mid-Atlantic;"

- "$65 billion [representing] the largest investment in clean energy transmission and grid in American history; and,"

- "$50 billion [representing] the largest investment in the resilience of physical and natural systems in American history."[25]

The IIJA is not only historic in its scale, it is unprecedented in the level of funding specifically devoted to environmentally beneficial projects, clean energy programs, climate change mitigation

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[24] *See* https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/.

[25] All of the forgoing quotes are from https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/.

and resilience projects, and water infrastructure. In addition to the environmentally beneficial projects described above, the infrastructure program includes funding to facilitate the buildout of CCUS infrastructure, including $100 million to expand the U.S. Department of Energy's ("DOE's") Carbon Capture Technology program to include front-end engineering and design for carbon dioxide transportation infrastructure and $2.1 billion for the establishment of a new CO_2 Infrastructure Finance and Innovation Act ("CIFIA") program to provide low-interest loans for carbon dioxide transport infrastructure projects. Another $2.5 billion would help expand DOE's Carbon Storage Validation and Testing program to include large-scale commercialization of carbon sequestration and transport projects. And $3.5 billion is authorized for regional direct air capture projects. The bill also authorizes DOI to permit geologic carbon sequestration on the outer Continental Shelf.

Hydrogen is also a major focus of the funding program, with $8 billion authorized for the establishment of clean hydrogen programs at DOE, as well as $500 million for a clean hydrogen manufacturing and recycling program. Another $1 billion would fund a demonstration, commercialization and deployment program intended to decrease the cost of clean hydrogen production from electrolyzers.

This unprecedented level of infrastructure investment will precipitate NEPA reviews on a scale never before encountered by federal agencies. Most of the IIJA's spending provisions are the largest financial commitments the federal government has ever made, and while funding provisions (like passenger rail) may have been the subject of larger investments in the past, those prior programs preceded the enactment of NEPA and the concomitant requirement that agencies review the potential impacts of their decisions.

It is not clear how federal agencies can effectively manage the number of NEPA reviews necessary to bring the anticipated infrastructure investment into being, but it is quite clear that CEQ will need to provide agencies' some means of ensuring their reviews become more efficient and focused. Indeed, Congress, in passing the IIJA, and President Biden, in signing it into law, both recognized the need for NEPA reform. Section 139 of the IIJA allows surface transportation projects to be reviewed under significantly streamlined NEPA review procedures. Although the IIJA's Section 139 provisions are obviously limited in scope, they clearly illustrate that, absent meaningful NEPA reforms, agency NEPA reviews will present a formidable barrier to the infrastructure improvements described in the IIJA.

Moreover, the IIJA was enacted not only to update and improve America's aging physical infrastructure, but to stimulate economic activity and help our nation recover from the COVID-19 pandemic. As such, the multi-year agency reviews that have become the unfortunate hallmark of NEPA would entirely preclude realization of this critical rationale for enacting the IIJA. Regardless of the unprecedented scale of the IIJA's funding commitments, it will not stimulate the

economy or help America recover from the pandemic if the agency reviews necessary to access that investment take an average of 4.5 years to complete.[26]

Much of the IIJA's unprecedented funding for environmentally beneficial projects is at similar risk of being withheld while project approvals languish in multi-year agency reviews. Indeed, the IIJA critical environmental projects reveal the unfortunate paradox that will be brought about without reasonable measures to rein in and refocus agencies' unnecessarily protracted NEPA reviews. These projects also illustrate the extent to which agencies' fealty to their own non-statutory procedures has become detached from NEPA's purpose. Environmentally beneficial or not, IIJA projects will need to undergo NEPA reviews, and many are at risk of being sidelined by protracted agency reviews of unrealistic alternatives and effects that will not reasonably inform agency decision making.

As such, while the Associations share and support CEQ's goal to ensure robust and fully informed NEPA review processes, we urge CEQ to recognize that the 2020 NEPA Regulations contained many reasonable limits on the scope of agency reviews that are fully consistent with that goal. And without the 2020 NEPA Regulations' procedural reforms or a similar effort to address widely recognized NEPA implementation problems, the administration's infrastructure achievements are likely to be mired in unnecessarily protracted agency reviews that could delay their approval for multiple years.

III. COMMENTS IN RESPONSE TO THE PHASE I PROPOSAL'S THREE PROPOSED REVISIONS

CEQ is proposing three revisions to the 2020 NEPA Regulations in its Phase 1 Proposal: (1) the elimination of language clarifying the scope of the agencies' "purpose and need" statements as well as the scope of their analyses of "reasonable alternatives;" (2) the removal of the agencies' requirements to implement the procedural reforms and clarifications consistent with the 2020 NEPA Regulations; and, (3) the reintroduction of non-statutory definitions of types of "effects."[27] The Associations' comments in response to each of these proposed changes follow in the subsections below.

[26] Council on Environmental Quality, Environmental Impact Statement Timelines (2010-2018), (June 12, 2020).
[27] 86 Fed. Reg. at 55,759.

a. Purpose and need

The 1978 NEPA Regulations required that every EIS "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."[28] This purpose and need statement is central to agency decision making under NEPA because it "dictates the range of reasonable alternatives" that an agency must consider within the EIS.[29]

Notwithstanding that "NEPA requires only consideration of *reasonable* alternatives,"[30] 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 and more informed agency decision making.[31] As relevant here, 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 squanders agency and project proponents' resources, prolongs reviews, and most importantly, does not result in improved agency decision making. 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.

The 2020 NEPA Regulations attempted to rein in these unwarranted analyses of implausible alternatives and the unnecessary paperwork and delay that they generate by revising the purpose and need requirements in Section 1502.13 and proposing a new definition of "reasonable alternatives." Specifically, in order to align CEQ's implementing regulations with Supreme Court precedent,[32] the 2020 NEPA Regulations amended Section 1502.13 to require that an agency's purpose and need statement be based on goals of the applicant and the scope of the agency's authority when the agency is reviewing an application for authorization.[33] And in defining "reasonable alternatives" for the first time in CEQ's regulations, the 2020 NEPA Regulations

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[28] *See* 40 C.F.R. § 1502.13.
[29] *San Juan Citizens All. v. Norton*, 586 F.Supp.2d 1270, 1283 (D.N.M. 2008).
[30] *Beyond Nuclear v. U.S. Nuclear Regulatory Comm'n*, 704 F.3d 12, 19 (1st Cir. 2013) (emphasis added) (*citing Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972)).
[31] *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768-69 (2004).
[32] *See Dep't of Trans. v. Public Citizen*, 541 U.S. 752 (2004).
[33] 85 Fed. Reg. at 43,329.

explained that, when an agency is reviewing an application for approval, "reasonable alternatives" are those that "meet the goals of the applicant."[34]

CEQ now proposes to remove these provisions, even though the provisions do not unduly constrain agency discretion and are consistent with applicable case law.[35] In the subsections below, the Associations explain why these concerns are misplaced and why the revisions in the 2020 NEPA Regulations advance NEPA's purpose of better informing agency decision making.

1. Goals of the applicant

CEQ asserts that it is proposing to delete the 2020 NEPA Regulations' references to the "goals of the applicant" in Section 1502.13 and the definition of "reasonable alternatives" from Section 1502.13, which the 2020 NEPA Regulations reference to the goals of the applicant in order to preserve agencies' "discretion to base the purpose and need for their actions on a variety of factors, which include the goals of the applicant, but not to the exclusion of other factors."[36] But the text CEQ proposes to delete does not limit agency discretion in the manner CEQ suggests. To the contrary, it is practical, consistent with NEPA, and fully supported by applicable case law.

