COMMENTS OF THE

CENTER FOR ENVIRONMENTAL ACCOUNTABILITY

Comments on
National Environmental Policy Act Implementing Regulations Revisions Phase 2;
Proposed Rule

88 Fed. Reg. 49,924 (July 31, 2023)
Docket No. CEQ–2023–0003

SUBMITTED SEPTEMBER 29, 2023

The Center for Environmental Accountability (CEA) submits these comments on the Council on Environmental Quality's (CEQ) proposed rule entitled *National Environmental Policy Act Implementing Regulations Revisions Phase 2*, 88 Fed. Reg. 49,924 (July 31, 2023) (the Proposal).

CEA is a 501(c)(3) organization devoted to educating the public and government on the importance of transparency and accountability in the areas of environmental and energy policy. CEA's work is driven by core principles, including a commitment to the rule of law, to a clean environment, and to a healthy human environment founded on a strong economy and vibrant communities animated by people gainfully employed in all the occupations of human flourishing. CEA understands that adherence to law requires respect for the proper roles of each branch of government and for the respective roles of the federal government and of state governments. CEA recognizes that the public interest requires a balance of environmental stewardship, resource development, and energy access and security, and that environmental remediation functions best when targeted on those communities injured by unlawful pollution.

I. Introduction

Congress enacted NEPA during the great productive period in environmental lawmaking. But unlike major authorizing statutes such as the Clean Air and Clean Water Acts, NEPA does not confer delegated regulatory authority on the executive branch. Instead, it plays a crucial but limited role: requiring agencies under certain circumstances to consider and inform the public about the environmental consequences of their proposed major actions.

NEPA was a slim statute. Its operative provision governing these agency environmental studies was short, and at its origin it was expected to enhance coordination, education, and expedition in the integration of environmental analysis into the workings of the administrative state.

Over the next half century, however, the process mushroomed. Unfortunate case law, driven by interest-group litigation that was overly zealous at best and obstructionist at worst, caused agency environmental analyses to balloon to thousands of pages, average permitting times to stretch, and needed infrastructure and other projects to languish.

At the center of this procedural hypertrophy lay the Council on Environmental Quality. Operating with a small staff in a cloistered townhouse one block from the White House, this body wrested control of environmental and energy policy from Congress. NEPA did *not* delegate regulatory authority to CEQ—but CEQ, citing Executive Orders, purported to exercise it anyway. After CEQ issued its first implementing regulations in 1978, a feedback loop developed between those regulations, expansively read by NGO commenters and litigants, the activist courts those litigants sought out, and acting agencies caught up in "analysis paralysis."

In 2020, CEQ finally pruned back the brush, streamlining its implementing regulations to ensure expeditious, orderly, rational environmental analysis. And when Congress this year substantively amended NEPA for the first time, it adopted much of this regulatory reform, locking into the statute a clear direction to CEQ and acting agencies that analysis has proper limits, in subject matter and timeline. The message was clear: it's time to get America moving again.

But key aspects of CEQ's "phase two" Proposal make a mockery of Congress's direction. While paying lip service to speed and certainty, in the same document it embraces the very theories of frequent-flyer litigants whose efforts led to the morass that the 2020 rule and 2023 statutory

amendments sought to drain. This strikes at the heart of accountability in environmental regulation: the people's representatives have spoken, but CEQ isn't listening.

The Proposal also deepens CEQ's improper assertion of control over those agencies to whom Congress has *actually* delegated rulemaking authority. Again: CEQ is not an agency, and it exercises no delegated rulemaking authority, for it was given none. It reports to the President, who directs executive branch agencies through personnel decisions and policy directions within the statutory frame established by Congress. CEQ has no right to bring acting agencies into conflict with their statutory obligations, but this Proposal will make that conflict widespread and inevitable.

The Proposal will also enable the worst tendencies of the federal judiciary. Where the 2020 regulatory reform and the 2023 statutory amendments sought to restore workable, certain, bright-line, common-sense analytical approaches, the Proposal introduces expansive, unworkable analytical requirements. NEPA's core is the consideration of environmental impacts where they are felt the most: at a project site itself and in the effects *proximately* caused by the project. The Supreme Court has held as much and has further held that there is a direct link between an agency's statutory jurisdiction and the scope of its NEPA analyses. If an agency has no power to alter its decision based on a piece of effects analysis, NEPA does not require it to conduct that analysis. The Proposal completely disregards these key high-court rulings, emboldening lower courts to do the same.

The Proposal would create an illegal double standard, under which projects the Administration favors are presumed (without a showing) to have no or net-beneficial impacts, while projects it disfavors will be dispatched to a treadmill of endless climate and other impacts analysis. It would reserve for CEQ a standardless, lawless "innovative" escape hatch, arrogating to the Council sole authority to excuse an acting agency from *any* regulatory requirements in the case of "extreme" environmental effects—which CEQ illustrates with a set of terms so broad as to encompass any situation it chooses. This will trap the Administration's disfavored projects, programs, and energy sources under the "tyranny of small decisions," while weaponizing NEPA into an unauthorized instrument to force an "energy transition."

The Proposal would also enshrine the sensitive issue of environmental justice at the heart of NEPA analysis. But the task of grappling with our nation's complex social structure and the legacy of the past was never what Congress intended CEQ or acting agencies to address under NEPA. This will not only, as with climate, expand NEPA analyses and draw agencies further and further away from their duly delegated authority; it will cynically use our nation's greatest ideals as a tool for a lawless and unsound rush to abandon generations of social and economic progress.

If finalized as proposed, this rule will distort accountability in all three branches of government. It will frustrate Congress's original design and recent reform of NEPA. It will harness duly authorized agencies to an unauthorized, transformative agenda. And it will defy the Supreme Court while fanning the flames of activist district-court litigation.

What it will *not* do is improve environmental quality—and could well harm it. Even the largest federal oil and gas lease sale has vanishingly small impact on the composition of the atmosphere. Fossil fuels are central to domestic and global economic and social well-being. In addition to amending NEPA to curtail CEQ's and others' historical tendency to improperly expand the environmental-analysis process, Congress has also recently acted to itself authorize a natural gas pipeline, in the process expressly finding that the pipeline would have a long list of benefits,

including emission reductions. The people of the United States in Congress assembled have made their position clear. CEQ should not plug its ears to these warnings.

The sluggish pace of the President's energy transition is no excuse for biasing reviews away from the true consequences of a decision. Agencies have finite resources. Their review is subject to tradeoffs between those issues truly within their control and those merely thematically connected to issues of public interest. Here, the rule of law and the rule of reason converge: CEQ must observe its and NEPA's important but limited role, and it must not finalize this Proposal in anything like its current form.

II. Summary of Comments

In contrast to the steps forward that CEQ made in its 2020 Rule to increase efficiencies and certainty in the process for complying with NEPA's, provisions the current Proposal employs a stultifying combination of increasing both the complexity of the analysis required and the uncertainty involved. CEQ's 2020 efforts incorporated decades of NEPA practice, implementation, and litigation in an impartial fashion to clarify key terms and requirements that had frequently been the subject of litigation with the result being a contribution to greater certainty and predictability in NEPA implementation.[1]

Congress Signaled Approval of the 2020 Rule by Incorporating Key Provisions into NEPA

Congress affirmed the direction of the 2020 Rule by incorporating many of its provisions directly into NEPA through the Fiscal Responsibility Act (FRA). Specifically, among other things, the FRA amendments:

- (1) narrowed the analysis of effects to those that are "reasonably foreseeable,"[2] a phrase which appeared in the definition for "effects,"[3] and which CEQ retained in the Phase 1 change of the "effects" definition;[4]
- (2) narrowed the alternatives analysis by incorporating language from the 2020 Rule's new definition of "reasonable alternative";[5]
- (3) incorporated language from § 1502.23 into new provision in NEPA found at § 102(D) and (E);
- (4) incorporated the 2020 Rule's concept of threshold considerations found in § 1501.1 by adding a new provision in NEPA §106(a);
- (5) included a new definition for "major federal action" that tracked the 2020 Rule's definition in § 1508.1(q);
- (6) created a new §109 to allow agencies to adopt the categorical exclusions of other agencies, which came from § 1506.3(d) of the 2020 Rule; and
- (7) incorporated the page limits and deadlines from the 2020 Rule into the statute with new provisions in §107(e) and (g).

[1] *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,305 (July 16, 2020).
[2] NEPA, §102(2)(C)(i)-(ii).
[3] 40 C.F.R. § 1508.1(g) (2020). *See also* 85 Fed. Reg. at 43,343-44.
[4] 40 C.F.R. § 1508.1(g) (2022).
[5] NEPA, §102(2)(C)(iii). *See also*, 40 C.F.R. § 1508.1(z) (2020), 85 Fed. Reg. 43,351.

Congress further signaled its seriousness about shortening the time to complete the NEPA process by creating a new right for project sponsors to sue when an agency fails to meet the statutory deadlines. NEPA itself contains no other specific provision allowing suit.

CEQ's Proposal Seeks To Roll Back Recent Improvements to NEPA Efficiency

In response to the significant changes Congress recently made to NEPA's text, CEQ only offers lip service to the letter of these amendments, while ignoring their spirit. While acknowledging these changes, CEQ dismisses them as nothing more than "largely codify[ing] longstanding principles," and then simply summarizes them in the preamble with a conclusion that "the rule would update the regulations to address how agencies should implement NEPA consistent with the amendments made by the FRA."[6] However, the Proposal only offers minor edits based upon the FRA amendments, and does nothing to build upon the efficiencies Congress incorporated into NEPA with the FRA amendments.[7]

Congress' approval of CEQ's approach to the 2020 Rule was unmistakable. Instead of continuing forward with that approach, the current CEQ Proposal seeks to reinstate provisions from the 1978 regulations that led to frequent litigation causing many of the inefficiencies that developed in the NEPA process, and imposes new analysis burdens for projects politically disfavored by the current Administration, while reducing those burdens for politically favored projects. This sort of thumb-on-the-scales scheme is neither appropriate, nor allowed under the statute.

CEQ's Proposal Champions the Heckler's Veto

CEQ's focus on forcing a rollback of the advances to permitting efficiency made in the 2020 Rule, and by the FRA, serves to preserve the playbook environmental litigants previously developed for delaying much-needed infrastructure projects under the old rules. But CEQ goes even further, by offering them a grab-bag of new tools that will increase litigation risks associated with NEPA compliance. Thus, rather than building upon the FRA's narrowing of NEPA analysis, CEQ's Proposal goes in the opposite direction.

By attempting to appease the current Administration's allies in the environmental community, CEQ's Proposal ignores the perils of allowing self-styled environmental groups to use NEPA litigation to dictate national energy policy. Early NEPA litigation from these groups focused on challenging nuclear power, but they then backed off of those challenges in favor of coal generation facilities. As climate change came into focus for these groups, they have shifted to opposing *all* fossil fuel development projects, especially those that rely upon coal, and now support large scale renewable generation facilities that require considerably more land use per megawatt hour of electricity generated, abandoning their founding principles of land conservation. CEQ should not place America's future at the cross-purposed and ever-changing whims of these litigants by finalizing this Proposal.

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[6] *National Environmental Policy Act Implementing Regulations Revisions Phase 2*, 88 Fed. Reg. 49,924, 49,924-25 (July 31, 2023); *see also id*. at 49,949 ("The FRA's amendments to NEPA codified the longstanding principle from the 1978 regulations and long recognized by the courts that effects must be reasonably foreseeable.").

[7] *Id*. at 49,958 (minor edits to § 1507.2 adding verbatim additions to NEPA § 102(2) from the FRA and renumbering references to NEPA)

As the first Administrator of the Environmental Protection Agency, William Ruckelshaus, once observed, good governance stops the pendulum swinging.[8] If CEQ finalizes the litigation friendly scheme it has proposed here, it will move the pendulum so far in one direction that the inevitable result will be correction by a court through litigation challenging CEQ's new rules, by a subsequent Administration through new revisions to the regulations, or by Congress through additional amendments to the statute. This will result in continued uncertainty and unpredictability surrounding the NEPA process for many years to come.

Since NEPA's passage, litigation has driven interpretation of the statute, and led to the placement of increasingly burdensome requirements on agencies that distract from their core missions. Over time, the length of NEPA documents and time it takes to complete these documents has increased exponentially past the initial estimates made shortly after its passage. Everyone from the agencies to Congress to project proponents and the public grew increasingly frustrated with delays in project permitting—the sole exception being environmental litigants intent on exercising an outsized heckler's veto to hold up projects. The 2020 Rule sought to rebalance the NEPA process by codifying case precedent and best practices from lessons learned. Congress recently affirmed the approach towards improving efficiencies taken in the 2020 Rule by incorporating many of its concepts into the statute and building in new provisions to narrow the scope of review, limiting the number of projects requiring review, and allowing project proponents the opportunity seek judicial relief when delays pass newly imposed statutory deadlines for the completion of NEPA reviews. This Proposal steps back from those improvements to the NEPA process. Instead, it reinstates provisions that allowed environmental groups to find success under the old regime, and offers them new tools for slowing the process.

CEQ Lacks Rulemaking Authority

As a threshold matter, NEPA does not provide CEQ with any rulemaking authority, much less authority to bind agencies. Instead, NEPA places the rulemaking authority in the hands of the acting agencies themselves. NEPA only establishes an advisory role for CEQ, as such its regulations amount to nothing more than non-binding guidance, and this entire effort should appropriately be framed as such.

New Substantive Requirements Would Transform NEPA from a Procedural Statute

Since President Nixon signed NEPA into law in 1970, the courts and agencies have uniformly interpreted NEPA to be a procedural statute.[9] CEQ's Proposal turns that understanding on its head by including numerous features that seek to impose substantive requirements into what has always been understood to be a procedural statute. If finalized, the Proposal will impose new, action-forcing burdens on all agencies that will inevitably lead to increased litigation risk for the nation's infrastructure and create future uncertainty for agencies, project proponents, and the public.

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[8] Ruckelshaus, W. D. (1995). Stopping the Pendulum. Environmental Toxicology and Chemistry, 15(3), 229-232.

[9] *See, e.g., Calvert Cliffs' Coordinated Committee v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971) (earliest NEPA case finding NEPA §101 does not require substantive results, but §102 does impose procedural requirements); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council*, 435 U.S. 519 (1978) (while NEPA sets forth substantive goals for the Nation, its mandate to agencies is procedural).