When conducting reviews, NEPA requires agencies to consider only "*reasonable* alternatives" to proposed actions.[37] "'[T]he concept of alternatives must be bounded by some notion of feasibility,' which includes alternatives that are 'technically and economically practical or feasible.'"[38] In other words, agencies need only consider alternatives that will "bring about the ends" of the proposed action.[39] And when the project sponsor is not the agency itself, but rather an applicant for an agency authorization, the desired "ends" must fall within the bounds of the applicant's proposed action.

Indeed, in the agency authorization context, absent the applicant's proposal, there would be no activity or project, and no agency action requiring NEPA review. Moreover, there is no point in evaluating alternatives that are so inconsistent with an applicant's goals that they have no reasonable prospect of being implemented. An agency's consideration of such an alternative, therefore, serves only to prolong reviews and drain agency and applicant resources. These types

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[34] 40 C.F.R. § 1508.1(z).
[35] 86 Fed. Reg. at 55,761.
[36] 86 Fed. Reg. at 55,760.
[37] *Beyond Nuclear v. U.S. Nuclear Regulatory Comm'n*, 704 F.3d 12, 19 (1st Cir. 2013) (emphasis added) (citing *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972)).
[38] *Beyond Nuclear*, 704 F.3d at 19 (*quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978), and *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 69 (D.C. Cir. 2011)).
[39] *Beyond Nuclear*, 704 F.3d at 19 (*quoting City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994)).

of analyses do not improve agency decision making or meaningfully inform the public, and thus are plainly at odds with the goals of NEPA. As such, the 2020 NEPA Regulations' directive that agencies refrain from conducting unnecessary analyses by considering the goals of the applicant is entirely logical and fully consistent with the Act.

Further, the 2020 NEPA Regulations' references to the goals of the applicant do not elevate those goals above all other considerations. Agencies must still weigh Congress's intent, as expressed through the jurisdiction conferred by their governing statutes. The 2020 NEPA Regulations did not, and in fact, could not alter these statutory mandates.

Basing alternatives on the goals of the applicant does nothing more than allow agencies to efficiently winnow the universe of potential alternatives to those that should reasonably be considered. Agencies must still analyze the potential impacts of this narrower range of reasonable alternatives, and, in fact, the elimination of unrealistic alternatives allows agencies to devote more resources to analyzing alternatives that could realistically be implemented. As the Supreme Court observed in *Metropolitan Edison Co. v. People Against Nuclear Energy*, "[t]he scope of [an] agency's inquiries must remain manageable if NEPA's goal of '[insuring] a fully informed and well-considered decision' . . . is to be accomplished."[40]

The 2020 NEPA Regulations' requirement that agencies consider alternatives that the applicant is capable of implementing does not foreclose consideration of potential environmental impacts or the public interest. It does not impede an agency's ability to review and verify the project purpose asserted by the applicant or relieve an agency of the obligation to consider information submitted by the public. Most importantly, basing alternatives on the needs of the applicant does not unreasonably narrow the range of alternatives that an agency must consider. Agencies are still required to consider other reasonable alternatives that align with the goals of the applicant, and agencies always remain obligated to consider and identify "no action" as the preferred alternative.

For these reasons and others, courts have already instructed that "consideration of alternatives may accord substantial weight to the preferences of the applicant."[41] As such, the 2020 NEPA Regulations' did not break new ground by requiring that agencies base purpose and need statements, and therefore the consideration of alternatives, on the goals of applicants. Rather, by codifying this approach in CEQ's regulations, it aligned those regulations with relevant Supreme Court jurisprudence and equipped agencies with an additional means of defending themselves

[40] 460 U.S. 766, 776 (1983) (*quoting Vt. Yankee*, 435 U.S. at 558).

[41] *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991)(finding the agency appropriately considered applicant goals and statutory mandate); *See also Beyond Nuclear*, 704 F.3d at 19 (*quoting City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994)); *See also Webster v. United States Dep't of Agriculture*, 685 F.3d 411, 423 (4th Cir. 2012) ("In deciding on the purposes and needs for a project, it is entirely appropriate for an agency to consider the applicant's needs and goals.").

against litigants demanding consideration of a seemingly unlimited number of alternatives regardless of how unreasonable or speculative. Rescinding this approach would lead to needlessly protracted review processes that drain agency and applicant resources without contributing to better informed decision making. The 2020 NEPA Regulations codified a lawful, practical, and judicially supported approach that can improve agency decision making, conserve agency resources, reduce delays, and help protect against meritless litigation. The Associations therefore urge CEQ to retain these provisions.

2. Jurisdiction of the agency

In addition to the requirement that agencies base purpose and need statements, and therefore the consideration of alternatives, on the goals of the applicant, the 2020 NEPA Regulations directed that purpose and need statements as well as alternatives be based on agencies' jurisdiction. Similar to the needs of the applicant, this logical approach is in accord with NEPA and supported by applicable case law.

It is self-evident that the purpose of an agency action must be within the scope of the statutory authority conferred by Congress. And it is equally apparent that alternatives outside the jurisdiction and control of an agency are not "reasonable" and therefore need not be considered.[42]

Early court decisions following the enactment of NEPA seemed to construe an agency's obligation to consider alternatives as altogether eliminating any jurisdictional limits imposed by the agency's governing statute by requiring, for example, that an agency consider an alternative that eliminated offshore oil and gas leasing, which is compelled by federal law.[43] Subsequent decisions by the Supreme Court and other courts, however, have since reaffirmed the common-sense view that reviewing agencies need only consider those alternatives they are statutorily able to pursue.[44] It is now widely recognized that NEPA does not expand an agency's substantive authority and that

[42] *See Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996) ("An agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives.") (Citations omitted).
[43] *Def. Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).
[44] *See e.g., Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978); *See also Dep't of Trans. v. Public Citizen*, 541 U.S. 752 (2004).

consideration of alternatives that an agency has no power to act upon does not further NEPA's goals.[45]

The Phase I Proposal suggests that CEQ continues to agree that the purpose and need statement, and therefore an agency's consideration of alternatives, is necessarily limited by the agency's jurisdiction.[46] CEQ nonetheless proposes to delete the 2020 NEPA Regulations' reference to agencies' statutory authority based on a belief that the self-evidence of this limitation renders the 2020 revision "unnecessary."[47] The Associations respectfully disagree that the existence of case law makes it unnecessary for CEQ to provide a regulatory clarification on the manner in which an agency's jurisdiction limits the scope of alternatives it can consider. Regardless of whether the case law is exceedingly well-established or commonly understood, codification of these jurisdictional limits remains important to ensure that all agencies are guided by the same legally sound interpretation of the applicable jurisprudence. As such, codifying these clarifications not only helps improve the legal defensibility of agencies' consideration of alternatives, it allows for more consistent consideration of alternatives across agencies.[48]

CEQ also maintains that the 2020 NEPA Regulations' singular reference to this jurisdictional limitation, in conjunction with the above-referenced "goals of the applicant" condition, may lead to an erroneous conclusion that an agency's jurisdiction limits its consideration of alternatives only in the context of applications for authorization.[49] In this respect, the Associations agree the current text could benefit from additional clarification. We do not agree, however, that deleting the reference to agency jurisdiction will supply the desired clarity. Rather, consistent with statements in the preamble to the Phase I Proposal, the Associations believe that CEQ must be explicit within its implementing regulations that an agency's jurisdiction limits the scope of the purpose and need statement and the consideration of alternatives in all instances.