The Consideration of Climate-Related Impacts Is Not Required

Over the last 15 years challenges to the NEPA reviews based on climate-related impacts have exploded nearly twenty-fold compared to the prior 30-year period, and the courts have continually moved the target on agencies seeking to comply with their NEPA obligations by imposing increasingly burdensome requirements for the analysis of climate-related impacts. Last year, in response to NEPA litigation resulting in the vacatur of the Biden Administration's first offshore lease sale, Congress intervened to ensure the Department of the Interior carried out its intent to make the outer Continental Shelf "available for expeditious and orderly development" under the Outer Continental Shelf Lands Act[10] by including specific provisions in the Inflation Reduction Act. This year, through the NEPA amendments found in the Builder Act provisions of the Fiscal Responsibility Act (FRA), Congress removed any requirement that may have previously existed under NEPA for cumulative impacts analyses. This also removed any requirement for the analysis of climate-related impacts, since those impacts only rise to a level of significance when considering other actions cumulatively with any proposed agency action subject to NEPA review. In contravention of the law, the Proposal gives no weight to the substantial changes made to NEPA through the FRA amendments, and instead seeks to impose specific obligations on agencies to consider climate-related impacts.

CEQ Proposes To Transform Discretionary Programmatic Review Into a Tool To Halt Entire Resource Programs

CEQ proposes to strike one word from 40 CFR 1506.1(c): the word "required." But this seemingly minor change could have drastic consequences. Currently, this provision says that, in most circumstances, the pendency of a *required* programmatic environmental review prevents agency action falling under that review from proceeding. By removing the limiting word "required," however, CEQ would transform this provision into one that permits an agency to halt a duly authorized and implemented regulatory program by merely announcing a *discretionary* programmatic review. The experience of the federal coal-leasing program, which was halted in just this fashion by the Obama Administration, as upheld by a misguided district-court opinion, reveals the true intent of this small but weighty proposed change.

The New Environmental Justice Provisions Are Vague and Unworkable

Similarly, CEQ proposes to incorporate new environmental justice requirements into its NEPA regulations. NEPA analyses have evaluated environmental justice concerns since the mid-1990s, and agencies have developed strategies for addressing environmental justice concerns that reflect each agency's unique challenges, mandates, and responsibilities. Courts have been appropriately deferential to agencies and understood that environmental justice analyses will vary between agencies. However, a new Executive Order (EO) from the Biden Administration creates a politically charged, expansive definition of "environmental justice," and the Proposal seeks to adopt this definition wholesale in imposing vague substantive requirements into the NEPA process. CEQ's Proposal strips people in these groups of their individual value, lumping all environmental justice communities into a single group and merely assuming all their interests align. The Proposal results in an unworkable and impossible to implement approach for conducting NEPA reviews by working environmental justice principles into every major section of CEQ's regulations.

[10] 43 U.S.C. §1332(3)

New Alternatives Requirements and Mitigation Provisions Further the Unauthorized Transformation of NEPA into a Substantive Statute

In addition, despite the requirement that NEPA only requires consideration reasonable alternatives, the Proposal encourages agencies to consider alternatives not within an agency's jurisdiction. The Proposal also includes a new requirement for agencies to identify an "environmentally preferable" alternative that focuses upon climate-related effects and environmental justice concerns. In addition, new direction is provided to agencies on mitigation measures, while making such measures enforceable and imposing new monitoring requirements. The Proposal's incorporation of new requirements for alternatives analysis and mitigation raises new concerns over CEQ's attempt to transform NEPA into a substantive statute.

The New "Innovative Approaches" Provisions Create an Impermissible Dual-Track Process

Further, the Proposal illegally attempts to create for CEQ a newfound, standardless discretion to approve or disapprove "innovative approaches" to NEPA compliance. The sole function of these alternative arrangements appears to be an attempt to create a dual-track mechanism for streamlining the review process for politically favored projects renewable projects, while allowing the other changes in the regulations to impose more burdensome obligations on disfavored projects. This thumb-on-the-scales scheme should be rejected.

CEQ Cannot Impose New Limitations to the FRA's Categorical Exclusion Improvements

Where the FRA changes attempted to streamline the process by allowing agencies to adopt the categorical exclusions of other agencies, the Proposal attempts to walk back those efficiencies by imposing new burdens to consider a bevy of "extraordinary circumstances" and imposing new requirements before adopting a categorical exclusion.

CEQ Should Withdraw the Proposal and Start Fresh to Address the FRA Amendments

CEQ should withdraw the Proposal and make changes that focus on clarifying the FRA amendments, and build upon the efficiencies from the 2020 Rule before advancing any new Proposal for additional review and comments.

III. Background

By elevating the agenda of environmental litigants aligned with the current Administration in promulgating this Proposal, CEQ has abandoned a core constituency, namely the agencies that will ultimately bear the burden of implementing these changes. We understand that within days of the FRA being signed into law, CEQ dropped a draft of the Proposal on agencies, giving them only hours to provide comments back. When some agencies complained about the brief opportunity to review and comment on the Proposal, CEQ responded by only allowing a few additional days.

Aside from CEQ's sending a clear signal by taking this approach that feedback from the agencies would not play a meaningful role in shaping the Proposal, it also demonstrates how little CEQ respected the clear message *Congress* sent when it substantively changed NEPA for the first time in over half a century by incorporating and codifying many of the 2020 Rule's provisions into the statute itself. The current political leadership of CEQ further exhibited its disdain for Congress, as the representative of the people, in its refusal to participate in the oversight hearing held on September 14, 2023, where it would have certainly faced questioning over the Proposal.

A. NEPA's Origins and Legislative History

Throughout the 1950s and 1960s the American public began to express a higher level of concern about the environment, and their representatives in Congress began to respond. A key legislative option that emerged from congressional debates during this time centered upon a declaration of national policy.

The Resources and Conservation Act of 1959, introduced by Senator James E. Murray in the 86th Congress provided a model for what ultimately became NEPA. That bill contained provisions for key concepts found in NEPA today. It would have established an environmental advisory council in the office of the President, declared a national policy on the environment, and required annual reports on the environment.[11]

For the next decade, similar bills were introduced and hearings were held. In 1968, the chairmen of the Senate Committee on Interior and Insular Affairs and the House Committee on Science and Astronautics convened a colloquium to discuss ways to implement a national environmental policy.[12] The concepts and ideas from this colloquium formed the basis for the bills that became NEPA.

The bills that would become NEPA were introduced in 1969.[13] After hearings on the bills, Senator Jackson introduced amendments to the Senate bill that included a declaration of national environmental policy, and a requirement that "all agencies of the Federal Government … include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a *finding* by the responsible official that … the environmental impact of the proposed action has been studied and considered."[14] The Senate passed its version in July 1969, without debate or amendments being offered, while the House passed its version by a vote of 372 to 15 in September 1969. In conference committee the requirement for a "finding" changed to a requirement for a "detailed statement" be prepared. This "detailed statement" has now become known as an EIS, and forms a central element of NEPA compliance.

1. Amending NEPA

Until only a few months ago with the passage of the FRA, Congress had only amended NEPA to include technical amendments.[15] This is why Congress' recent willingness to amend NEPA is so profound, and indicates more future changes may be coming to NEPA unless the process for completing environmental reviews becomes more efficient.

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[11] S. Rept. 91-296, 91st Cong., 1st sess., July 9, 1969, pp. 11-12, and Lynton Caldwell, *The National Environmental Policy Act: An Agenda for the Future*, Indiana University Press, 1998, pp. 26-27.

[12] *Joint House-Senate Colloquium to Discuss a National Policy for the Environment, Hearing before the Committee on Interior and Insular Affairs, United States Senate, and the Committee on Science and Astronautics, U.S. House of Representatives*, July 17, 1968.

[13] S. 1075, introduced by Senator Jackson on February 18, 1969, and H.R. 12549, introduced on July 1, 1969.

[14] S. 1075 Amendments, referred to Senate Committee on Interior and Insular Affairs, May 29, 1969 (emphasis added).

[15] See P.L. 94-52, July 3, 1975 (regarding how CEQ may spend appropriated funds); P.L 94-83, August 9, 1975, (specifying parameters or stated to prepare an EIS); and P.L. 97-258, §4(b), September 13, 1982 (budget and accounting procedures).

2. Drivers for the FRA Amendments

The primary driver for the FRA's changes was a growing and bipartisan concern over delays in federal approvals due to NEPA's environmental review process. In short, both sides of the aisle want to see their favored projects being built faster, and see the environmental review process as an impediment towards that goal.

As CEQ noted in implementing the much needed reforms found in its 2020 Rule, Federal Highway Administration (FHWA) NEPA reviews were taking 7 years to proceed from a notice of intent (NOI) to preparation of an EIS and record of decision (ROD), "a dramatic departure from CEQ's prediction in 1981" that most EIS would take 12 months or less to complete, and that the average across the Federal Government for completion of an EIS was 4.5 years, with a quarter of EISs taking over 6 years, while a quarter took less than 2.2 years.[16] The changes in the 2020 Rule, particularly the requirement for a 2 year limit, were universally embraced by all but environmental litigants who had found success under the old regime in bringing lawsuits to exercise an outsized heckler's veto on projects they opposed for ideological reasons. In the latter instance, they fell back to their tried and true tactic of bringing lawsuits against CEQ to preserve the regime they had found success in navigating.[17]

Only one case was ultimately decided, however, as the others were stayed pending this Administration's review of the 2020 Rule. And that single case was dismissed the claims of the plaintiff environmental groups without prejudice on grounds of ripeness and standing; this decision was upheld by the U.S. Court of Appeals for the Fourth Circuit.[18] CEQ now seems intent to placate its former adversaries who sought to preserve the 1978 regulations by reinstating provisions from the 1978 regulations, as evidenced in the Phase 1 changes last year, and now the proposed Phase 2 changes to which these comments respond. As further evinced by the Proposal, CEQ even seems willing to go further by proposing to incorporate a wish-list of new provisions designed to adopt positions advanced by such groups.

B. The Evolution of NEPA's Implementation

Unlike other environmental statutes that employ a regulatory approach, NEPA provides instead a procedural framework for agencies to follow when taking "major Federal actions."[19] As originally enacted, NEPA neither provided details on how the process should be accomplished, nor vested enforcement of its provisions in any agency.

Left with no agency to enforce its requirements, and an absence of regulations to implement the statute, federal agencies initially responded in a number of different ways. Litigation emerged almost immediately as a pathway to enforce compliance with NEPA's mandates, and NEPA

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[16] 85 Fed. Reg. at 43,305.

[17] *Wild Virginia v. Council on Environmental Quality*, 544 F. Supp. 3d 620 (W.D. Va. 2021) (dismissed for lack of justiciability); *Alaska Community Action on Toxics v. Council on Environmental Quality*, No. 3:20-cv-05199-RS (N.D. Cal., stayed Feb. 12, 2021); *California v. Council on Environmental Quality*, No. 3:20-cv-06057 (N.D. Cal., stayed Feb. 12, 2021); *Environmental Justice Health Alliance v. Council on Environmental Quality*, No. 3:20-cv-06143-CM (S.D.N.Y., stayed Feb. 16, 2021); *Iowa Citizens for Community Improvement v. Council on Environmental Quality*, No. 1:20-cv-02715-TJK (D.D.C., stayed Feb 9, 2021).

[18] *Wild Virginia v. Council on Environmental Quality*, 56 F.4th 281 (4th Cir. 2022).

[19] NEPA, §102(2).

eventually became the nation's most litigated environmental statute.[20] The courts have, therefore, played a prominent role in determining how to implement NEPA.

1. NEPA Provides Procedural Mandates, Not Substantive Ones

Since NEPA originally provided no provision for judicial review,[21] plaintiffs have challenged an agency's compliance through the Administrative Procedure Act (APA).[22] In the early era of litigation, courts focused upon whether agencies complied with the procedural requirement of NEPA, instead of delineating *how* agencies were to comply.

One of the first cases interpreting NEPA, *Calvert Cliffs' Coordinated Committee v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), exemplified this early era of litigation and set the course for subsequent cases. Important legal principles established by this case include the concept that NEPA §101's substantive policy requirements "leaves room for a responsible exercise of discretion and may not require particular substantive results," and the understanding that NEPA § 102's procedural requirements "must be complied with to the fullest extent, unless there is a clear conflict of statutory authority." *Id*. The court reasoned that NEPA §102 created judicially enforceable duties that would allow reversal, even if courts could not reverse an agency's substantive decision on the merits, and set the stage for what would become an EIS in its focus on the "detailed statement" that must "accompany" a proposal.

In another early case also challenging nuclear energy, the Supreme Court held that NEPA's mandate to agencies is purely procedural.[23] Shortly after, the Supreme Court set forth the now-well-established principle that NEPA does not require agencies to elevate environmental concerns over other legitimate concerns, and the courts lack authority to shift an agency's prioritization of concerns, as long as the agency considers the environmental consequences of its decision.[24]

In 1983, the Supreme Court reiterated these principles in yet another case involving nuclear power plants that clarified the twin aims of NEPA as: (1) the consideration of the environmental effects of a proposed action, and (2) informing the public that it considered environmental concerns in its decision making process.[25] In *Baltimore Gas*, the Court further explained that "Congress in enacting NEPA, did not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it required only that the agency take a 'hard look' at environmental consequences before taking major action."[26] The Supreme Court further reiterated the principle that NEPA does not mandate particular results, but simply prescribes a process for agencies to follow, in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989),

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[20] Congressional Research Service, *National Environmental Policy Act: Judicial Review and Remedies,* Sept. 22, 2021.
[21] The most recent FRA amendments, under NEPA § 107(g), provide a narrow opportunity for project sponsors to seek judicial review when an agency fails to meet the new statutory deadlines for completion incorporated into NEPA.
[22] 5 U.S.C. §706.
[23] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).
[24] *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980).
[25] *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983).
[26] *Id*. at 100.

exemplified through its statement that "NEPA merely prohibits uniformed—rather than unwise—agency action."[27]

2. Litigation Losses, Longer Documents, and Project Delays

Over time, NEPA litigation evolved and the courts began expanding the scope of what agencies were required to consider in their analyses when ruling against the agencies. In the 1990s, litigants began to find success in exploiting the cumulative impacts provision of the 1978 Rule. Then in the 2000s litigants began trying arguments to expand upon these successes with a narrower cumulative impacts focus on climate change impacts, and eventually found success, such that agency decisions are now being vacated based solely on the level of detail in the climate change impacts analysis.[28] In recent years, litigation tactics have further evolved and litigants have also found success under NEPA through environmental justice arguments.[29]

Agencies have responded to these rulings by constantly increasing the detail of their analyses to cover whatever topic resulted in the last NEPA loss. The result of these efforts led to ever-expanding EAs and EISs. As these documents began numbering into the hundreds, and even thousands of pages,[30] the CEQ's guidance "generally advis[ing] agencies to keep the length of EAs to not more than approximately 10-15 pages" became nothing more than a relic reminding everyone of a gentler, more naïve age in the nation's history.[31] A key aspect that got lost in the course of agencies' efforts to "litigation proof" these documents was that "NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."[32]. Even if someone had the time and inclination to read such a lengthy tome from cover to cover, the information contained in these documents became so mired in extraneous discussions, needless detail, and technical jargon that their value for meaningfully informing anyone of anything decreased significantly in inverse proportion to their length.