While the Associations concur with CEQ's view that this jurisdictional limit is well-established, we are concerned that removal of the reference will itself create the implication that agencies' discretion to consider alternatives may not be limited by their statutory authority. Indeed, regardless of how well-established this limitation is, agencies continue to be besieged by demands for consideration of alternatives far outside of their statutory authority. In promulgating the 2020

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[45] *See e.g., Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996)
[46] *See* 86 Fed. Reg. at 55,760.
[47] 86 Fed. Reg. at 55,760.
[48] Codification is also practical and efficient. Rather than leaving each agency to compile the statutory, regulatory, and judicial guidelines applicable to NEPA reviews, as the entity charged with overseeing the federal government's implementation of NEPA, CEQ should ensure to the greatest extent practicable that its regulations provide a comprehensive and centralized clearinghouse of requirements and processes that are generally applicable to each agencies' implementation of NEPA.
[49] 86 Fed. Reg. at 55,760.

NEPA Regulations, CEQ itself fielded numerous comments calling for near-limitless consideration of alternatives. As such, while the Associations can understand the need for further clarifying the scope of these provisions, the 2020 NEPA Regulations' clarification of agencies' jurisdictional limitations should not be removed.

b. Agency NEPA procedures

The second revision outlined in the Phase I Proposal is CEQ's plan to amend the Part 1507 provisions that direct and facilitate individual federal agencies' implementation of CEQ's NEPA regulations. While intragovernmental procedures for regulatory implementation would seem to serve only an innocuous ministerial function, they are in fact immensely important. As relevant here, the procedures outlined in Part 1507 are the essential means by which the NEPA regulations promulgated by CEQ are implemented by the agencies. Absent some directive that agencies must implement CEQ's rules and procedures, any changes promulgated by CEQ could be devoid of any real effect. Thus, as detailed below, while CEQ characterizes its proposed revision of Section 1507.3 as just one "discrete" change in a multi-phase approach to revising the 2020 NEPA Regulations,[50] the Associations are concerned that these proposed Part 1507 changes may be misconstrued to provide agencies impermissibly broad authority to decline to implement the 2020 NEPA Regulations.

The Phase 1 Proposal suggests that rescinding compulsory language in Part 1507 is necessary to reestablish the flexibility and discretion afforded agencies prior to the 2020 NEPA Regulations,[51] but the 1978 NEPA Regulations themselves mandated that "Agency procedures shall comply with these regulations . . ."[52] While the 1978 NEPA Regulations allowed agencies some flexibility to tailor their procedures to accommodate their governing statutes and agency-specific programs,[53] so too did the 2020 NEPA Regulations.[54]

As such, the 1978 NEPA Regulations and the 2020 NEPA Regulations both contain provisions that were intended to balance agency needs for flexibility in implementation with project proponents' and other stakeholders' reasonable expectations for some level of consistency in implementation of NEPA. Rather than proposing revisions to recalibrate that balancing, CEQ's

[50] *See* 86 Fed. Reg. at 55,759.
[51] *See* 86 Fed. Reg. at 55,761.
[52] 40 C.F.R. § 1507.3(b) (1978).
[53] 40 C.F.R. § 1507.1 (1978).
[54] *See* 85 Fed. Reg. at 43,340; 40 C.F.R. § 1507.3 (1978).

proposed Part 1507 revisions seem to broadly discard agency compliance requirements and instead instruct agencies to implement regulations that CEQ will review under standards that have not yet been defined.

1. CEQ's proposed Part 1507 provisions do not revert to, and are inconsistent with, the 1978 NEPA Regulations

The Phase 1 Proposal suggests that CEQ's proposed Part 1507 revisions would remove text added by the 2020 NEPA Regulations and therefore "revert to language in the 1978 Regulations".[55] However, the proposed Part 1507 would rescind key provisions of the 1978 NEPA Regulations as well.

For instance, in Section 1507.3(b), CEQ proposes to remove language from the 2020 NEPA Regulations that required agencies to refrain from adopting procedures inconsistent with CEQ's regulations unless they are required by law or intended to increase efficiency.[56] In lieu of this directive, CEQ proposes that Section 1507.3(b) require that "each agency shall develop or revise, as necessary, proposed revisions to implement the regulations in this subchapter."[57] While this proposed revision would, in fact, remove language promulgated in the 2020 NEPA Regulations, it would also remove similar language found in the 1978 NEPA Regulations.

Similar to the 2020 NEPA Regulations, the 1978 NEPA Regulations directed that:

> Agency procedures shall comply with the regulations except where compliance would be inconsistent with statutory requirements . . .[58]

The proposal would effectively delete this mandatory directive in the 1978 NEPA Regulations. Further, the Phase I Proposal does not "revert to" the 1978 NEPA Regulations' requirement that agencies comply with CEQ's regulatory time limits unless different time periods are "necessary to comply with other specific statutory requirements."[59]

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[55] 86 Fed. Reg. at 55,760.
[56] *See* 86 Fed. Reg. at 55,761.
[57] *See* proposed text of 40 C.F.R. § 1507.3(b) in 86 Fed. Reg. at 55,768.
[58] 40 C.F.R. § 1507.3(b) (1978).
[59] 40 C.F.R. § 1507.3(c) (1978).

Each of these provisions of the 1978 NEPA Regulations mandate agency compliance with CEQ-promulgated procedures similar to the procedural "ceiling" described in the Phase I Proposal. And each of these mandates provided a modest level of consistency across the scores of federal agencies that conduct NEPA reviews. To be sure, the 2020 NEPA Regulations contained additional provisions to improve the efficiency and consistency of NEPA reviews across federal agencies, but those 2020 NEPA Regulations built upon similar provisions in the 1978 NEPA Regulations that would also be eliminated by the Phase I Proposal.

With the removal of these provisions, the only implementation requirement that would remain in Part 1507 would be the broad admonition that "each agency . . . develop or revise proposed procedures to implement the regulations of this subchapter."[60] The Associations are concerned that this vague admonition will be insufficient to promote CEQ's longstanding goal of improving efficiency and consistency within the NEPA review process. We therefore respectfully urge CEQ to consider retaining or adding additional language compelling agencies to adopt NEPA procedures that are in accord with CEQ's requirements and broadly consistent across the federal government.

2. CEQ's proposed Part 1507 provisions are not necessary

CEQ describes the proposed Part 1507 provisions as necessary to allow agencies "to tailor their procedures to meet their unique statutory mandates and include additional procedures or requirements beyond those outlined in CEQ's NEPA regulations."[61] However, the 2020 NEPA Regulations and the preceding 1978 NEPA Regulations already allow agencies to vary their procedures when "otherwise required by law."[62] As such, to the extent CEQ's proposed Part 1507 revisions provide agencies any additional flexibility, it will be to impose procedures and requirements beyond what is required by the agencies' governing statutes.

While it is entirely reasonable for the 2020 NEPA Regulations to prohibit agencies from imposing procedures and requirements beyond what agencies may impose pursuant to their own governing statutes, the 2020 NEPA Regulations are not as inflexible as the Phase I Proposal suggests. To the contrary, the 2020 NEPA Regulations provided agencies "the flexibility to address the requirements of the CEQ regulations as they relate to their programs and need not state them

[60] *See* proposed text of 40 C.F.R. § 1507.3(b) in 86 Fed. Reg. at 55,768.
[61] 86 Fed. Reg. at 55,761.
[62] 40 C.F.R. § 1507.3(b).

verbatim in their procedures."[63] Indeed, the 2020 NEPA Regulations contain numerous provisions that allow agencies to align their NEPA procedures with other statutorily mandated reviews, analyses, and information needs.[64]

Given the flexibility that the 2020 NEPA Regulations and the preceding 1978 NEPA Regulations already confer to agencies in tailoring their NEPA procedures, the Associations are concerned that CEQ's proposed Part 1507 revisions can be misconstrued to provide agencies impermissibly broad authority to decline to implement the 2020 NEPA Regulations. While the Associations do not believe that CEQ intends agencies to regard its proposed Part 1507 revisions as an invitation to wholly disregard their obligation to implement the 2020 NEPA Regulations, we urge CEQ to expressly instruct that agencies must narrowly construe their flexibility under CEQ's proposed Part 1507 revisions to prevent those revisions from being challenged as broadly preventing the 2020 NEPA Regulations from taking effect without observing of additional rulemaking procedures.

Accordingly, if CEQ proceeds with finalizing its proposed Part 1507 revisions, the Associations believe that CEQ must provide agencies clear guidelines on the scope of their authority "to tailor their procedures," and include safeguards to prevent agencies from using CEQ's planned Part 1507 revisions in a manner that would render any aspect of the 2020 NEPA Regulations altogether voluntary based simply on agency preference. This manner of regulatory revision is plainly impermissible.

Duly promulgated rules can only be amended through observance of notice and comment rulemaking procedures, and not by simply deleting the requirement that those rules be implemented. The same Administrative Procedure Act ("APA") procedures that CEQ utilized to promulgate the 2020 NEPA Regulations apply equally to any effort to rescind those regulations. Indeed, the case law is clear that an agency "may not employ delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits."[65]

As such, in order to avoid even the implication that CEQ's planned Part 1507 revisions would allow a wholesale invalidation of existing regulations in a manner akin to a rule change, the

[63] 85 Fed. Reg. at 43,341.
[64] *See, e.g.*, 85 Fed. Reg. at 43,341-43,342.
[65] *Air All. Houston v. EPA*, 906 F.3d 1049, 1065 (D.C. Cir. 2018).

Associations urge CEQ to consider withdrawing this aspect of the Phase I Proposal. If CEQ decides to retain its proposed Part 1507 revisions, the Associations recommend that, at minimum, CEQ provide clear and conspicuous guidelines sufficient to safeguard against an impermissibly broad invalidation of duly promulgated regulations.

c. Definition of "Effects" or "Impacts" [66]

The third and final revision outlined in the Phase I Proposal would rescind the 2020 NEPA Regulations' approach to defining "effects."[67] The relevance of this proposed change stems from NEPA's requirement that for major federal actions, agencies prepare a detailed statement of, among other things, the "environmental impact of their proposed action" and "adverse environmental effects" that cannot be avoided.[68] Similar to NEPA's requirement to consider alternatives, the requirement that agencies analyze effects can result in an unwieldy, protracted, and ultimately unnecessary process if agencies misconstrue their obligation to examine effects as an invitation to theorize and speculate about potential outcomes that bear little relation to the proposed action.

The NEPA review for the Ambler Road Project provides one example of how agency analysis of speculative impacts can frustrate NEPA's goals.[69] The proposed Ambler Road is a 211-mile industrial road that would provide year-round access to the Ambler Mining District in northwest Alaska, an area believed to have high resource potential, but which has been underexplored due to its remote location. This part of Alaska is rural and contains very limited infrastructure – communities are not connected by roads and may be accessible only by boat or plane, depending on the time of year. Residents often do not have the luxury of running water; and one in every four Northwest Arctic Borough residents lives below the poverty line.[70]

In February 2017, BLM Alaska began what would be a three-year process for producing an EIS for the Ambler Road Project. This protracted review timeframe was because the agency did not constrain itself to analyzing the effects of the proposed Ambler Road itself. Instead, BLM also analyzed potential impacts from four *hypothetical* hard rock mines based on the agency's speculation that the road would allow for the eventual operation of these mines. To be clear, these nonexistent mines were not part of the Ambler Road Project, not part of any concurrent plan, and not the subject of any permitting process. Nonetheless, BLM's EIS plotted the mines' precise (hypothetical) locations on maps and diagrams and speculated in incredible detail about the siting

[66] Consistent with the 2020 NEPA Regulations, we ascribe the same meaning to the terms "effects" and "impacts."
[67] 86 Fed. Reg. at 55,762.
[68] 42 U.S.C. § 4332(2)(C)(i)-(ii).
[69] *See* https://eplanning.blm.gov/public_projects/nepa/57323/20003914/250004586/FINAL_2019-09-05_Ambler_BLM_FAQs-508.pdf.
[70] *See* https://www.census.gov/quickfacts/fact/table/northwestarcticboroughalaska,US/PST045219.

of mine infrastructure and processing plants, as well as the exact location and extent of excavation areas, tailing piles, waste rock dumps, catchment ponds, processing plants, and access roads.

None of BLM's analysis of the four hypothetical mines was necessary for, and therefore extraneous to, the agency's decision about whether or not to allow Ambler Road to be constructed. Were a new mine to be proposed in the future, the proposal would require its own project-specific NEPA review, and importantly, that effects analysis could be based upon an actual project description. Nonetheless, in addition to being unnecessary, BLM's examination of the four hypothetical mines created significant confusion. In the comments BLM received on the Draft EIS for the Ambler Road Project, the word "road" was used 2,364 times with a nearly equal number of references to "mine" and its derivatives – 2,224 in total. As such, by misconstruing the nature and scope of the project under consideration and artificially inflating the impacts analysis, BLM failed to effectively solicit relevant and potentially important feedback from local residents and knowledgeable stakeholders, and therefore failed to adequately inform its own decision making on the important project it was tasked to consider.

The Ambler Road Project EIS provides just one example of why the Associations believe it is critical that CEQ's regulations define "effects" consistent with NEPA and with relevant court decisions interpreting the Act. We further believe that the 2020 NEPA Regulations' revisions to Section 1508.1(g) represented an important effort to provide that needed clarity and consistency.

The Associations supported the 2020 NEPA Regulations' removal of the non-statutory definitions of "direct" and "indirect" effects and "cumulative impacts," which brought CEQ's regulations in line with the Supreme Court's well-established interpretations on the extent of the requisite causal relationship between proposed actions and potential effects/impacts that must be considered.[71] The 2020 NEPA Regulations focus agency review on those effects that have a reasonably close causal relationship to the proposed action, and avoid unnecessarily devoting agency resources to assessing theorized impacts that are speculative, highly attenuated, or beyond the agency's authority to address. Requiring an agency to analyze effects that are not proximately caused by the proposed action or within its statutory authority does not improve agency decision making and is therefore inconsistent with NEPA.

[71] 86 Fed. Reg. at 55,762 – 52,766.

The Phase I Proposal does not appear to provide sufficient justification for rescinding each of the clarifications and reforms that the 2020 NEPA Regulations included in Section 1508.1(g).[72] While agencies are permitted to change policy positions, they must provide a reasoned basis for doing so.[73] New and changed policy positions are subject to the same APA standards[74] under which "a reviewing court shall . . . hold unlawful and set aside agency actions, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[75]

This standard requires agencies to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[76] Courts will invalidate agency decisions as "arbitrary and capricious" if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[77]

Therefore, although "agency action representing a policy change" need not be "justified by reasons more substantial than those required to adopt a policy in the first instance,"[78] a policy change must be accompanied by a reasoned explanation that connects the proposed change to the evidence before the agency. In light of this standard, the Associations are concerned that the Phase I Proposal lacks sufficiently reasoned support for the proposed revisions to the 2020 NEPA Regulations' approach to agency consideration of effects.