With increasing levels of analysis and their corresponding pages, came increasingly longer completion timelines for these documents and increasing costs. Again, CEQ's guidance advising agencies that under its 1978 Rule "even large complex energy projects would require only about 12 months for the completion of the entire EIS process," and "the NEPA process [for EAs] should take no more than 3 months, and in many cases substantially less" time to analyze and approve, became nothing more than a bygone pipedream.[33] Instead, the average time to complete the NEPA review process increased to many years, and sometimes took over a decade.[34] CEQ no longer expressed such rosy optimism by the time it completed its 2020 Rule, which sought to

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[27] *Id*. at 351.
[28] *E.g*., *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113 (D.D.C. 2021) (vacating offshore Lease Sale 257), *vacated and remanded by Friends of the Earth v. Haaland*, 2023 WL 3144203 (D.C. Cir. 2023) (appeal rendered moot by Inflation Reduction Act (IRA) requirement to issue leases within 30 days after passage of the Act).
[29] *E.g., Vecinos para el Beinestar de la Comunidad Costera v. Federal Energy Regulatory Comm'n,* 6 F.4th 438, 449 (D.C. Cir. 2022) (finding agency's NEPA analysis of impacts on climate change and environmental justice communities deficient).
[30] *Length of Environmental Impact Statements (2013-2018),* CEQ (June 12, 2020).
[31] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations ("Forty Questions"), 46 Fed. Reg. 18,026, 18,038 (CEQ 1981).
[32] 40 CFR § 1500.1(c) (1978).
[33] *See* Forty Questions at 35.
[34] *Environmental Impact Statement Timelines (2010-2018),* CEQ (June 12, 2020).

limit the completion time to 2 years for EISs, and 1 year for EAs, despite the fact that the Department of the Interior had begun completing these documents in half that time the NEPA streamlining policies implemented through Secretary's Order 3355.[35] As further evidence of how drastically expectations changed over intervening years of litigation, even Congress in passing the recent FRA amendments did not retain CEQ's early optimism on timelines for completion of the NEPA process.

3. The Evolution of Remedies

Like the other changes described above, the remedies sought by litigants have evolved. By the 2000s litigants were exploiting wins on the merits to have courts craft increasingly complex permanent injunctions that sought to obligate agencies to implement the litigants' preferred policy outcomes.[36] However, in 2010 the Supreme Court stressed that "no thumb on the scales" in favor of injunction exists in environmental cases, and affirmed that the traditional requirements for permanent injunctive relief apply in the NEPA context.[37] In response to the tightening of injunctive standards, litigants shifted their arguments to asserting that complete vacatur should be the default remedy under the APA.[38] In some instances, the agencies have been able to counter this argument and have the courts remand the decision back to the agency without vacatur or only partial vacatur to allow for correction of the underlying analysis.[39] Under either an injunction or remand without vacatur, the result is further delay and increased costs due to the NEPA process because additional NEPA analysis will be necessary to address the court's decision, and it is likely that upon conclusion of the supplemental NEPA analysis another round of litigation will begin.[40]

IV. Comments on the Proposal

CEQ's 2020 Rule made long overdue and meaningful updates to the NEPA process that set the right course for navigating federal agencies out of the burdensome, costly, and time-consuming morass that had developed over the prior half century. But the 2020 Rule did not go far enough in foreclosing courts from using indirect impacts to accomplish much of what they previously did via cumulative impacts. With regard to the analysis of climate change impacts, there has not been a huge delta between agency review times under the 2020 and 1979 Rules or in the way adverse decisions under the 2020 Rule would characterize the flaws in the indirect-effect analysis

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[35] The current Secretary of Interior revoked S.O. 3355 through S.O. 3398, with the result that that timelines for the completion of the NEPA process, even for priority projects favored by the current Administration, now take much longer.

[36] *See, e.g, High Sierra Hikers Ass'n v. Moore*, 561 F.Supp. 1107, 1117-1120 (N.D. Cal. 2008) (crafting very specific injunctive relief reinstating prior agency action with injunction superseding conflicting provisions in that prior agency action).

[37] *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010).

[38] CEQ, NEPA Litigation Surveys: 2001-2013, *available at* https://ceq.doe.gov/docs/ceq-reports/nepa-litigation-surveys-2001-2013.pdf.

[39] *E.g., Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 282 F.Supp.3d 91 (D.D.C. 2017) (remand without vacatur); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. U.S. Forest Serv*., 2012 WL 13043847 (D. Or. 2012).

[40] *See e.g., WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2013) (remand without vacatur). *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237 (D.D.C. 2020), *dismissed sub nom. WildEarth Guardians v. Haaland*, No. 21-5006, 2021 WL 3176109 (D.C. Cir. Apr. 28, 2021) (rejecting supplemental NEPA analysis conducted on remand).

compared to court discussions of flaws in the cumulative analysis under 1979. In both cases the agency spends a lot of time and effort setting the metes and bounds of the action's casual universe, bringing together data and applying different tools or models to bean-count GHG molecules emitted — and a court would decide they didn't do enough in running the numbers, didn't use the newest tool from the Sabin Center at Columbia or didn't adequately address a commenter's competing model that showed more beans in the air.

Congress finally responded in a rare bipartisan fashion to the delays in NEPA permitting by incorporating many of the provisions contained in the 2020 Rule directly into the statute itself. In making these statutory changes Congress signaled its intent to preserve the progress made through the 2020 updates and prevent the current CEQ from rolling them back in its anticipated Phase 2 revisions. Congress acted after witnessing the Phase 1 rollbacks and the Guidance on Consideration of Greenhouse Gas Emissions and Climate Change issued earlier this year, and seeing cause for concern about the approach that the Phase 2 efforts would take. Those Congressional concerns were communicated directly to CEQ's Chair in a June 22, 2023 hearing of the House Committee on Natural Resources in the days after President Biden signed the FRA into law.[41] Undaunted, CEQ rapidly proceeded in moving forward with its prior plans, and rolled out the Proposed Phase 2 changes at the end of July.

The Proposal attempts to transform NEPA from its role as a procedural statute designed to inform agencies and the public of the effects of proposed agency actions, into to an unauthorized substantive function designed to avoid or balance those effects and advance political goals of the current Administration. Further, the Proposal's burdensome requirements on applicants and federal agencies sit at cross-purposes with the FRA, particularly in light of the FRA's presumptive page limits and timelines for environmental reviews. Uncertainty over numerous provisions and ill-defined terms place nearly all agency NEPA decisions in jeopardy and create an unworkable permitting regime that further risks the country's infrastructure and energy future. The result would put the entire nation at a competitive disadvantage to other countries.

CEQ should heed the rebuke of Congress in enacting the FRA amendments to not roll back the progress made in its 2020 Rule. Instead, it should withdraw this Proposal and move forward with changes targeted at interpreting and providing greater clarity of the new provisions incorporated into the statutory language through the FRA amendments.

A. CEQ Lacks Clear Statutory Authority To Promulgate Any Regulations

NEPA does not expressly include statutory authority for CEQ to promulgate regulations among the duties and responsibilities given to CEQ. CEQ's authority to issue regulation arose purely from executive order beginning with Executive Order (E.O.) 11514 issued by President Nixon after signing NEPA into law. The E.O. directed CEQ to develop regulations that would be "designed to make the [EIS] process more useful to decision makers and the public," and focused on reducing paperwork, emphasizing the "focus on real environmental issues and alternatives," requiring EISs "to be concise, clear, and to the point," and supporting the EIS with "evidence that agencies have made the necessary environmental analyses." Notably E.O. 11514 did not

[41] *Examining the Council on Environmental Quality Fiscal Year 2024 Budget Request and Related Policy Matters*, 118th Congress (June 22, 2023) (CEQ Chair in responding to Rep. Graves question regarding the narrowing the scope of NEPA analysis under the FRA amendments indicated that CEQ views the changes as being in line with what CEQ was doing under NEPA, and Rep. Graves expressing concern with the response that CEQ will ignore the substantial changes of law included in the FRA provisions).

purport to endow CEQ with the authority to legally bind federal agencies to these regulations, meaning they would only serve as guidance from CEQ.

That changed when President Carter issued E.O. 11991 which directed CEQ to issue regulations that would be binding on federal agencies, and eventually resulted in CEQ's issuance of the 1978 Rule. By drafting the regulations at a high level of generality, CEQ gave each agency flexibility to tune the NEPA process to their agencies' needs through agency-specific NEPA rules, guidance, and handbooks. This flexibility allowed NEPA's regs to adapt over time, prolonging their viability without the need for a CEQ-lead regulatory revisionWhile the Supreme Court has noted that CEQ's 1978 Rule was entitled to deference,[42] neither it nor other courts directly addressed CEQ's authority to issue regulations that bind other federal agencies, despite questions being raised periodically about the extent of CEQ's rulemaking authority.[43]

Arguably, CEQ does not have the authority to promulgate binding regulations, much less authority to issue any regulation, because Congress never granted it any, and the President cannot do so by executive action.[44] As NEPA makes clear, Congress tasked individual agencies, not CEQ, with implementation of the statutory provisions in a manner the meets each agency's specific mission and aligns with its own organic statutes.[45]

Accordingly, CEQ should revise § 1500.3(a) to clarify that its regulations amount to nothing more than non-binding guidance to agencies.

B. Reinforcing the Procedural Nature of NEPA

At its core, NEPA is a procedural statute that requires agencies to analyze the potential environmental effects of "major Federal actions significantly affecting the quality of the human environment."[46] But as the Supreme Court makes clear, it does "not require agencies to elevate

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[42] *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 355.

[43] *See, e.g., Tomac v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006) ("[T]he binding effect of CEQ regulations is far from clear."); *City of Alexandria v. Slater*, 198 F.3d 862, 866 n.3 (1999) (CEQ "has no express regulatory authority under the National Environmental Policy Act[.]"); *Hiram Clarke Civic Club v. Lynn*, 476 F.2d 421, 424 (5th Cir. 1973) ("CEQ does not have the authority to prescribe regulations governing compliance with NEPA."). *Cf. Ctr. For Biological Diversity v. FERC*, 67 F.4th 1176, 1181 n.1 (D.C. Cir. 2023); *Food & Water Watch v. U.S. Dep't of Agriculture*, 1 F.4th 1112, 1119 (D.C. Cir. 2021) (Randolph, J., concurring) (questioning CEQ's authority to promulgate binding regulations); *Oglala Sioux Tribe v. U.S. NRC*, 45 F.4th 291, 300–01 (D.C. Cir. 2022) (avoiding the "thorny question" raised by the Nuclear Regulatory Commission's assertion that it is an independent agency, and "CEQ's regulations are only non-binding guidance"). *See also* Scott C. Whitney, *The Role of the President's Council on Environmental Quality in the 1990's and Beyond*, 6J. Env't L. & Litig. 81 (1991).

[44] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Frankfurter, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."). *See also Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 453 (D.C. Cir.2017) ("whether an executive or independent agency has statutory authority from Congress to issue a particular regulation" is a separation of powers question.).

[45] *See* 42 U.S.C. § 4333 (authorizing individual agencies authority to promulgate NEPA regulations that bind that individual agency).

[46] NEPA, § 102(2)(C)

environmental concerns over other appropriate considerations."[47] The Proposal replaces the 2020 Rule's description of NEPA as a "procedural statute" with a statement that NEPA "is the basic national charter for protection of the environment."[48] The Proposal goes on to explain that although the description of NEPA as a procedural statute is correct, "CEQ considers that language to be an inappropriately narrow view of NEPA's purpose that minimizes some of the broader goals of NEPA…."[49]

The Proposal then expands upon the discussion of NEPA "policy" by replacing NEPA's statutory reference to "all Americans" to "all people."[50] Next, the Proposal restores the language of the pre-2020 Rule that characterizes NEPA as "action-forcing,"[51] and states that "[t]he NEPA process is intended to help public officials . . . take actions that protect, restore, and enhance the environment."[52] In pursuit of those ends, the Proposal strikes numerous provisions of the 2020 Rule in favor of action-forcing requirements that address climate change, environmental justice, and other progressive priorities. Among these additions is a new "policy" section that directs agencies to "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment, such as alternatives that will reduce climate change-related effects or address adverse health and environmental effects that disproportionately affect communities with environmental justice concerns."[53]And perhaps most problematically, new substantive requirements for agencies to monitor the efficacy of mitigation measures that has the potential to lead to long term future litigation risks.[54]

C. Climate Change

In recent years, climate change analysis has taken an outsized role as agencies struggle to juggle the courts' ever-moving stringent requirements for adequate consideration of climate impacts with more site-specific environmental issues meriting analysis and to reconcile the many other statutory obligations with which Congress has specifically tasked them. Neither this Proposal, nor CEQ's interim GHG Guidance, offer meaningful assistance to agencies diligently attempting to square their Congressionally mandated duties with NEPA's procedural obligations. In other words, the current Proposal would not only allow, but actually encourage, the elevation of the most remote effects that only rise to a level of significance when considered cumulatively at a global scale to supersede the discussion of effects more closely related geographically and temporally to the proposed agency action and more relevant to environmental conditions that agencies can actually influence in practice. This would be entirely inconsistent with the purpose of NEPA, Supreme Court precedent, and the revised statutory language.

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[47] *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citing *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980)).
[48] *Compare* Phase 2 Proposed Rule, § 1500.1(a) *with* 2020 Rule, § 1500.1(a).
[49] 88 Fed. Reg. at 49,930 (2023).
[50] *Compare* NEPA, § 102(b)(2) ("assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings") *with* Phase 2 Proposed Rule, § 1500.1(a)(1) ("assure for all people safe, healthful, productive, and aesthetically and culturally pleasing surroundings.")
[51] Phase 2 Proposed Rule, § 1500.1(a)(2).
[52] Phase 2 Proposed Rule, § 1500.1(c).
[53] Phase 2 Proposed Rule, § 1500.2(e).
[54] Phase 2 Proposed Rule, §§ 1501.4(d)(3), 1501.6(c), 1505.2(c).

1. History of Climate Change Challenges Under NEPA

NEPA claims have led the number of federal suits involving climate change issues.[55] In the first 30 years after NEPA's passage, only a handful of cases alleged climate change or global warming issues. In the early 2000s a dozen more such cases were brought, but the pace of climate related claims began to rapidly accelerate after 2007 with over 350 such cases having been brought since that time.

Initially the claims turned on the issue of standing, resulting in plaintiffs' claims being unsuccessful.[56] However, as more and more claims were brought, the tides began to turn. For example, in *WildEarth Guardians v. Jewell*, 738 F.3d 298, 307 (D.C. Cir. 2013), the D.C. Circuit found the district court "sliced the salami too thin" in ruling that plaintiff lacked standing because it could not demonstrate a causal link between recreational interests at the local level and "the diffuse and unpredictable effects of GHG emissions."[57] Notwithstanding, plaintiff did not prevail on the merits, with the court finding that plaintiff's claims were of the "mere flyspeck" variety, and that BLM properly considered the proposed coal mine's cumulative impacts on climate change by quantifying estimated GHG emissions and comparing them to the percentage of state and nationwide emissions. The CEQ ultimately adopted this so-called "reasonable proxy" analysis in its 2016 GHG Guidance.