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[72] 86 Fed. Reg. at 55,762 – 52,766

[73] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

[74] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 ("The [APA] makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.").

[75] 5 U.S.C. § 706(2)(A).

[76] *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 v. United States*, 371 U.S. 156, 168, (1962)).

[77] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[78] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515.

1. The Phase I Proposal does not sufficiently explain why CEQ must restore the terms "direct" and "indirect" to the definition of "effects"

The 2020 NEPA Regulations removed the terms "direct" and "indirect" from the definition of "effects" because those terms are not found in the Act, and because they invited commitment of agency resources to unnecessary categorization of effects into the various types defined in the 1978 NEPA Regulations.[79] Categorization of the precise type of effect to be considered results in "excessive documentation about speculative effects and . . . frequent litigation . . . without serving NEPA's purpose of informed decision making."[80]

In lieu of the confusing and frequently inconsistent categorization of effects by type, and consistent with the Supreme Court's decision in *Public Citizen*, the 2020 NEPA Regulations broadly clarified that effects must be reasonably foreseeable and have a reasonably close causal relationship to the proposed action.[81] The 2020 NEPA Regulations then further clarified the bounds of the required analysis by noting that it "may include effects that are later in time or farther removed in distance," but not those potential effects that are so geographically or temporally remote that they are speculative.[82]

The Phase I Proposal provides a handful of rationales for CEQ's proposed rescission of the 2020 NEPA Regulations' Section 1508.1(g) reforms, but none sufficiently explain the need for this change. First, the Phase I Proposal suggests that restoration of the terms "direct" and "indirect" is necessary to avoid confusion that could undermine agency decision making.[83] This overlooks, however, that it was the 1978 NEPA Regulations' definition of terms not found in the statute (*e.g.*, "direct effects," "indirect effects," and "cumulative effects") that fomented decades of ambiguity, conflicting agency interpretations, and litigation. Indeed, under the 1978 NEPA Regulations, the

[79] 85 Fed. Reg. at 43,343.
[80] 85 Fed. Reg. at 43,344.
[81] 85 Fed. Reg. at 43,343.
[82] 85 Fed. Reg. at 43,343.
[83] *See* 86 Fed. Reg. at 55,764 (noting that deletion of the "cumulative impacts" definition has the potential to create confusion); *See also* 55,766 (noting that *Public Citizen's* causation limit could undermine agency informed decision making).

timelines for agency review grew to 4.5 years,[84] the average length of an EIS grew to 661 pages,[85] and NEPA became the most litigated of any environmental statute.[86]

The Phase I Proposal also includes an uncited assertion that agencies have expressed confusion on how to implement these aspects of the 2020 NEPA Regulations.[87] The fact that changes to long-standing regulations may generate questions about implementation is not surprising. The Associations respectfully submit that it would be more appropriate to address any agency confusion through CEQ guidance, rather than through a wholesale rewrite that will only lead to more uncertainty.

If CEQ decides to develop guidance for agencies, the Associations recommend that CEQ first discern whether agency confusion is primarily based on the 2020 NEPA Regulations themselves or uncertainty about whether or to what extent CEQ intends agencies to implement the 2020 NEPA Regulations. Determining the source of agency confusion is important because it does not appear that CEQ has provided agencies any implementation guidelines or assistance in implementing the various provisions of the 2020 NEPA Regulations. On the other hand, CEQ may have introduced significant uncertainty into agencies' implementation processes by delaying implementation of the 2020 NEPA Regulations,[88] and raising questions about the regulations' legality.[89]

In addition to CEQ's concerns about agency confusion, the Phase I Proposal asserts that the terms "direct" and "indirect" must be restored to ensure consistency with "case law, as courts have interpreted the NEPA statute to require agencies to analyze the reasonably foreseeable direct and indirect effects of a proposed action and alternatives."[90]

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[84] Council on Environmental Quality, Environmental Impact Statement Timelines (2010-2018), (June 12, 2020).
[85] Council on Environmental Quality, Length of Environmental Impact Statements (2013-2018), (June 12, 2020).
[86] James E. Salzman and Barton H. Thompson, Jr., *Environmental Law and Policy* 340 (5th ed. 2019) (''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.'').
[87] 86 Fed. Reg. at 55,763.
[88] *See* 86 Fed. Reg. 34,154.
[89] *See* 86 Fed. Reg. at 34,155.
[90] 86 Fed. Reg. at 55,763.

That justification, however, seems to overlook the plain text of section 1508.1(g) as revised by the 2020 NEPA Regulations, which provides for consideration of reasonably foreseeable direct *and* indirect effects:

> ***Effects* or *impacts*** means changes to the human environment from the proposed action or alternatives that are *reasonably foreseeable* and have a reasonably close causal relationship to the proposed action or alternatives, including those *effects that occur at the same time and place as the proposed action or alternatives* [*i.e.*, direct effects] *and may include effects that are later in time or farther removed in distance from the proposed action or alternatives* [*i.e.*, indirect effects].[91]

Indeed, in the Phase I Proposal, CEQ agrees that the definition of "effects" in the 2020 NEPA Regulations includes direct and indirect effects.[92] As such, CEQ's suggestion that restoration of the terms "direct" and "indirect" is necessary to conform to court decisions requiring agency analysis of "reasonably foreseeable direct and indirect effects of a proposed action and alternatives,"[93] does not provide a "reasoned explanation" for this proposed change. According to CEQ's Phase I Proposal, the 2020 NEPA Regulations comport with these decisions as well.

2. The Phase I Proposal did not provide a sufficiently reasoned explanation for proposing to restore the term "cumulative effects" to the definition of "effects"

CEQ also proposes a return to the 1978 NEPA Regulations' definition of "cumulative impacts" under the new term "cumulative effects."[94] As with the proposed restoration of the terms "direct" and "indirect" effects, the Phase I Proposal describes the proposed restoration of the term "cumulative effects" as necessary to address confusion by "federal agency NEPA practitioners both individually and in agency meetings,"[95] but that is not sufficient record support for the proposed change. As previously noted, the fact that CEQ fielded questions about the consideration of "cumulative effects" under the 2020 NEPA Regulations does not mean that those regulations are inherently confusing or unworkable. Such outreach and consultation is entirely expected with

[91] 40 C.F.R. § 1508.1(g) (emphasis added).
[92] 86 Fed. Reg. at 55,763.
[93] 86 Fed. Reg. at 55,763.
[94] 86 Fed. Reg. at 55,764.
[95] 86 Fed. Reg. at 55,764.

any rule change, especially one that had not been updated in over 40 years.

In order to more fully support the Phase I Proposal's characterization of agency confusion, the Associations encourage CEQ to provide additional information on the nature of these questions as well as CEQ's own efforts to respond to those questions or otherwise mitigate confusion. If CEQ has not yet attempted to address agency questions, or if CEQ pronouncements and delay in implementing the 2020 NEPA Regulations contributed to this alleged uncertainty, then agency confusion may not provide a "reasoned explanation" for this proposed change.

As an alternative justification, the Phase I Proposal describes the revisions to Section 1508.1(g)(3) as necessary "to ensure that agencies fully analyze reasonably foreseeable cumulative effects before Federal decisions are made."[96] But as with the other revisions described in the Phase I Proposal, CEQ's statements regarding the Section 1508.1(g) revisions appear to contradict this stated rationale.