But the courts continued to move the target for agencies. Several environmental groups began a "keep it in the ground" campaign that sought to challenge literally every federal coal decision, and eventually all fossil fuel decisions. These claims have been based upon climate change concerns, and are driven by a flawed understanding of basic economic principles. Under their simplistic theory, every domestic fossil fuel project that is blocked results in lower supply of the commodity, higher costs, and in turn, lower demand for fossil fuels and fewer emissions. An unstated premise is that were enough fossil fuel projects blocked in this manner, costs would surge to a level where U.S. demand for fossil fuels would vanish in short order—and by extension this would be sufficient to control global atmospheric concentrations of carbon dioxide and methane. In this way, these claims imply, action-agencies can control global temperatures by using NEPA reviews to present to agency decision makers a bean-counting of emissions potentially resulting from every fossil fuel authorization. What these claims lacked in economic literacy and even a basic grasp of cause and effect, they made up for in ambition and improper transformative intent.

This bean-counting theory gained traction in a case challenging the NEPA review of BLM's coal leasing decisions, where the concepts of elasticity and substitution informed the agency's air analysis. Based on this more nuanced approach, BLM concluded that neither approving nor

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[55] *See* https://climatecasechart.com/us-climate-change-litigation/ (documenting 373 NEPA cases, 206 ESA and other wildlife protection statutes, 199 Clean Air Act cases, 65 Clean Water Act cases, and 207 cases brought under other statutes and regulations).

[56] *See, e.g.*, *Foundation on Economic Trends v. Watkins*, 794 F. Supp. 395 (D.D.C. 1992) ("Notwithstanding the seriousness of the phenomenon, there is no 'global warming' exception to the standing requirements of Article III or the APA."); *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466 (D.C. Cir. 2009) (plaintiff failed to show harm from climate change caused by OCS leasing was actual or imminent, and how leasing was a proximate cause of climate change); *Amigos Bravos v. U.S. Bureau of Land Mgmt*., 816 F. Supp. 2d 1118 (D.N.M. 2011) (challenging BLM review of leases for failing to discuss GHG impacts, dismissed on standing grounds).

[57] *Citing WildEarth Guardians v. Salazar*, 880 F. Supp. 77, 84 (D.D.C. 2012).

blocking the leases would result in changes to supply, prices, demand, use or GHG emissions as the future demand for coal would be met from another source if BLM did not allow these lease sales. Fuel markets tend to be relatively inelastic,[58] since there are less readily available substitutes, and even where there are, the costs of switching to a generating source that relies upon a different fuel source requires greater capital expenditures. For example, while gasoline prices may increase, demand remains as car owners still rely on their cars to drive to work. Though people could switch to an electric vehicle, the cost for switching would require a significant capital investment, and may not be worth the investment, especially if the price increase is expected to be temporary. Similarly, coal fired electricity generation cannot readily substitute another fuel source without a substantial capital investment that would take considerable time to implement. Meanwhile, demand for electricity from consumers will continue, and cannot be placed on hold to allow new generating facilities using other fuel sources to be built.

Failing to understand the economic concept of elasticity, plaintiffs lampooned BLM's approach as "the perfect substitution" model. In reliance on the D.C. Circuit's 2013 decision, the Tenth Circuit found standing and then ruled against BLM on the merits, finding that BLM abused its discretion in relying upon the assumption that demand could be supplied from other sources because it "contradicted basic economic principles."[59] In coming to this conclusion, the court went behind the BLM's statements in the NEPA document to scrutinize a specific report on energy outlook from the U.S. Energy Information Administration (EIA) that BLM relied upon in making the assumption. Thus, the case marked another example of the courts' willingness to more closely examine an agency's NEPA climate change analysis to find fault with the agency's decision, and ultimately require additional supplemental analysis of climate related issues.

When courts began to address more climate related challenges under NEPA, the agencies got whipsawed. As the volume and pace of climate related NEPA challenges increased, certain courts ratcheted up requirements for documenting climate impacts. For instance, some courts imposed a new requirement on agencies to monetize climate change impacts by employing the social cost of carbon,[60] while others did not.[61] Even as NEPA cases began to turn entirely upon the analysis of climate change impacts, some courts have continued to move the target. Under this dynamic, agencies expended ever-greater resources quantifying and disclosing a project's GHG emissions in order to satisfy the curiosity of courts not the needs of agency decision makers, but with declining certainty that their efforts would be deemed sufficient 2-3 years in the future when a potential challenge might be heard. Even when courts appeared to finally plant the

[58] *See, e.g.*, Gasoline prices tend to have little effect on demand for car travel, U.S. Energy Information Administration (Dec. 15, 2014), *available at* https://www.eia.gov/todayinenergy/detail.php?id=19191.
[59] *WildEarth Guardians v. U.S. Bureau of Land Mgmt*., 870 F.3d 1222, 1238 (10th Cir. 2017).
[60] *See, e.g.*, *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174 (D. Colo. 2014).
[61] *WildEarth Guardians v. Jewell*, 2017 WL 3442922, at *12 (D.N.M. Feb. 16, 2017) ("Consistent with these regulations, CEQ guidance specifically states that agencies need not use the social cost of carbon method to evaluate GHG emissions.").

goal posts for agencies,[62] they ultimately decided to move the uprights again after the agencies attempted to comply.[63]

For example, in *WildEarth Guardians v. Zinke*, challenging BLM lease sales, the court set forth very specific steps the agency should undertake in completing its analysis on remand. The court specifically required a strengthening of the discussion of the environmental effects of downstream oil and gas use, consider quantifying GHG emissions through the use of an emissions calculator suggested by plaintiffs, and consider the cumulative impact of GHG emissions generated by past, present, and reasonably foreseeable BLM sales nationwide, among other things.[64] Plaintiffs then challenged the supplemental analysis completed on remand from that decision, and the court, again finding error, remanded back to the agency for additional analysis on a climate budget or another methodology for quantifying climate change would contribute to the agency's decision making.[65] While the agency continued to refine its analysis of climate change impacts to address new requirements imposed by the court, lessees could not obtain drilling permits for any of their leases at issue.[66]

Finally, the level of climate impacts analysis the courts were requiring became too much for Congress, which demonstrated a willingness in recent legislation to pass laws that directly overturn the consequences of these court decisions. For example, when a district court vacated Outer Continental Shelf Lease Sale 257,[67] Congress did not wait for the appeal to be decided before addressing it in the Inflation Reduction Act (IRA).[68] Similarly, Congress ended judicial review of the Mountain Valley Project—which had been over 90 percent complete since 2020 but was still threatened by challenges brought under a statute requiring substantive environmental review—in provisions contained within the FRA.[69] Finally, the FRA's amendments to NEPA, properly construed, supersede "cumulative impact" and the more open-ended versions of "indirect impact" analysis. This is a clear message that frequent-flyer litigants and sympathetic courts should not impose on agencies unrealistic expectations for low-information but time-consuming climate analysis.

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[62] *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2013) (providing guidance to BLM on analyzing downstream GHG emissions and related cumulative impacts).
[63] *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237 (D.D.C. 2020), *dismissed sub nom. WildEarth Guardians v. Haaland*, No. 21-5006, 2021 WL 3176109 (D.C. Cir. Apr. 28, 2021) (rejecting supplemental NEPA analysis conducted on remand consistent with the court's prior ruling, and imposing additional requirements for the agency to analyze).
[64] *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d at 75, 77.
[65] *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d at 256.
[66] *Id*. at 245, 259.
[67] *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113 (D.D.C. 2022) (finding analysis of the no action alternative inadequate for failing to address a study that predicted global demand for oil decreasing).
[68] *Friends of Earth v. Haaland*, 2023 WL 3144203 (D.C. Cir. Apr. 28, 2023) (vacating the district court's order and remanding with instructions to dismiss as moot based upon provisions in the IRA, Pub. L. No. 117-169, §§ 50264(b)(1)-(2)).
[69] FRA §324. *See also Mountain Valley Pipeline, LLC v. Wilderness Soc'y*, No. 23A35, 2023 WL 4770018 (Sup. Ct. July 27, 2023) (vacating Fourth Circuit stay of agency actions related to Mountain Valley).

2. The FRA Amendments to NEPA Prohibit Consideration of Cumulative Impacts

The Supreme Court has consistently held that agencies need only consider those effects that have "a reasonably close causal relationship" to the proposed major federal action.[70] The 2020 Rule codified this principle in its definition of "effects."[71] As explained in the preamble to the 2020 Rule, CEQ amended the definition of effects to provide "clarity on the bounds of effects consistent with the Supreme Court's holding in *Public Citizen*, 541 U.S. at 767-68."[72] Consistent with *Public Citizen* and the revised statutory language, "effects must be reasonably foreseeable and have a close causal relationship to the proposed action or alternatives."[73] This Administration rejected the 2020 Rule's characterization of the Supreme Court's holdings on casual nexus in its Phase 1 Rule and reverted to the language pre-2020 Rule's definition. In its Phase 1 rulemaking, CEQ justified its decision by narrowing the holding of *Public Citizen* to the "specific factual and legal context" of the action at issue in that case, to allow consideration of a broader range of effects in other circumstances.[74] CEQ then rationalized that "limiting the scope of NEPA analysis" based on *Public Citizen* would "not lead to improved agency decision making, enhanced public participation , or a better informed public" primarily based upon "stakeholder" feedback that the 2020 Rule's definition departed from CEQ's prior interpretation under the 1978 Rule.[75] But CEQ is wrong. CEQ's impermissibly narrow reading of the holding ignores that the Supreme Court found both "[t]he underlying policies behind NEPA and Congress' intent" made clear that a causal connection is required. Moreover, CEQ's explanation for removing the causal nexus language from the definition of effects is plainly inconsistent with the Supreme Court's unambiguous statement that "EPA requires a reasonably close causal relationship akin to proximate cause in tort law."[76]

The Proposal now entirely omits reference to this long-standing precept. Yet, CEQ proposes to expand the definition of effects to "also include climate change-related effects, including the contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action and its alternatives."[77] Previously, GHG emissions were swept into the effects analysis primarily by virtue of court decisions. The expanded regulatory definition follows CEQ guidance documents touching on climate change.[78] In addition to explicitly incorporating climate change into the definition of "effect," the Proposal mandates discussion of "climate change-related effects" in an EIS's environmental consequences section,[79] as well as requiring an EIS to identify conflicts between a "proposed action and the

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[70] *Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 754 (2004) (citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 744 (1983)).
[71] 2020 Rule, § 1508.1(g).
[72] 85 Fed. Reg. at 43,343.
[73] *Id*.
[74] 86 Fed. Reg. 55,766.
[75] *Id*.
[76] *Public Citizen*, 541 U.S. at 754 (cleaned up).
[77] Phase 2 Proposed Rule, § 1508.1(g)(4).
[78] *See, e.g.*, Council on Environmental Quality, *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1,196 (Jan. 9, 2023); Council on Environmental Quality, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 81 Fed. Reg. 51,866 (Aug. 8, 2016).
[79] Phase 2 Proposed Rule, § 1502.16(a)(14).

objectives of "Federal, regional, State, Tribal, and local plans, policies, and controls for the area concerned, including those addressing climate change."[80]

However, this attempts to rachet up climate effects analysis willfully ignores the FRA amendments that specifically incorporate the "reasonably foreseeable" language to cabin the consideration of what qualities as an effect of the agency's action, and firmly rooted the scope of the effects analysis to in the "proposed agency action."[81] Congress affirmed Supreme Court precedent in *Public Citizen* and the 2020 Rule's changes to the definition of effects in §1508.1(g). By definition, cumulative effects are not limited to effects of the "proposed agency action," as required by the FRA's statutory amendments. Instead, cumulative effects include analysis of factors Congress has made clear it does not intend agencies to consider under NEPA, namely "the effects of *other* past, present, and reasonably future actions regardless of what agency (Federal or non-Federal) or person undertakes such *other* actions."[82] Accordingly, the FRA amendments clarify that cumulative effects are no longer valid for consideration under NEPA, if they ever were, and consideration of them in the future would be *ultra vires*. Under the "cumulative effects" definition, climate-related impacts can only be cumulative effects, despite some courts finding climate impacts to also be indirect effects,[83] since they only rise to the level of significance requiring NEPA analysis when considered with "*other* actions." Therefore, the Proposal's inclusion of climate impacts into the definition of effects is an illegal expansion of the statute. CEQ cannot simply ignore the changes to the statutory language, and attempt to re-impose specific requirements for a narrow class of cumulative effects. Doing so would amount to climate change analysis through regulatory diktat.

3. Placing a Thumb on the Scales Is Illegal

The Proposal also advances an expanded framing of NEPA's "significance determination." Consistent with the pre-2020 Rule, the 2020 Rule identified the "affected area" that agencies must analyze in considering the "potentially affected environment" as "national, regional, or local" and advised that for "site-specific action[s], significance would usually depend only upon the effects in the local area."[84] In contrast, the Proposal directs agencies to additionally "consider the potential global . . . contexts" of a proposed action when evaluating its significance.[85] Here, the proposed inclusion of "global" is explained by way of example, with CEQ stating that "leases for oil and gas extraction or natural gas pipelines have local effects, but also have reasonably foreseeable global indirect and cumulative effects related to [greenhouse gas] emissions."[86] By including this rationale, "keep-it-in-the-ground" environmental activists would find themselves well-armed to target traditional energy projects on the basis that an EIS inadequately analyzes climate change-related global impacts. This, in turn, would force agencies to conduct more expansive effects analysis, leading inevitably to longer documents and slower decision-making.

[80] Phase 2 Proposed Rule, § 1502.16(a)(6).
[81] NEPA §102(2)(C)(i)-(ii).
[82] 40 C.F.R. § 1508.1(g)(3) (emphasis added) (language removed by 2020 Rule but restored by 2022 Phase 1 Rule).
[83] *See, e.g.*, *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d at 41, 73-74.
[84] 2020 Rule, § 1501.3(b)(1).
[85] Phase 2 Proposed Rule § 1501.3(d)(1).
[86] 88 Fed. Reg. at 49,935 (July 31, 2023).

This undermines the FRA's presumptive page limits and timelines and demonstrates the single-mindedness of the Biden Administration.

In a give-away to progressive interests, the Proposal provides that federal agencies need not require an EIS for certain projects where "on balance the effects of the action will be beneficial."[87] As an example, CEQ highlights a renewable energy project and suggests that "long-term reductions in [greenhouse gas] emissions" outweigh "short-term construction-related [greenhouse gas] emissions" such that the "climate effects of the proposed action would not be significantly adverse, and therefore an EIS would not be required."[88] In other words, the "beneficial effects" carve-out included in the new "significance determination" provision appears to help codify the Biden Administration's climate change agenda. By placing a thumb on the scale to potentially shield favored projects from lengthy NEPA review, CEQ tacitly admits that the Proposal will increase the burden to agencies in complying with NEPA even for its favored projects, and attempts to remedy the situation by picking market-place winners and losers. This attempt will have the likely effect of making investment in traditional energy production even more uncertain.