Like its proposed restoration of the terms "direct" and "indirect," CEQ explains that the 2020 NEPA Regulations' removal of the term "cumulative impacts" "did not exclude reasonably foreseeable effects from consideration merely because they could be categorized as cumulative effects" and "did not automatically exclude from analysis effects falling within the deleted definition of 'cumulative impacts.'"[97] CEQ's continued recognition that this provision of the 2020 NEPA Regulations already addresses the need identified in its justification for proposing to rescind that same provision thus reflects that the Phase I Proposal lacked a "reasoned explanation" for this change.

Furthermore, in the preamble, CEQ references environmental justice concerns as part of the justification for the proposal to add "cumulative effects" to the definition of "effects." The Associations would like to clarify that their concerns with this expanded definition of effects does not diminish the collective recognition and value of the consideration of environmental justice in environmental reviews. The natural gas and oil industry intends to operate in a way that protects all human health – regardless of race, color, national origin or income – and the environment. Natural gas and oil companies seek to meet the demand for affordable, reliable, and cleaner energy and have a positive impact on the communities in which we operate. We strive to understand, discuss and appropriately address community concerns with our operations. We support solving problems of potential inequitable impacts on communities and facilitating the involvement of all people. We believe that environmental justice considerations can be addressed at various stages of environmental reviews and permitting throughout a project, and industry welcomes the opportunity to work with CEQ on issues of importance on this matter in future regulatory actions.

[96] 86 Fed. Reg. at 55,764.
[97] 86 Fed. Reg. at 55,764.

Our industry is working every day to be a good neighbor and have a positive impact in local communities. We are committed to supporting constructive interactions between industry, regulators, and surrounding communities/populations that may be disproportionately impacted and addressing any potential inequitable effects. However, we believe these objectives can be achieved absent the expansion of the definition of effects for environmental reviews.

3. The Phase I Proposal did not provide a sufficiently reasoned explanation for proposing to rescind the 2020 NEPA Regulations' approach to analyzing effects

In addition to the Phase I Proposal's reinstatement of the various regulatory categories of effects, CEQ proposes to rescind text promulgated as part of the 2020 NEPA Regulations that clarifies the relationship between proposed actions and potential effects. These changes were intended to improve agency decision making by placing reasonable boundaries on agencies' analyses, thereby allowing them to avoid wasting resources examining effects that are highly attenuated or purely speculative. Indeed, if allowed to be implemented, the 2020 NEPA reforms could help streamline the review process, reduce demand on staff resources, and enable a more meaningful and focused review of a proposed action. The 2020 NEPA Regulations' reforms are fully consistent with NEPA, and in some cases taken directly from relevant Supreme Court opinions interpreting agencies' obligations under NEPA.

As with the other proposed rescissions, the Phase I Proposal appears to lack a "reasoned explanation" for eliminating clarifications widely regarded as necessary or for declining to reasonably incorporate the binding case law on which these reforms were based.

i. The Phase I Proposal lacks sufficient support for rescinding the 2020 NEPA Regulations' clarifications about foreseeability

In the Phase I Proposal, CEQ proposes to delete the 2020 NEPA Regulations' clarifying instruction that effects be "reasonably foreseeable and have a reasonably close causal relationship" to a proposed action or alternative.[98] As with other proposed rescissions, CEQ's proposed changes to Sections 1508.1(g) and (g)(2) are intended to clarify agencies' obligations under NEPA. And, as with the other proposed rescissions, the Associations are concerned that the proposed revisions are more likely to frustrate rather than enhance the clarity the Phase I Proposal purports to seek.

[98] 86 Fed. Reg. at 55,762, 55,765.

CEQ proposes to delete the 2020 NEPA Regulations' clarification that agencies need only analyze effects that are "reasonably foreseeable" as part of its proposed reinstatement of the non-statutory definitions of "direct" and "indirect" effects.[99] As such, in addition to the Associations' previously stated concern with CEQ's proposed return to artificially categorizing effects by type, we herein note our additional concern that a further consequence of this proposed revision is the removal of the crucial admonition that agencies refrain from committing resources to analyzing effects that are not reasonably foreseeable.

The Phase I Proposal suggests this concern is misplaced because agencies already know that they need not analyze effects unless they are reasonably foreseeable.[100] According to the Phase I Proposal, NEPA's requirement that agencies analyze effects if they are "reasonably foreseeable" has already been well established by a long line of court decisions going back to the years immediately following the enactment of the Act.[101] While the Associations agree that this limitation on the scope of effects that an agency must consider is plainly evident from the uncontroverted case law, it is equally evident that agencies have continued to engage in analyses of effects that exceed the bounds of reasonable foreseeability and are frequently sued for refraining from analyzing effects that are purely speculative. The NEPA review for the Ambler Road project (described above) is one such example.

The 2020 NEPA Regulations recognized that, regardless of the case law, many agencies continued to analyze effects that were not reasonably foreseeable. And to improve compliance and consistency, the 2020 NEPA Regulations were broadly construed as an effort to centrally compile existing rules and requirements disparately located in various court decisions, regulations, agency guidelines, and other documents. The Associations view this effort to centrally compile requirements as reasonable and necessary.

Consequently, regardless of how well established, the Associations continue to believe that the concept of reasonable foreseeability should remain codified within CEQ's regulations. And more broadly, we cannot conceive how the Phase I Proposal's express and purposeful deletion of the 2020 NEPA Regulations' reference to "reasonably foreseeable" effects can be construed as a clarification that agencies need not consider effects that are not "reasonably foreseeable."

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[99] 86 Fed. Reg. at 55,765.
[100] *See* 86 Fed. Reg. at 55,762-67.
[101] 86 Fed. Reg. at 55,763.

ii. The Phase I Proposal lacks support for rescinding the 2020 NEPA Regulations' clarifications about causality

CEQ proposes to rescind the 2020 NEPA Regulations' clarification that agencies must consider the effects that share a "reasonably close causal relationship" with the proposed action.[102] Along with this proposed revision, CEQ also proposes to rescind the 2020 NEPA Regulations' related clarification that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA."[103]

The Associations believe these tandem provisions of the 2020 NEPA Regulations are necessary to focus agencies' analyses on the decisions that they are statutorily empowered to make, rather than each attenuated potential consequence of their action regardless of whether those consequences are beyond agencies' authority to consider or control. We view these provisions as essential to implementing NEPA according to the "rule of reason,"[104] and therefore do not agree that they create a "confusing new standard to apply."[105]

The "reasonably close causal relationship" requirement has been the governing law since at least 1983, when the Supreme Court, in *Metro. Edison Co.*, held that NEPA's statutory use of "environmental effect" and "environmental impact" must be "read to include a requirement of a *reasonably close causal relationship* between a change in the physical environment and the effect at issue."[106] Thereafter, the Supreme Court, in *Public Citizen*, further clarified that "a *'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA* and the relevant regulations."[107]

Indeed, the 2020 NEPA Regulations' clarification about the "reasonably close causal relationship" is copied verbatim from the Supreme Court's *Metro Edison's* holding, and its admonition that a "'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA" is copied verbatim from the Supreme Court's *Public Citizen* decision. These Supreme Court interpretations of NEPA are binding on agencies irrespective of whether they appear in the text of the regulation[108] and agencies have been applying them for decades.

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[102] 86 Fed. Reg. at 55,765 – 55,766.
[103] 86 Fed. Reg. at 55,765 – 55,766.
[104] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. at 767 ("inherent 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.").
[105] 86 Fed. Reg. at 55,766.
[106] 460 U.S. at 774 (emphasis added).
[107] 541 U.S. at 767 (emphasis added).
[108] *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

It is thus unclear how removing these clarifications from CEQ's NEPA regulations will reduce agency confusion or lead to more consistent and better-informed decisions, as CEQ claims. In fact, the Associations are concerned that by deleting any reference to the Supreme Court's interpretations in *Metro Edison* and *Public Citizen*, CEQ would create the uncertainty, ambiguity, and confusion that the Phase I Proposal purports to address.

iii. The Phase I Proposal lacks support for rescinding the 2020 NEPA Regulations' instruction that agencies need not consider remote or speculative effects

CEQ also proposes to delete the 2020 NEPA Regulations' reasonable clarification that "[e]ffects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain."[109] The Phase I Proposal provides three reasons for removing this clarification, but none of the reasons appear to be furthered by the proposed revision.[110]

First, the Phase I Proposal suggests that the 2020 NEPA Regulations' conditioned admonition that agencies "should generally not" consider such effects "creates confusion as to whether agencies can or should consider" effects that "'are remote in time, geographically remote, or the product of a lengthy causal chain.'"[111] The Phase I Proposal's suggested confusion over this tempered language stems from the decision to apply this instruction as a general presumption against speculation rather than an inflexible rule that must be applied in all circumstances. Given the scores of agencies and thousands of varied proposed actions to which this instruction would apply, we believe that CEQ reasonably crafted the 2020 NEPA Regulations to provide flexibility in its application. While the 2020 NEPA Regulations could have reduced agency confusion by imposing a more rigid limitation, such an approach would be unworkable and inconsistent with the agency flexibility CEQ intends the Phase I Proposal to provide in other respects.

Second, the Phase I Proposal claims that the 2020 NEPA Regulations' presumption against speculative impacts will potentially lead "to inconsistent application of NEPA, public confusion or controversy, and enhanced risk of litigation and concomitant delays in the NEPA process."[112]

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[109] 86 Fed. Reg. at 55,765 – 55,766.
[110] 86 Fed. Reg. at 55,766.
[111] 86 Fed. Reg. at 55,766 (citing 40 C.F.R. § 1508.1(g)(2)).
[112] 86 Fed. Reg. at 55,766.

As with CEQ's concerns about agency confusion, its concerns about inconsistent application are a consequence of the deference and flexibility afforded by the conditional language used in this portion of the 2020 NEPA Regulations. And like the Phase I Proposal's assertions about confusion, CEQ's concerns about inconsistency could be addressed by affording agencies less discretion.

Additionally, the Phase I Proposal lacks support for its suggestion that the 2020 NEPA Regulations' presumption against considering effects that "are remote in time, geographically remote, or the product of a lengthy causal chain" creates litigation risks.[113] NEPA is already the most litigated environmental statute.[114] The 1978 NEPA Regulations that most agencies are currently implementing are not effectively controlling litigation risks, and if allowed to be implemented, the 2020 NEPA Regulations' presumption against unsupported speculation should help to mitigate the risk. Moreover, the Phase I Proposal also fails to reasonably explain its conclusion that litigation risks are best addressed by removing the 2020 NEPA Regulations' presumption against speculation and returning to the regulatory approach that causes NEPA to be litigated more frequently than all other environmental laws.

Finally, the Phase I Proposal asserts that removing the 2020 NEPA Regulations' presumption against speculation is in line with statutory text directing:

> agencies to produce a detailed statement on the 'environmental impact of [a] proposed action,' 'any adverse environmental effects which cannot be avoided,' and 'the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.'[115]

Notwithstanding this assertion, nothing in this statutory provision allows, much less mandates, that an agency consider effects that are remote in time or geography or the product of a lengthy causal chain. And to the contrary, many courts have examined this same provision and concluded that

[113] 86 Fed. Reg. at 55,765 – 55,766.
[114] James E. Salzman and Barton H. Thompson, Jr., *Environmental Law and Policy* 340 (5th ed. 2019) (''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.'').
[115] 86 Fed. Reg. at 55,766 (quoting 42 U.S.C. § 4332(c)).

agencies need not "consider 'remote and speculative'" effects or alternatives.[116] As such, the Phase I Proposal's suggestion that rescission of the 2020 NEPA Regulations' presumption against speculation is necessary to align CEQ's regulations with NEPA is plainly unsupported.

iv. The Phase I Proposal lacks support for proposing to rescind the 2020 NEPA Regulations' directive to refrain from needlessly analyzing effects an agency has no ability to prevent

CEQ's final proposed change to Section 1508.1(g) would delete from the definition of "effects" the clarification that "[e]ffects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action."[117] The Phase I Proposal suggests this revision is needed "because agencies may conclude that analyzing and disclosing such effects will provide important information to decision makers and the public."[118] However, agencies may not implement NEPA in a manner that would allow for consideration of impacts outside of their statutory jurisdiction.

Congress intended NEPA to provide action-forcing mechanisms to ensure that in making decisions, agencies "will have available, and will carefully consider, detailed information concerning significant environmental impacts."[119] Thus, NEPA requires that environmental impacts be "adequately identified and evaluated" and "prohibits uninformed . . . agency action," but the underlying purpose of NEPA review is to "affect the agency's substantive decision."[120]

Consequently, in *Public Citizen*, the Supreme Court looked at the purpose Congress intended for NEPA as well as a common-sense understanding of causation to hold that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect" and thus "the agency need not consider these effects in its EA when determining whether its action is a 'major Federal

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[116] *City of Angoon v. Hodel*, 803 F.2d 1016, 1020 (9th Cir. 1986); *See also Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 580 (9th Cir. 2016); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir. 2009); *Fuel Safe Washington v. F.E.R.C.*, 389 F.3d 1313, 1323 (10th Cir. 2004); *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 295 (D.C. Cir. 1988).
[117] 86 Fed. Reg. at 55,766 (quoting 40 C.F.R. § 1508.1(g)(2)).
[118] 86 Fed. Reg. at 55,766.
[119] *Robertson v. Methow Valley*, 490 U.S. 332, 349 (1989).
[120] *Robertson v. Methow Valley*, 490 U.S. 350-351.

action.'"[121] In so holding, the Court explained that considering actions an agency has no ability to control serves "no purpose" because it undermines NEPA's "'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."[122] The Supreme Court therefore concluded that NEPA's "informational purpose" is not served when an agency devotes resources to the consideration of effects that are beyond the agency's ability to control.[123]

Several other courts have similarly looked to the underlying purpose of NEPA and reached the same commonsense conclusion – and for good reason.[124] NEPA review is triggered by an action that a federal agency proposes to undertake pursuant to an authorizing statute (*e.g.*, a federally issued permit under the Clean Water Act or a certificate issued pursuant to the Natural Gas Act). It is through these authorizing statutes that Congress delineated the bounds of agencies' decision making authority, and therefore also circumscribed the agency's discretion to take the action which triggered the NEPA review. In enacting NEPA, Congress did not intend to broadly erase all the jurisdictional limits that it carefully circumscribed for agencies through a multitude of different authorizing statutes.[125]

In *Center for Biological Diversity v. U.S. Army Corps of Engineers*, for example, the U.S. Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") held that, when the Army Corps undertakes a NEPA review for the proposed approval of a discharge permit under Section 404 of the Clean Water Act ("CWA"), it should not consider the environmental effects of the wholly separate activities that approving the permit might later make possible.[126] According to the Eleventh Circuit, "NEPA and its regulations require agencies to consider only those effects caused by the agency's action" and not the "attenuated" effects caused by later activities made possible by the agency's action.[127] "Only the effects caused by that change in the environment—here, the