Through rulemaking, President Biden seeks to make good on his campaign promise: "No more drilling on federal lands. No more drilling, including offshore. No ability for the oil industry to continue to drill. Period. Ends. Number one."[89] The Administration has already been largely successful in its efforts by ignoring its legal obligations and refusing to hold a single offshore lease sale that was not compelled under court order or a newly created, specific statutory provision.[90] After the Administration cancelled all remaining leases under the previous Five Year Program, and failed to comply with its statutory obligation to complete a new Five Year Program under the Outer Continental Shelf Lands Act (OCSLA), Congress intervened and included provisions in the IRA to reinstate the cancelled leases sales.[91] Despite the clear, unambiguous, non-discretionary requirement to hold these lease sales by certain dates, the Department of the Interior still squandered resources and created litigation risk by completing NEPA reviews for these sales.[92] In addition, they waited until today to issue a new Five Year Program that would allow for future offshore leasing which would hold no lease sales in 2024 or 2026 and only three lease sales over the next five years,[93] despite future offshore wind leasing being tied directly to its holding oil and gas lease sales under new provisions in the IRA.[94] The direction from Congress could not be more clear: do both. The Administration may not picking winners and

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[87] 88 Fed. Reg. at 49,936 (July 31, 2023); Phase 2 Proposed Rule, § 1501.3(d)(2)(i).
[88] 88 Fed. Reg. at 49,936 (July 31, 2023).
[89] CNN-Univision Democratic Debate, March 15, 2020.
[90] Analysis: US Federal Leasing Strategy Will Continue to Evolve, Offshore Magazine (Oct. 12, 2022), *available at* https://www.offshore-mag.com/regional-reports/us-gulf-of-mexico/article/14284179/hunton-andrews-kurth-llp-analysis-us-federal-leasing-strategy-will-continue-to-evolve.
[91] *Id*.
[92] *Final Environmental Impact Statement on the Cook Inlet Lease Sale 258*, 87 Fed. Reg. 65,247 (Oct. 22, 2022); Gulf of Mexico Lease Sales 259 and 261 Supplemental Environmental Impact Statement (BOEM), *available at* https://www.boem.gov/oil-gas-energy/gulf-mexico-lease-sales-259-and-261-supplemental-environmental-impact-statement.
[93] 2024-2029 National Outer Continental Shelf Oil and Gas Leasing Proposed Final Program (BOEM).
[94] National OCS Oil and Gas Leasing Program for 2023-2028, *available at* https://www.boem.gov/oil-gas-energy/national-program/national-ocs-oil-and-gas-leasing-program; *see also* Analysis: US Federal Leasing Strategy Will Continue to Evolve.

losers by applying fundamentally different environmental review requirements based on energy source. Yet the Administration, and CEQ, ignore this direction from Congress, and fail to appreciate the consequences of their policy direction for all projects, including the Administration's favored projects.

Just as this Administration continues to ignore its statutory obligations, CEQ ignores the reality of the world as it exists. To the extent the Administration's goals are to advance renewable energy, this is counterproductive.

By attempting to put a thumb on the scales that favors certain politically favored projects over others, CEQ fails to appreciate how the consequences to politically unfavored projects adversely carries over to its favored projects. The only legal approach would be to maintain a neutral position, and focus on improving the efficiency of the NEPA review process for all projects. As a byproduct of the neutral approach to efficient NEPA implementation taken in the 2020 Rule, renewable energy capacity permitting doubled under the prior Administration, while it has decreased under the current approach.[95]

4. Climate-Related Effects Are Not Appropriate for NEPA Analyses

CEQ's focus on gifting additional tools to litigants under the Proposal ignores the enormous challenges agencies have faced over the last decade in addressing the ever-shifting requirements for more climate impacts analysis. The trend in climate change analysis under NEPA has been towards ever-greater quantification of emissions data, but the focus on providing decisionmakers with useful information for making an informed decision has been neglected.

The courts have largely ignored the practical limitations for quantification of emissions from many projects. Quantifying future emissions for oil and gas leases, for example, is complex and tinged with uncertainties.

At the leasing stage, great uncertainty exists for oil and gas resources. First, while all lessors and producers would love to know the amount of recoverable oil and gas at the leasing stage, the actual amount recoverable is unknowable until seismic surveys are completed, wells are drilled, and production begins. Second, uncertainty exists as to whether a lease will ever come into production, many leases do not ever result in production. Third, even assuming a lease comes into production, not all production will be burned since a certain amount will be used for creating other products. Fourth, even assuming all production is burned, it becomes less obvious that emissions will be released into the atmosphere as advances in carbon capture and sequestration and hydrogen come online in the future. In short, quantification efforts at the leasing stage produce much less accurate estimates for emissions, and overestimate future emissions. This inherent unreliability makes the overall value of performing these calculations less useful to decisionmakers. Moreover, it must be remembered that the economic concept of elasticity means that demand would continue to be met, most likely from other nations outside the United States where the carbon emissions per barrel of oil are higher. Therefore, failing to produce domestic supplies could actually lead to higher global emissions.

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[95] *Examining Systemic Government Overreach at CEQ*: Hearing before H. Subcomm. Oversight and Investigations, Natural Resources, 118th Cong. (Sept. 14, 2023) (statement of Mario Loyola, p. 2) (*citing* Chart: U.S. Annual and Cumulative Utility-Scale Clean Power Capacity Growth – Clean Power Annual Market Report 2022), *available at* https://naturalresources.house.gov/uploadedfiles/testimony_loyola.pdf.

It must also be recognized that fossil fuels production does not exist in a vacuum for the simple purpose of increasing atmospheric concentrations of GHGs and causing climate related impacts—and that no authorization for a fossil fuel project does either of these in any meaningful sense. The producers do not represent the end users of the production. The production enters the stream of commerce for use by everyone, including those engaged in what CEQ recognizes as beneficial-on-whole projects, and those parties suing to prevent fossil fuel development.

In addition, the impacts from any single source of GHG emissions remains impossible to attribute to any specific impact associated with climate change, much less determine when a climate-related impact from the proposed agency action will occur. In other words, actual impacts from the proposed agency action cannot be analyzed in a NEPA document. At best, all the agency can provide is a qualitative discussion of climate related impacts generally, but the agency could not with certainty attribute any specific potential impact to the proposed agency action being analyzed under NEPA. The effects would be remote both temporally and geographically, and a product of a lengthy causal chain—not the sort of reasonably foreseeable effects NEPA requires agencies to consider or that it would be appropriate to consider consistent with the rule of reason. *Marsh v. Oregon Natural Resources Defense Council*, 490 U.S. 360, 373.

Finally, climate modeling continues to evolve. At best, models can be used to estimate a range of future scenarios. Predictions from the IPCC's first report predicted a much higher increase of global temperatures than those experienced. The IPCC's more recently developed Representative Concentration Pathways (RCP) for predicting concentrations of atmospheric GHGs, provides several different pathways. The further out in time from the present the greater the discrepancy between these pathways.[96] The divergence becomes exponentially greater after about 20 years, meaning accurate predictions and usefulness for decisionmakers diminishes the further out these predictions are carried.[97] By the time these pathways carry out to one hundred years in the future, the range varies from negligible to hell-in-a-handbasket catastrophic. While a reasonable decisionmaker would find this range useless, or even acknowledge that historically actual outcomes have trended along the lower predictions, litigants and sympathetic judges typically focus on the most extreme outcomes. To the extent CEQ offers future guidance on analyzing climate impacts, it should focus on helping agencies explain these uncertainties and how far out into the future modeling retains usefulness for decision making. In addition, CEQ should compare past predictions from models with actual data over time, to gauge the utility of continuing to rely on such models.

D. The Proposed Deletion of "Required" in 40 CFR 1506.1(c) Is Unreasoned, Improper, and Unauthorized

CEQ is attempting to make a major change in how NEPA works surreptitiously, by striking a single word from the regulations. The consequences of this slight alteration may be dire. By deleting this word, the Administration is seeking to give itself the power to halt entire government programs simply by initiating a *discretionary* environmental review of those programs, making this yet another aspect in which this Proposal attempts to transform NEPA into

[96] Data Distribution Centre (IPCC), Scenario Process for AR5, *available at* https://sedac.ciesin.columbia.edu/ddc/ar5_scenario_process/RCPs.html.
[97] *See generally* Terando et al., Using Information from Global Climate Models To Inform Policymaking—The Role of the U.S. Geological Survey (USGS Open File Report 2020-1058), *available at* https://doi.org/10.3133/ofr/20201058.

a tool to transform the policy and energy landscape. After showing that CEQ's explanation for this change is not backed up by a coherent explanation, we then explain that recent history shows full well how the proposed, seemingly minor change could in fact be used to wreak great mischief.

40 C.F.R. § 1506.1 currently reads (emphasis added):

> While work on a *required* programmatic environmental review is in progress and the action is not covered by an existing programmatic review, agencies shall not undertake in the interim any major Federal action covered by the program that may significantly affect the quality of the human environment unless such action:
>
> (1) Is justified independently of the program;
>
> (2) Is itself accompanied by an adequate environmental review; and
>
> (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

This provision is materially identical to the form codified in the original 1978 implementing regulations. *See* 43 Fed. Reg .at 56,000 (emphasis added):

> (c) While work on a *required* program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:
>
> (1) Is justified independently of the program;
>
> (2) Is itself accompanied by an adequate environmental impact statement; and
>
> (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

As this demonstrates, since its inception this provision has prevented work on any major Federal action covered by an ongoing programmatic environmental analysis only when that analysis is *required*.

CEQ now proposes to strike the word "required." CEQ's sole attempt in the Proposal's preamble to justify this proposed change to a forty-five-year old regulatory provision is as follows:

> CEQ also proposes to strike "required" in paragraph (c). This edit is consistent with § 1506.11, which encourages, but does not require, the use of programmatic environmental reviews.

88 Fed. Reg. at 49,955/1.

This is a *non sequitur* at best, and disingenuous at worst.

First, it is unclear to which provision CEQ intends to refer when it says that the proposal to strike the word "required" from 1506.1(c) is "consistent with § 1506.11."

40 CFR § 1506.11 *currently* governs "Timing of agency action." It does not contain the word "programmatic" and does not appear to make any reference to programmatic environmental reviews.

The Proposal would renumber 1506.11 as 1506.10, and would renumber current 1506.12 as 1506.11. *See* 88 Fed. Reg. at 49,957/1-2; *see also id.* at 49,984/2. This latter provision (current 1506.12, proposed to be renumbered as 1506.11) reads in full:

> Where emergency circumstances make it necessary to take an action with significant effects without observing the provisions of the regulations in this subchapter, the Federal agency taking the action should consult with the Council about alternative arrangements for compliance with section 102(2)(C) of NEPA. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Alternative arrangements do not waive the requirement to comply with the statute, but establish an alternative means for NEPA compliance.

So the *proposed* 1506.11 *also* makes no mention of programmatic review. CEQ's "explanation" for striking the word "required," brief as that explanation is, is therefore a nullity: CEQ justifies this proposed deletion on the grounds of "consisten[cy]" with a provision (whichever version of 1506.11 is the intended reference here) that is completely inapposite. And CEQ's proposed alteration here is thus arbitrary and capricious, for failure to provide a coherent explanation, and in derogation of its obligation to provide notice and take comment to boot.

But perhaps CEQ, in its haste to rush out this Proposal, meant instead to cite to *1501*.11, rather than 1506.11. After all, 1501.11 under its proposed revised form will indeed explicitly address "programmatic review." And CEQ's proposed changes to 1501.11 would indeed emphasize that agencies will often have discretion *not* to undergo programmatic review, *compare* 40 CFR § 1501.11, *with* 88 Fed. Reg. at 49,973/3 (proposed revised version, adding several "mays" in addition to other proposed changes). But that makes the effect of EPA's proposed deletion of "required" from 1506.1(c) more, not less, significant, and far from a mere conforming edit.

Currently, the text only halts an action where the relevant programmatic review is *required*. Under the proposed revision, *any* programmatic review, discretionary or no, would suffice to halt action. Because CEQ's explanation of what it's doing here is improperly cited and so bare-bones as to be facially arbitrary, the commenting public is left with no recourse but to review precedent in the hope of determining what CEQ is actually after here. And in that light, the real significance of this proposed deletion becomes obvious: deleting the word "required" would give this and future Administrations a *textual* regulatory hook of the sort that was lacking in 2016, when the Department of Interior halted the entire federal coal leasing program by pointing to its *discretionary* undertaking of a programmatic review of that program. This gambit touched off a listless period of operational uncertainty, needless litigation, and Kafkaesque environmental review that would make a Byzantine Emperor proud.

The District of Montana endorsed this theory, under which an agency initiating a *discretionary* programmatic review creates a barrier against subsequent, equally discretionary decisions to change course. *See Citizens for Clean Energy v. U.S. Dep't of Interior*, 384 F. Supp. 3d 1264, 1279 (D. Mt. 2019) ("Plaintiffs have identified potential environmental harm that could result from lifting the moratorium."); *see also* 621 F. Supp. 3d 1165, 1173 (D. Mt. 2022) ("The [Environmental Assessment] did not take the 'hard look' NEPA requires with respect to restarting the federal coal leasing program. Under NEPA, the 'no action' alternative describes baseline

conditions. These conditions reflect the 'status quo' against which the impacts of the proposed action and its alternatives are to be measured. BLM improperly cabined its NEPA analysis for ending the coal leasing moratorium to the leases granted during the estimated PEIS timeline. BLM's attempt to curtail the potential environmental impacts of lifting the moratorium, by *failing to consider a potential alternative that provided a baseline of an indefinite moratorium*, proves arbitrary and capricious.") (citations omitted) (emphasis added).

This reasoning is fundamentally flawed. First, it presumes an answer to policy questions that the review was ostensibly commissioned to inform—and which only officials helming the agency at the completion of a Final PEIS would have had authority to answer. Second, it's unworkable. A programmatic environmental review is an important tool for agencies to seek to obtain information that might be influential to inform *future* decisions, or to drive more efficient reviews through the practice of tiering. The court's decision, if adopted as national policy, would render this tool useless for this legitimate purpose, while converting it into an improper trap to halt needed programs indefinitely, even if the American people vote for a change in policy direction.

Expanding 1506.1 to apply it to leasing actions taken under programs whose environmental impacts the agency is voluntarily reviewing environmental impacts appears intended to lay the foundation for similar abrupt shuttering of fossil fuel programs, including those that were fortunate enough to avoid a deep-freeze during the Obama administration.

CEQ does not have statutory authority to create springing NEPA obligations out of whole cloth. An axiom of administrative law is that an action can be undone through the same process through which it was originally taken. The notion that, once an agency crosses the threshold of embarking on a *voluntary* environmental review it *cannot* reverse course without going through a special procedure, is abhorrent to basic principles of administrative law. The very definition of "discretion" is that there is no such one-way rachet. An agency rightly retains freedom of action throughout until the decision-making process concludes.

The premise of this rachet is that abandoning a *voluntary* environmental review of a program is itself a major federal action. This cannot be the case. It would obligate agencies to consider the environmental effects of the decision whether to *continue* performing an environmental review of a program—or indeed even of the decision to initiate one. This infinite regress which would render programmatic review functionally unavailable confirms that this cannot be valid law or valid reasoning. Moreover, since there is no meaningful distinction between a new action and a continuing action where the agency has not made a final decision on the program, the logic of the proposed revision would mean an agency must consider the environmental effects of the decision whether to embark on a programmatic environmental review in the first place.

Congress's recent amendments to NEPA remind us that it never intended the environmental analysis process to be interminable. In this regard, this simply codifies common sense: every environmental review must come to an end at some point. For Congress's vision to be realized, a decision to end a review, *either before or through* the publication of a PEIS document, must not become a federal case. And just as ending a review does not create a new procedural barrier to commencing a subsequent one, starting a review does not impose a procedural impediment to the agency later deciding to reallocate resources to other priorities, such as the administration of statutorily mandated leasing regimes.

The government has freedom of expression and copyrights, which it may fully exercise unless circumscribed by law to withhold or publish information. Nothing in NEPA requires an agency to publish a PEIS to close out a discretionary decision to commence programmatic review—and CEQ lacks authority to foreclose agency discretion over the continuing direction of agency resources or speech by regulation. This is particularly true where a new administration with new policy priorities concludes that agency resources are being misallocated, and particularly where an ongoing misallocation is the predicate for failure to act that violates the agency's statutory obligations under substantive statutes. We are a nation of laws. Where those laws do not require the preparation and publication of a PEIS, an agency remains free to walk away from a discretionary review at any time, and anyone interested in the information produced during an aborted review may file a records request under the Freedom of Information Act.[98]

CEQ's Proposal to expand the restriction imposed by 1506.1 is arbitrary and capricious. It's unclear what legitimate purpose could be served by this revision. It is irrational, unless it's taken for the cognizable but improper purpose of maladministration of important programs that are essential to domestic energy security and productive, multiple use of federal lands. To the extent that any valid purpose for this proposed deletion exists, the agency has failed to describe it, and it must at a minimum supplement its Proposal with an actual explanation of what is intended here, a clear statement as to whether our concerns about the true intent set forth above are indeed what's at play, and a solicitation of comment so that a duly informed public can explain in greater detail to CEQ just why this is both illegal and bad policy.

E. CEQ's proposed environmental justice requirements are vague and unworkable

For the first time ever, CEQ proposes to incorporate environmental justice requirements into its NEPA regulations. As drafted, these requirements touch nearly every major section of the Proposal. They represent a significant expansion of the procedural and substantive requirements found in CEQ's existing environmental justice guidance and, if implemented, will result in longer project timelines, increased litigation, and greater outcome uncertainty.

1. Environmental justice as an organizing principle

Environmental justice has been part of the NEPA decision making process since the mid-1990s. In 1994, President Clinton signed Executive Order 12898 ("1994 EJ EO") directing each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income communities…."[99] This executive order was accompanied by a transmittal memorandum that specifically identified NEPA as a statute and process that must incorporate environmental justice considerations into environmental effects analysis, mitigation measures, and public participation activities.[100]

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[98] See *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc*., 141 S. Ct. 777 (2021) (A record is not "final" for purposes of the deliberative process privilege simply because it is the last version and nothing else follows it)

[99] Executive Order 12,898, *Federal Actions to Address environmental Justice in Minority Populations and Low-Income Populations* (Feb. 11, 1994).

[100] Presidential Memorandum, *Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (Feb. 11, 1994).

In response to this direction, CEQ issued guidance in 1997 that describes six general principles to aid federal agencies in their environmental justice efforts.[101] These principles include consideration of the affected area's demographic composition, consideration of relevant public health and industry data, recognition of interrelated factors that may amplify a proposed action's environmental effects, development of public participation strategies, assurance of meaningful community representation, and appropriate involvement of federally recognized Indian tribes.[102] Additional non-binding advice on "promising practices" in environmental justice methodologies was issued in 2016 by the Federal Interagency Working Group on Environmental Justice ("EJ IWG"), of which CEQ is a member.[103] The EJ IWG subsequently issued a "community guide" to improve stakeholder engagement in agency NEPA environmental justice efforts in 2019.[104]

In April 2023, the Biden Administration issued Executive Order 14096 ("2023 EJ EO"),[105] which seeks to embed environmental justice and equity initiatives throughout the federal government. Under the auspices of a new White House Office of Environmental Justice, agencies are expected to implement systemic changes in everything from permitting to funds distribution to enforcement priorities. Among other things, the 2023 EJ EO directs federal agencies to carry out NEPA reviews in a manner that:

> (A) analyzes direct, indirect, and cumulative effects of Federal actions on communities with environmental justice concerns;
>
> (B) considers best available science and information on any disparate health effects (including risks) arising from exposure to pollution and other environmental hazards, such as information related to the race, national origin, socioeconomic status, age, disability, and sex of the individuals exposed; and
>
> (C) provides opportunities for early and meaningful involvement in the environmental review process by communities with environmental justice concerns potentially affected by a proposed action, including when establishing or revising agency procedures under NEPA."[106]

Perhaps most significantly, however, the 2023 EJ EO creates a new, expansive definition of "environmental justice":

> *Environmental justice* means the just treatment and meaningful involvement of all people regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision making and other Federal activities that affect human health and the environment so that people:

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[101] Council on Environmental Quality. *Environmental Justice: Guidance under the National Environmental Policy Act* (Dec. 10, 1997).
[102] *Id*.
[103] Federal Interagency Working Group on Environmental Justice. *Promising Practices for EJ Methodologies in NEPA Review* (Mar. 2016).
[104] Federal Interagency Working Group on Environmental Justice. *Community Guide to Environmental Justice and NEPA Methods*. (Mar. 2019).
[105] Executive Order 14096. *Revitalizing Our Nation's Commitment to Environmental Justice for All*. (Apr. 21, 2023).
[106] *Id*. at § 3(a)(ix).

(1) Are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy or racism or other structural or systemic barriers; and

(2) Have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.[107]

The environmental justice components of the Proposal are an outgrowth of the 2023 EJ EO, though seemingly embraced by CEQ with little consideration for how disruptive they will be to existing NEPA practices or how counterproductive they will be to the goals of the FRA.[108]

For nearly 26 years, CEQ's environmental justice guidance has largely been properly confined to addressing its stated purpose of "improv[ing] the internal management of the executive branch with respect to environmental justice under NEPA."[109] Over that same period, each federal agency has developed strategies for addressing environmental justice concerns that reflect their unique challenges, mandates, and responsibilities.[110] Courts too have recognized these distinctions and understand that environmental justice analysis for Bureau of Land Management leasing activities will look very different than for Federal Highway Administration grantmaking activities. For this reason, when reviewing an agency's NEPA-related environmental justice analysis, courts apply the Administrative Procedure Act's "arbitrary and capricious" standard.[111] With few notable exceptions, these reviews are appropriately deferential to agency expertise and have rightly emphasized NEPA as a procedural statute. *See, e.g., Sierra Club v. Fed. Energy Regul. Comm'n*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) ("As always with NEPA, an agency is not required to select the course of action that best serves environmental justice, only to take a 'hard look' at environmental justice issues.").

The Proposal seeks to abandon a quarter century of CEQ guidance and related agency directives and case law in favor of vague substantive requirements designed to promote environmental justice outcomes. So pervasive are these requirements that environmental justice appears to be an organizing principle for CEQ's entire regulatory reform effort. This is most clearly apparent in the wholesale adoption of the 2023 EJ EO's expansive definition of "environmental justice." This politically charged interpretation of "environmental justice" is substantially broader than

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[107] *Id*. at § 2(b); Phase 2 Proposed Rule at § 1508.1(k).
[108] Pub. L. No. 118-5, 137 Stat. 10 (2023).
[109] Council on Environmental Quality. *Environmental Justice: Guidance under the National Environmental Policy Act*.
[110] *See, e.g.,* U.S. Department of Defense. *Strategy on Environmental Justice*. (March 24, 1995).; U.S. Department of the Interior. *Environmental Justice Strategic Plan*. (Nov. 2016). ("DOI EJ Strategic Plan"); U.S. Department of Transportation. *Environmental Justice Strategy*. (Nov. 15, 2016).
[111] This standard of review also reflects federal courts' recognition that the 1994 EJ EO and CEQ guidance do not create enforceable rights to challenge the sufficiency of an agency's environmental justice review. *See, e.g., Sur Contra la Contaminación v. Env't Prot. Agency*, 202 F.3d 443 (1st Cir. 2000); *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215 (5th Cir. 2006); *Latin Ams. For Soc. & Econ. Dev. v. Adm'r of the Fed. Highway Admin.*, 756 F.3d 447 (6th Cir. 2014); *Mid States Coal. Progress v. Surface Transp. Bd*., 345 F.3d 520 (8th Cir. 2003); *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569 (9th Cir. 1998); *Cmtys. Against Runway Expansion, Inc. v. Fed. Aviation Admn.*, 355 F.3d 678 (D.C. Cir. 2004).

that currently used by any federal agency.[112] And while there may be some value in crafting a single, government-wide definition of this increasingly partisan phrase, it should absolutely not arrive as a proposal borrowed verbatim from a campaign-style presidential directive.

As drafted, the proposed definition of environmental justice is not only ambiguous but also impossible to implement. Among other things, it seeks to "fully protect[]" people from the disproportionate effects of "climate change . . . and the legacy of racism or other structural or systemic barriers."[113] There is no guidance offered in the Proposed Rule or its preamble on what these progressive shibboleths mean in the context of NEPA. Nor is there any direction on how to balance competing interests from disparate "communities with environmental justice concerns." It is, for example, not uncommon for there to be a federally recognized tribe that supports a proposed project that is opposed by *other* "communities with environmental justice concerns."[114] Or a "low-income population" that supports a proposed project that is opposed by a "minority population." CEQ, by treating all such groups as a monolith, creates an insoluble analytical problem and reveals its condescending view of what is in reality a complex society largely constituted of people of many types, whose individual interests and values are not necessarily aligned.

More broadly, CEQ advises in its preamble to the Proposal that the phrase, "communities with environmental justice concerns" is intended to "mean communities that do not experience environmental justice as defined in § 1508.1(k)."[115] But simply referencing back to the politicized "environmental justice" definition from the 2023 EJ EO does little to add clarity to the undefined term. In fact, as drafted, an overwhelming percentage of Americans would appear to fit within one of the phrase's ambiguous, constituent parts. This result fits well with campaign narratives that nurture victimhood. But it is not a workable definition for NEPA. And it is a far cry from existing agency efforts that rely on quantifiable, Census Bureau-assisted data regarding "low-income populations" and "minority populations" as originally emphasized in the 1994 EJ EO.[116]

This definitional problem is compounded by the Proposal's incorporation of "environmental justice" into its "effects or impacts" definition: "Effects include ecological, aesthetic, historic, cultural, economic, social, or health, *such as disproportionate and adverse effects on*

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[112] *See, e.g.*, DOI EJ Strategic Plan at 6 ("Environmental justice refers to meeting the needs of [minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands] by reducing disparate environmental burdens, removing barriers to participation in decision making, and increasing access to environmental benefits that make all communities safe, vibrant, and healthy places to live, work, learn, and engage in recreation."); U.S. Environmental Protection Agency. *Learn About Environmental Justice*, *available at* www.epa.gov/environmentaljustice/learn-about-environmental-justice ("Environmental justice (EJ) is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.").

[113] Phase 2 Proposed Rule at § 1508.1(k)(1).

[114] *See, e.g.*, *Eagle County, Colorado v. Surface Transportation Board*, No. 22-1019 at 10, 2023 WL 5313815 (D.C. Cir. Aug. 18, 2023) (noting "supporting statements from the Ute Indian Tribe" regarding a rail line that was opposed by environmental groups, partly on environmental justice grounds).

[115] Council on Environmental Quality. *National Environmental Policy Act Implementing Regulations Revisions Phase 2*. 88 Fed. Reg. 49,924, 49,960. (July 31, 2023).

[116] *See, e.g.*, DOI EJ Strategic Plan at 6.

communities with environmental justice concerns, whether direct, indirect, or cumulative."[117] By requiring nearly every potential effect or impact to be viewed through the lens of environmental justice, CEQ proposes to create an interminable review process that is highly subject to judicial remand based on perceived inadequacies in an agency's environmental justice analysis. This concern applies not only to a court's review of a complicated EIS, but also to challenges relating to the sufficiency of an EA or the availability of a CE.

Regarding CEs specifically, the Proposal seeks to include "potential disproportionate and adverse effects on communities with environmental justice concerns" in a new definition of "extraordinary circumstances" that would prohibit an agency from utilizing an otherwise available CE if such concerns were found to be present.[118] This change is significant, as "extraordinary circumstances" are currently defined at the agency level and, with respect to environmental justice, often borrow from the language of the 1994 EJ EO. *See, e.g.*, 43 C.F.R. §46.215(j) ("Have a disproportionately high and adverse effect on low income or minority populations."). By requiring application of CEQ's more expansive "environmental justice" definition and eliminating the "high" qualifier in "disproportionately high" found in the 1994 EJ EO,[119] the CEA is concerned that CEs will become less available for projects that do not align with progressive priorities.

Concerns such as these are present throughout the Proposal, as environmental justice requirements are now included in rulemaking sections that address public engagement,[120]alternatives analysis,[121] significance determinations,[122] environmental consequences,[123] and mitigation measures.[124] Each of these requirements presents new avenues for project opponents to challenge the adequacy of an agency's NEPA process. For example,

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[117] Phase 2 Proposed Rule at § 1508.1(g)(4) (emphasis added) (internal parenthetical omitted).
[118] Phase 2 Proposed Rule at § 1508.1(m).
[119] *Compare* 1994 EJ EO at § 1-101 ("disproportionately high and adverse…." *with* Phase 2 Proposed Rule at §§ 1508.1(k) and (m) ("disproportionate and adverse….").
[120] Phase 2 Proposed Rule at § 1500.2 ("Federal agencies shall to the fullest extent possible … (d) Encourage and facilitate public engagement in decisions that affect the quality of the human environment, including meaningful engagement with communities with environmental justice concerns….").
[121] Phase 2 Proposed Rule at § 1500.2 ("Federal agencies shall to the fullest extent possible … (e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment, such as alternatives that will … address adverse health and environmental effects that disproportionately affect communities with environmental justice concerns."); Phase 2 Proposed Rule at § 1502.14(f) ("The environmentally preferable alternative will best promote the national environmental policy expressed in section 101 of NEPA by maximizing environmental benefits, such as addressing … disproportionate and adverse effects on communities with environmental justice concerns….").
[122] Phase 2 Proposed Rule at § 1501.3(d)(2) ("Agencies shall analyze the intensity of effects considering the following factors … (ix) The degree to which the action may have disproportionate and adverse effects on communities with environmental justice concerns.").
[123] Phase 2 Proposed Rule at § 1502.16(a) ("The discussion [on environmental consequences] shall include … (14) The potential for disproportionate and adverse human health and environmental effects on communities with environmental justice concerns.").
[124] Phase 2 Proposed Rule at § 1505.3(b) ("The lead or cooperating agency should, where relevant and appropriate, incorporate mitigation measures that address or ameliorate significant adverse human health and environmental effects of proposed Federal actions that disproportionately and adversely affect communities with environmental justice concerns.").

every rejection of a policy preference advocated by a "community with environmental justice concerns" becomes an opportunity to litigate over whether the federal decisionmaker adequately discussed the human health and environmental effects of a proposed action and alternatives to communities with environmental justice concerns (§ 1502.16(a)(14)), met its regulatory obligations of "meaningful engagement" (§ 1500.2(d)), or appropriately weighed environmental justice considerations when selecting environmentally preferred alternatives (§§ 1500.2(e) and 1502.14(f)).