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[121] *Public Citizen*, 541 U.S. at 770.
[122] *Public Citizen*, 541 U.S. at 767-68.
[123] *Public Citizen*, 541 U.S. at 769.
[124] *See Sierra Club v. Fed. Energy Regul. Comm'n*, 827 F.3d 36, 47-49 (D.C. Cir. 2016) (finding that the Federal Energy Regulatory Commission was not obligated to consider effects it "had no authority to prevent); *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196-97 (4th Cir. 2009) (finding that the Army Corps of Engineers did not have to consider effects beyond its "control and responsibility" in its NEPA analysis).
[125] *See Town of Barnstable v. Federal Aviation Administration*, 740 F.3d 681 (D.C. Cir. 2014) (FAA lacked authority to contradict approval of wind project regardless of outcome of assessment of risk to air traffic).
[126] *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288 (11th Cir. 2019).
[127] *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d at 1294.

discharge into U.S. waters—is relevant under NEPA."[128] The discharge in that case made it possible (in the but-for sense) for the land owner to operate a phosphate mine, which in turn made it possible to process ore and produce fertilizer.[129] But those later activities "[took] place far from and long after the Corps-permitted discharges."[130] Moreover, as relevant to this discussion of agency jurisdiction, the court explained that "[t]he Corps did not issue a mining permit, nor a permit to produce fertilizer" because it "has no jurisdiction to regulate or authorize any of that."[131] And because those actions were outside the agency's authority to regulate, the Eleventh Circuit concluded that they were necessarily outside the "effects" of the agency's action that NEPA required it to review.[132]

The Associations are concerned that CEQ's proposal to rescind the 2020 NEPA Regulations' exclusion of "effects that the agency has no ability to prevent" could be construed as an attempt to preserve discretion for agencies to conduct the same kind of analysis that the Supreme Court and multiple other courts have viewed as undermining NEPA's core focus on "improving agency decision-making."[133]

Not only is the proposal inconsistent with legal precedent, it also makes little practical sense. For example, with reference to the Eleventh Circuit decision described above, Congress conferred to the Army Corps the authority to issue permits for the discharge of dredged or fill material to waters of the United States under Section 404 of the CWA and, in executing that duty, the Army Corps developed an expertise in CWA Section 404 permitting and the potential environmental effects of such discharges. Using a similar statutory authorization, Congress vested the EPA with authority to regulate effects from the phosphate mine and the subsequent manufacture of fertilizer, and therefore EPA similarly developed an understanding of the environmental effects of those operations.

This specialization of agency expertise concomitant with their statutory authority is the paradigm Congress intended. Congress did not direct the Army Corps to develop the expertise needed to address any air emission or waste-generation impacts of the hypothetical manufacturing of

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[128] *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d at 1294.
[129] *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d at 1294.
[130] *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d at 1294.
[131] *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d at 1294.
[132] *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d at 1294.
[133] *Public Citizen*, 541 U.S. at 769 n. 2.

fertilizer that the Army Corps' issuance of the Section 404 permit may allow to occur. Congress entrusted that jurisdictional authority and expertise and authority to EPA.

NEPA should therefore be implemented consistent with this statutory paradigm, as Congress intended. If agencies are allowed to implement NEPA without due regard for their congressionally-authorized jurisdiction or expertise, it will result in inexpert assessments of potential effects that are outside of an agency's decision making authority and inconsistent with "NEPA's core focus on improving agency decision-making."[134]

Since first promulgating its regulations in 1978, CEQ has maintained that "NEPA's purpose is not to generate paperwork."[135] But that is precisely what would be accomplished if CEQ does not take reasonable steps to meaningfully constrain agencies' discretion to inexpertly opine on effects that are beyond their statutory authority to control. The Associations therefore urge CEQ to reconsider these proposed rescissions.

IV. CONCLUSION

The Associations appreciate the opportunity to provide these comments. As noted above, the Associations have long supported programmatic NEPA reform at the CEQ and individual agency levels because we believe those 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.[136] For these same reasons, we supported and continue to support reforms in the 2020 NEPA Regulations. Again, the Associations' support is not simply based on interests in expediency, but rather our belief that the public interest will be served by implementing reforms in the 2020 NEPA Regulations to reorient NEPA review processes back to the Act's central purpose of improving agency decision making.

The Associations acknowledge that CEQ intends to broadly revisit and revise aspects of 2020 NEPA Regulations,[137] and we share CEQ's interest in implementing NEPA "to reduce paperwork, to reduce delays, and at the same time to produce better decisions which further the national policy to protect and enhance the quality of the human environment."[138] The Associations also recognize that these same interests in robust, lawful, timely, efficient, and consistent NEPA reviews inform this proposal.

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[134] *Public Citizen*, 541 U.S. at 769 n. 2.
[135] *See* 1978 NEPA Regulations at 40 C.F.R. § 1500.1(c).
[136] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council ("Vt. Yankee")*, 435 U.S. 519, 558 (1978).
[137] 85 Fed. Reg. 43,304 (July 16, 2020).
[138] 43 Fed. Reg. at 55,983.

Although we are aligned with CEQ in the goals underlying CEQ's efforts to revise portions of the 2020 NEPA Regulations, we do not share CEQ's view that the Phase I Proposal can accomplish those goals. Indeed, the Associations are concerned that the Phase I Proposal will not promote, and may in fact undermine, NEPA's central purpose of facilitating "fully informed and well-considered" decisions. While it is certainly not the outcome that CEQ intends, the Associations believe that CEQ's proposal to rescind portions of the 2020 NEPA Regulations will undercut the clarity and consistency of agencies' NEPA review procedures and frustrate provisions of the 2020 NEPA Regulations that realign and focus 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.

As such, the Associations respectfully urge CEQ to meaningfully consider that many substantive elements of the 2020 NEPA Regulations not only align with this administration's objectives, but also remain consistent with NEPA's goal of providing for "fully informed and well-considered" agency decision making. As the administration prepares to fund historic and long overdue investments in infrastructure, we further urge CEQ to recognize that many of the reforms in the 2020 NEPA Regulations will likely be necessary to bring those infrastructure investments to timely fruition. Without the 2020 NEPA Regulations' procedural reforms or a similar effort to address widely recognized NEPA implementation problems, the administration's infrastructure achievements are likely to be mired in unnecessarily protracted agency reviews that could delay their approval for multiple years.

The Associations are thus compelled to recommend that CEQ refrain from finalizing the provisions in this proposal. If CEQ nonetheless proceeds with this rulemaking, the Associations urge CEQ to consider retaining key elements of the 2020 NEPA Regulations or otherwise take steps to attend to many of the same concerns that the 2020 reforms were intended to address. Moreover, regardless of whether CEQ proceeds to finalize the Phase I Proposal or pursue NEPA reform through other regulatory efforts, the Associations ask CEQ to view these comments as reflecting our sincere interest in engaging with CEQ constructively in pursuit of regulatory reforms that will help ensure that NEPA reviews advance in a timely manner and without unduly delaying construction of our nation's most critical energy, transportation, water treatment, and communications infrastructure.

Thank you again for your consideration of these comments. If you have any questions or would like to discuss these comments, please feel free to contact Paul Hartman at 202-682-8046 or HartmanP@api.org.

Sincerely,

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