2. *Judicial challenges, remands, and additional delays*

NEPA's existing regulatory framework provides federal judges ample opportunity to remand environmental documents for additional analysis and review. Only recently, however, have courts begun overturning agency decisions based on environmental justice concerns.[125] Perhaps no case is more illustrative of this brand of activism than the D.C. Circuit's recent opinion in *Eagle County, Colorado v. Surface Transportation Board*.[126] There, the court vacated a permit for construction of a new 88-mile rail line designed to transport crude oil extracted from Uintah County, Utah, due to an EIS that that, among other things, failed to analyze the "effects of oil refining on environmental justice communities in [along] the Gulf Coast."[127] That a federal agency would be required to consider a project's potential effects on coastal communities in Louisiana and Texas when sited over 1,300 miles away is a clear example of judicial overreach. Unfortunately, this is but one recent case of environmental justice review gone awry.[128] Even under CEQ's existing regulations, certain judges will take any opportunity to evaluate and opine on the sufficiency of an agency's NEPA-related environmental justice review. And if the federal government is today having difficultly defending its NEPA documents in cases like *Eagle County*, there should be no illusion that the Proposal provides environmental activists multiple new tools to challenge projects on environmental justice grounds.

Unlike other environmental effects, environmental justice considerations are inherently difficult to quantify. They often rely on uncertain health risk assessments and sociological studies that are informed by information largely unknown to federal agencies or project proponents. This creates two obvious challenges. First, environmental activists will always be able marshal data in the form of expert testimony or discreet studies that appear to show that a project creates risk to one or more "communities impacted by environmental justice concerns." Using *Eagle County* as an example, there are likely hundreds of communities comprising various demographic profiles that could make credible environmental justice claims within the scope of the Proposal. And with many claimants raising project concerns only after environmental documents have been finalized, responsible federal agencies will be left to constantly play catch-up and defense in litigation.

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[125] *See, e.g.,* Congressional Research Service. *Addressing Environmental Justice Through NEPA*. (Sept. 21, 2021).

[126] No. 22-1019, 2023 WL 5313815 (D.C. Cir. Aug. 18, 2023).

[127] *Id*. at 66.

[128] *See., e.g., Vecinos Para el Bienestar de la Comunidad Costera v. Fed. Energy Regul. Comm'n*, 6 F.4th 1321 (D.C. Cir. 2021); *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 440 F. Supp. 3d 1 (D.D.C. 2020), aff'd sub nom. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032 (D.C. Cir. 2021); *California v. Bernhardt*, 472 F. Supp. 3d 573 (N.D. Cal. 2020).

The second challenge is related to the first and involves proposed revisions to the regulations' "methodology and scientific accuracy" section.[129] Under CEQ's current rules, federal agencies are required to "make use of reliable existing data and resources" but need not "undertake new scientific and technical research to inform their analyses."[130] The Proposal eliminates this safe harbor for information deserts and creates a bias toward producing new technical and scientific data.[131] In the environmental justice context, this could prove especially difficult, as judges may insist that certain studies or models are "essential to a reasoned choice among alternatives."[132] The result, of course, will be the prophylactic expenditure of significant resources with no limiting principle except a determination that costs associated with obtaining new information are "unreasonable."[133] Returning again to the *Eagle County* example, it is likely that the Surface Transportation Board will now feel obligated to commission studies of all minority and low-income populations located near the 30-plus candidate Gulf Coast refineries, even though only a few such refineries will ultimately process Utah-extracted oil. Adoption of the Proposal's environmental justice provisions would undoubtably expand this analysis even further.

As with other aspects of the Proposal, new and burdensome environmental justice requirements directly conflict with the NEPA reforms included in the FRA. Among other things, the FRA established presumptive limitations on EA and EIS page limits and decisions timelines that a project proponent can petition a court to enforce. Yet where Congress has attempted to simplify and streamline the NEPA process, CEQ has run headlong in the opposite direction. From the perspective of CEA and many other commentators, it is difficult to see how federal agencies will be able to comply with CEQ's new environmental justice requirements and the FRA's page limits and decision timelines.

There is, however, one notable exception to this challenge. For politically favored projects, CEQ appears to provide an escape hatch through the guise of "innovative approaches."[134] This proposed new addition to the NEPA regulations is only available to projects that address "extreme environmental challenges" such as "disproportionate and adverse effects on communities with environmental justice concerns."[135] This Proposal appears to be another effort by CEQ to create two categories of projects: those subject to increasingly burdensome NEPA requirements, and others favored by progressive interests that qualify for regulatory diversion and streamlined environmental review.

Finally, the Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* likely renders certain applications of environmental justice unconstitutional.[136] There, the Supreme Court found that using race as one factor among many in

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[129] Phase 2 Proposed Rule at § 1502.23.
[130] Phase 2 Proposed Rule at § 1502.23(a) and (b).
[131] *See* Phase 2 Proposed Rule at § 1502.23(c) ("Where appropriate, agencies shall use projections when evaluating the reasonably foreseeable effect, including climate change-related effects.").
[132] Phase 2 Proposed Rule at § 1502.21(b). *See also Birckhead v. Fed. Energy Regul. Comm'n*, 925 F.3d 510, 520 (D.C. Cir. 2019); *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124 (9th Cir. 2011).
[133] Phase 2 Proposed Rule at § 1502.21(b) ("If the incomplete information relevant to reasonably foreseeable significant adverse effects is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable, the agency shall include the information in the [EIS].").
[134] Phase 2 Proposed Rule, § 1506.12.
[135] Phase 2 Proposed Rule, § 1506.12(a).
[136] Nos. 20-1199 and 21-7071 (Sup. Ct. June 29 2023).

the context of college admissions decisions violates the Equal Protection Clause, even if the use of race was intended by college admissions committees to address inequality. Similar sentiments have animated CEQ's discussion of environmental justice efforts. Notably, CEQ appears to have recognized this particular risk when it developed its "Climate and Economic Justice Screening Tool" ("CEJST") in November 2022.[137] Unlike the existing "Environmental Justice Screening and Mapping Tool" developed by the U.S. Environmental Protection Agency, CEJST explicitly does not include race or ethnicity as a factor in identifying targeted communities for the Biden Administration's Justice 40 Initiative. This decision was criticized by members of President Biden's hand-selected White House Environmental Justice Advisory Council.[138] But according to the CEQ Chair, it was a conscious choice to ensure that CEQ's efforts would "survive" legal scrutiny.[139] Curiously, however, the Proposal's definition of "environmental justice" folds back in "race" and "color" by choosing to accept without revision the definition of "communities with environmental justice concerns" from the 2023 EJ EO. In *Students for Fair Admission*, the Supreme Court made clear that "[a]ny exception to the Constitution's demand for equal protection must survive [the] daunting two-step examination known . . . as 'strict scrutiny.'"[140] As drafted, it seems unlikely that the Proposal's reliance on race in evaluating a project's environmental justice impacts will produce the "sufficiently measurable" results that the Supreme Court has emphasized in other contexts.[141] Further, the use of a community's racial makeup to increase NEPA scrutiny by denying otherwise available CEs or allowing a project to avoid an EIS through application of "innovative approaches" is particularly troubling. One would think that the Supreme Court's opinion in *Students for Fair Admission* would have confirmed the soundness of CEQ's decision to avoid race when developing the CEJST. But through the Proposal, CEQ appears to have drawn the opposite conclusion. This reversal of positions causes one to wonder whether CEQ is even attempting to craft a workable environmental justice framework, or is simply providing President Biden a campaign talking point.

The Supreme Court has long recognized that the "scope of [an] agency's inquiries must remain manageable if NEPA's goal of 'insur[ing] a fully informed and well-considered decision,' is to be accomplished."[142] The Proposal's environmental justice requirements cut in the opposite direction. The proposed definition of "environmental justice" is ambiguous and overly broad. CEQ's choice not to define "communities impacted by environmental justice concerns" is equally problematic, though for other reasons. And the incorporation of these principles into every major section of the Proposal will inevitably lead to increased time, expense, and litigation risk for federal agencies and project proponents.

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[137] *See* U.S. Council on Environmental Quality. *Climate and Economic Justice Screen Tool: Methodology*. Nov. 22, 2022).
[138] Maxine Joselow, *Environmental justice leaders fault White House's race-neutral approach*, THE WASH. POST, Apr. 13, 2022.
[139] Lisa Friedman, *White House Takes Aim at Environmental Racism, but Won't Mention Race*, N.Y. TIMES, Feb. 15, 2022.
[140] Nos. 20-1199 and 21-707, slip op. at 15 (S. Ct. June 29, 2023)
[141] *Id.* at 22.
[142] *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 443 U.S. 519, 558 (1978)).

3. Alternatives Analysis and Mitigation

Among the more significant "action-forcing" revisions to the 2020 Rule include changes to the EIS alternatives analysis. Whereas the 2020 Rule required agencies to simply "evaluate reasonable alternatives to the proposed action,"[143] the Proposal would require them to "[r]igorously explore and objectively evaluate"[144] such alternatives. Further, CEQ proposes to establish prescriptive criteria by which agencies identify the "environmentally preferable" alternative(s), which include "maximizing environmental benefits, such as addressing climate change-related effects or disproportionate and adverse effects on communities with environmental justice concerns."[145] Further complicating the development of this section of an EIS is new guidance that agencies "may also include reasonable alternatives not within the jurisdiction of the lead agency."[146] How CEQ intends this provision to work is unclear, but intuitively, an alternative that is not within an agency's authority to take should not be considered a reasonable one. Together, these changes have the potential to create additional avenues for environmental plaintiffs and other project opponents to challenge the adequacy of any EIS underlying a decision document.

Inclusion of mitigation measures in the proposed action and alternatives has been part of CEQ's NEPA regulations since 1978. New to the Proposal, however, is direction that agencies "should, where relevant and appropriate, incorporate mitigation measures that address or ameliorate significant adverse human health and environmental effects of proposed Federal actions that disproportionately and adversely affect communities with environmental justice concerns."[147] And where such mitigation measures were included "as a component of the proposed action" which an agency relied on to analyze such action's effects, "the mitigation shall be enforceable, such as through permit conditions, agreement, or other measures."[148] This "monitoring" requirement is also present where an agency might utilize a "mitigated" finding of no significant impact ("FONSI") and therefore avoid preparation of an EIS,[149] as well as for certain CEs that require mitigation to avoid preparation of an EA.[150] Moreover, CEQ should not retain language in §1503.3 requiring agencies to cite applicable statutory authority for any necessary mitigation measures. These provisions represent the clearest example of CEQ attempting to turn NEPA into a substantive statute through imposition of mandatory and continuing obligations on project proponents and federal agencies.

F. "Innovative Approaches"

The Proposal also seeks to add a new section to the regulations that would allow agencies to use "innovative approaches" to comply with NEPA when addressing "extreme environmental challenges."[151] The examples of such challenges then provided are largely progressive priorities,

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[143] 2020 Rule, § 1502.14(a).
[144] Phase 2 Proposed Rule, § 1502.14(a).
[145] Phase 2 Proposed Rule, § 1502.14(f). *See also* Phase 2 Proposed Rule § 1500.2(e).
[146] Phase 2 Proposed Rule, § 1502.14(a).
[147] Phase 2 Proposed Rule, § 1505.3(b).
[148] Phase 2 Proposed Rule, § 1505.2(c).
[149] Phase 2 Proposed Rule, § 1501.6(c).
[150] Phase 2 Proposed Rule, § 1501.4(d)(3).
[151] Phase 2 Proposed Rule, § 1506.12.

including climate change-related risks, degraded water or air quality, and "disproportionate and adverse effect on communities with environmental justice concerns."[152] Similar to the "significance determination" issues discussed above, this proposal appears to be another effort by CEQ to create two categories of projects: those subject to increasingly burdensome NEPA requirements, and others favored by the Biden Administration that qualify for regulatory diversion and streamlined environmental review.

Not only is the provision is unnecessary and redundant because the current "Emergencies" provision would accomplish the same objective without further expanding the scope of CEQ's authority, but it is arbitrary and capricious because it is unbounded, reserves standardless discretion for CEQ to either authorize or not authorize specific innovative approach. CEQ established regulations allowing alternative arrangements in emergency circumstances, where there is the potential for significant environmental impacts and that would require an EIS absent the emergency, under the current 40 C.F.R. § 1506.12.[153] The regulations already recognize "the possibility that circumstances could arise that would make it impossible to comply with the rigorous obligations of NEPA. Therefore, CEQ provided for an emergency provision, 40 C.F.R. s 1506.11." *Crosby v. Young*, 512 F. Supp. 1363, 1386 (E.D. Mich. 1981). Once an emergency is deemed to exist, agencies would be required to consult with CEQ about their proposed alternative arrangements for compliance with Section 102(c) of NEPA, and such arrangements would be limited to actions necessary to control the immediate impacts of the emergency. CEQ has already provided guidance for taking emergency action under NEPA, including factors that must be addresses when requesting or designing alternative arrangements, such as the nature and scope of the emergency, actions necessary to limit the immediate impacts of the emergency, duration of the emergency, and potential mitigation measures.[154]

It is clear that CEQ already has in place a framework to address environmental related challenges of varying duration and complexity under the "Emergencies" provision. Yet, it seeks to cast the "innovative approaches" provision as a "new concept…distinct from the emergency provisions in §1506.11" in order to impose additional regulatory requirements that could tip the scales in favor of "greener" projects and impose greater regulatory burdens on the fossil fuel industry. To start, CEQ justifies the new provision on grounds that "an extreme environmental challenge might have a longer time horizon than is typical for an emergency action,"[155] but this is a non-sequitur because some of the "extreme environmental challenges" it lists (e.g. disproportionate and adverse effects on EJ communities, degraded water quality, bolstering the resilience of infrastructure to increase disaster risk) could also have short durations depending on the scope of the problem and the resources available to remedy the issue. Next, the procedures for obtaining CEQ approval already closely mirror those required for reliance on the "Emergencies" provision, including the requirement to consult with CEQ and explaining the environmental issue the agency is trying to address.[156] This redundancy is a far cry from Congress's clear intent to streamline the regulations and the regulatory process. Moreover, it is unclear how any of the

[152] Phase 2 Proposed Rule, § 1506.12(a).
[153] *See* 43 Fed. Reg. 55,977 (Nov. 29, 1978), amended in 2020, 85 Fed. Reg. 43,304 (July 16, 2020).
[154] *Id.*
[155] 88 Fed. Reg. at 49,957.
[156] *Id.*

innovative approaches listed by CEQ[157] could require modification of the regulations. They all appear to involve deliberations, mechanisms, and tools that often already form part of agency processes during project development, approval, implementation, or a combination of these. In sum, the "innovative approaches" provision is another unnecessary, burdensome impediment to streamlining the environmental review process.

G. Categorical Exclusions

The FRA codified the 2020 Rule's provision that an agency may adopt an existing CE from another agency where the proposed action under review is substantially similar to that of the existing CE.[158] But while the Proposal largely follows the CE "adoption" language of the 2020 Rule, it makes some noteworthy changes.[159] First, it would expand the ways in which an agency could establish new CEs, such as through a land use plan or decision document supported by a programmatic EA or programmatic EIS.[160] Conceivably, this should provide agencies with greater flexibility and improve efficiency throughout the NEPA process. At the same, however, this section includes a number of procedural requirements that could make the process more difficult, which would certainly run counter to Congressional intent.[161]

The NEPA regulations have always required additional environmental analysis where a proposed action that satisfies an established CE presents with "extraordinary circumstances." CEQ seeks to define "extraordinary circumstances" for the first time, which it proposes would "include potential substantial effects on sensitive environmental resources, potential disproportionate and adverse effects on communities with environmental justice concerns, potential substantial effects associated with climate change, and potential adverse effects on historic properties or cultural resources."[162] This new standard could result in agency officials relying on CEQ's "extraordinary circumstances" definition to exclude from application of a CE those infrastructure, traditional energy, and other projects that do not align with certain progressive policy priorities, even if their own agency NEPA procedures would not require this result.[163]

H. Review of NEPA Compliance

The Proposal restores the pre-2020 Rule's language regarding an agency's use of "high quality" information in the NEPA process.[164] But it goes further, adding new direction that such

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[157] *Id*. at 49,958 ("[e]xamples of innovative approaches that could be the basis for a request include new ways to use information technology; cooperative agreements or work with local communities…new ways to work with project proponents and communities to advance proposals; and innovative tools for engaging the public and providing public comment opportunities[.]").
[158] *Compare* FRA, § 109 *with* 2020 Rule, § 1506.3(d).
[159] Phase 2 Proposed Rule, § 1506.3(d).
[160] Phase 2 Proposed Rule, § 1501.4(c).
[161] Phase 2 Proposed Rule, § 1501.4(e).
[162] Phase 2 Proposed Rule, § 1508.1(m). Presently, "extraordinary circumstances" are defined by each federal agency. *See, e.g.*, 7 CFR § 799.33(a) (U.S. Department of Agriculture); 43 CFR § 46.215 (U.S. Department of the Interior); 23 CFR § 771.116(b) (U.S. Department of Transportation).
[163] Phase 2 Proposed Rule, § 1501.4(a) ("agencies shall establish [CEs] for categories of actions that normally do not have a significant effect on the human environment, individually or in the aggregate, and therefore do not require preparation of an [EA] or [EIS] unless extraordinary circumstances exist that make application of the [CE] inappropriate….").
[164] *Compare* Phase 2 Proposed Rule, § 1500.1(b) *with* 2020 Rule, § 1500.1(b). *See also* Phase 2 Proposed Rule, § 1502.15(b).

information includes "the best available science and data."[165] Notably, CEQ does not define "best available science and data," meaning that courts would likely be asked to opine on its meaning and whether it was utilized in relation to a proposed action. The Proposal also adds a provision that, "[w]here appropriate, agencies shall use projections when evaluating the reasonably foreseeable effects, including climate-change related effects."[166] This change too would likely result in courts weighing the need for and the sufficiency of technical information, resulting in even more agency remands to conduct increasingly complex environmental analyses.

Finally, the Proposal seeks to eliminate many of the 2020 Rule's attempts to keep potential litigants from laying behind the log to sandbag a project. For example, the Proposal would eliminate the requirement that public comments on a final EIS prior to issuance of a ROD be "as specific as possible" or "be considered unexhausted and forfeited…."[167] Similarly, the Proposal would strike a provision that presumes against a finding of irreparable harm and injunctive relief if a court finds that an agency failed to comply with NEPA.[168] These changes return NEPA to a pre-2020 Rule status quo ante and would make it easier to halt agency-approved projects due to theretofore unknown post-ROD objections, thus heightening the uncertainty and unpredictability of the environmental review process.

I. Replacement of "Proposed Action" with "Proposed Agency Action"

Similar to CEQ's efforts to provide clarity by replacing all instances of "impacts" with "effects," CEQ should make sure that all references in the regulations track the language of the revised statute by replacing "proposed action" with "proposed agency action." The Proposal makes countless references to "proposed action," which fails to account for the narrowing Congress specifically incorporated into NEPA with the FRA amendments. Making this change would be consistent with the statute, as amended.[169]

J. "Where Compliance Would Be Inconsistent with Other Statutory Requirements"

The Proposal recommends striking the phrase "except where compliance would be inconsistent with other statutory requirements," from § 1500.3. However, the FRA amendments specifically add this language to NEPA §102(2)(C). CEQ should retain this language where it occurs in the regulations as being consistent with the statute, and also add this language to § 1502.3 to be consistent with the statutory language referenced therein. In subsequent revisions to the regulations, after withdrawing the Proposal and preparing updates that address the FRA amendments to the statute, CEQ should endeavor to interpret this language more fully.

K. Retain Estimated Costs To Prepare

CEQ should retain the 2020 Rule's language in § 1502.11(g) for providing an estimated total cost to prepare the EIS. CEQ's rationale for striking this provision relies on agency comments that they do not do this, it is difficult to monitor, agencies have inconsistent methodologies, and that it is burdensome. However, the 2020 Rule acknowledged that agencies have not routinely tracked these costs, and relied upon a 2014 report from the Government Accountability Office that costs vary considerably. The purpose of including this requirement in the 2020 Rule was to

[165] Phase 2 Proposed Rule, §§ 1502.15(b) and 1502.23(a).
[166] Phase 2 Proposed Rule, § 1502.23(c).
[167] 2020 Rule, § 1503.3(b) (deleted in its entirety from the Phase 2 Proposed Rule).
[168] 2020 Rule, § 1500.3(d) (deleted in its entirety from the Phase 2 Proposed Rule).
[169] *See e.g.*, NEPA §102(2)(C)(i), (iii), (v), § 106, passim.

address a data gap on the administrative costs of NEPA compliance because industry noted that delays resulted in higher costs, and it was difficult to quantify this claim without sufficient information. CEQ has not addressed why it is no longer necessary to fill this gap in the data.

L. CEQ's Special EA Is Inadequate

Seemingly as an afterthought, CEQ issued a nine page Special EA in July 2023 to "accompany and inform" this proposed rulemaking. Notably, CEQ fails explain the origins or authority for relying on this previously unseen concept. Nothing in the 2020 Rule or any prior practice explain what a Special EA is or when it can be employed. CEQ should answer these questions and provide clarity explaining the concept of a Special EA in its response to comments.

CEQ cannot escape its own legal obligations to comply with NEPA merely by calling the EA "Special." The Special EA fails consider the required no action alternative,[170] or any other alternatives to the Proposal. As such, it is fatally flawed. In addition, the Special EA fails to properly analyze the effects of the Proposal or take the requisite "hard look," and instead relies entirely upon conclusory assertions that is does not anticipate any reasonably foreseeable environmental effects, and further minimizes its obligation by concluding that even if there are they would be beneficial. But CEQ provides no basis for these conclusions. CEQ's reliance on the Special EA makes a mockery of its own Proposal because CEQ has failed include any analysis of climate impacts or impacts on environmental justice communities from the Proposal in this Special EA. This offers the surreal spectacle of "NEPA on NEPA on NEPA"—and maladministered NEPA^3, to boot.

M. Practical Insights from the Agency Level

1. The Problem of Too Many Cooks in the Kitchen

The public, and even Congress, often assume the lengthy time it takes to complete many NEPA documents is grounded in the need to complete studies or take time to analyze complex issues associated with the project.[171] Others attribute the delay to a lack of agency resources.[172] Just as often the cause of delay can be attributed to poor internal processes at agencies and lack of accountability, which result in large periods of time where no substantive work is conducted on the NEPA analysis.

Within any agency rests a division between an ever-rotating cadre of political leadership and a much larger set of permanent career staff whose priorities do not always align with each other. This can sometimes be seen when career staff try to draw the attention of political leadership to priorities in the field by publishing a Notice of Intent without any funding, or approval or prioritization from leadership to actually advance the project. And then it waits to get attention, sometimes never receiving it, or only receiving it after many years.

In addition, behind the scenes within the agencies, a countless number of bureaucrats at various levels within the agency often need to review NEPA documents before they can advance to

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[170] *See* NEPA §102(2)(C)(iii), and 40 C.F.R. § 1502.14.
[171] *Examining Systemic Government Overreach at CEQ*: Hearing before H. Subcomm. Oversight and Investigations, Natural Resources, 118th Cong. (Sept. 14, 2023) (testimony of Jill Witkowski Heaps answering Rep. Collins' question asking for reasons why it takes 5 years to complete an EIS).
[172] *Id*. (testimony of Mario Loyola in response to question asking for reasons why it takes 5 years to complete an EIS).

completion, even though any formal requirement for review by these officials cannot be found in NEPA or any implementing regulations. For instance, after field staff complete their analysis, it may need additional review by both career and political supervisors, sometimes at multiple levels up the chain of command to ensure alignment with leadership priorities or policies. Another example may be the need for a legal sufficiency review by agency counsel, which may involve review by one or more attorneys at various levels before it can be published or signed. In many instances that attorney's first involvement in the process may be when providing the legal sufficiency review.

At each level of review, the documents may need to be sent back to the field level staff for further revision before advancing to the next level of review. Since these reviews take time and field level staff rotate assignments within their agency, sometimes the staff with the knowledge of the documents are no longer available to work on the revisions, and new staff need to familiarize themselves with the contents. This can occur multiple times if each level of review is not completed in a timely manner. It can also lead to incongruities in the analysis making them more vulnerable to litigation challenges.

Occasionally, the most significant delays can be attributed to waiting on review from political leadership to ensure that the projects being advanced align with an administration's policies and priorities. While alignment with leadership policies and priorities is an important aspect of the decision-making process, it can often create a bottleneck for review as high-level political officials often have multiple competing priorities that prevent them from devoting the time necessary for reviewing lengthy NEPA documents.

Since agencies seldom articulate the process for these multiple levels of review to the public, project sponsors often press the field level staff they have been working with for status updates. This leads to frustration for both the field level staff and the project sponsors. For the staff because they have often completed their portion of the work many months before, but cannot advance the project without further approval from above. And because they neither know the status of review by their superiors, nor have the ability to press them to complete their review. This becomes frustrating for project sponsors because they cannot get a satisfactory answer for when their projects will advance. Meanwhile, the documents await review by superiors that have no clearly defined timeline for completion of their review, nor accountability for doing so in a timely manner.

Without efficient processes in place, these reviews can lead to significant delays with little of that time being spent analyzing the issues. These delays only compound when multiple agencies are involved in the review process, especially when the reviews are conducted across different departments.

2. *A Case Study for NEPA Streamlining: Implementation of Secretary's Order 3355 at the Department of the Interior*

On August 31, 2017, Secretary's Order 3355 (S.O 3355) was issued to streamline the Department's NEPA processes. Among other things, it included concepts that CEQ incorporated into the 2020 Rule, and that Congress eventually adopted in the FRA amendments, like setting page limits for EISs at 300 pages and EAs at 150 pages, and requiring that they be completed within 1 year and 6 months, respectively. The Department also created a NEPA and Permit Tracking Database (the Database). Within a year, several documents were issued implementing S.O. 3355.

- *Deputy Secretary Memorandum: Additional Direction for Implementing SO 3355* (April 27, 2018), among other things provided that a schedule be established for each EIS (another concept that eventually made its way first into CEQ's 2020 Rule and eventually into the statutory amendments). It also required that each EIS have a project team consisting of the first line Senior Executive Service (SES) member with line authority over the proposed action and an attorney from within the Office of the Solicitor to each team.
- *Deputy Secretary Memorandum NEPA Document Clearance Process* (April 27, 2018), consolidated the multiple levels of review by agency official into a single review team that clearly identified senior level officials that would have opportunities for review at six stages in the process and provided a strict schedule for participation.
- *Questions and Answers Related to Deputy Secretary Memorandums (Memos) dated April 27, 2018* (June 22, 2018).

Implementation of these policies allowed the Department to significantly reduce the time it took to complete the NEPA process for EISs, frequently to less than one year. This success was a result of several key features of the collective reforms of S.O. 3355 and its progeny:

- First, S.O. 3355 reforms built accountability into the process by clearly identifying and recording the identities of who would be responsible for timely completion of the EIS and defining their respective roles and responsibilities.
- Second, S.O. 3355 reforms required the project team to establish a schedule early in the process, and seek approval from a senior level official before being allowed to deviate from the schedule.
- Third, S.O. 3355 reforms consolidated multiple levels of review by senior officials into a single review at each important stage in the prosscess.
- Fourth, S.O. 3355 reforms established aggressive, and clear, timelines for completing the senior level review of NEPA documents.
- Fifth, S.O. 3355 reforms provided transparency of the review process to field level staff by allowing them to present their projects directly to senior level officials, receive their input in real time, and quickly execute on making any necessary revisions.
- Sixth, because of the shortened timelines, S.O. 3355 reforms reduced the likelihood that staff would be reassigned before revisions could be made to their work.
- Seventh, in practice senior officials only allowed the project team to begin their presentations after being assured that the SES and attorney had actually read the document being discussed, and the project team had addressed all their concerns, thereby adding another layer of accountability.
- Eighth, S.O. 3355's page limits made it manageable for senior level officials to complete their review in a timely manner.
- Ninth, by placing a departmental attorney onto the project team early in the process, S.O. 3355 reforms ensured that final documents supporting the decision would arise from decision making keyed to legal compliance at every step of the process.

CEQ should review these changes to the internal review processes within the Department as a model for creating a separate guidance document on how to implement similar internal

procedures across the whole of the federal government, as a way of improving efficiency to help meet the new statutory deadlines for completing EISs and EAs.

Improving the cadence of agency work is only one piece of the puzzle, and in most cases there will be far more significant impediments in the form of unreasonable analytical requirements and the time required to obtain counsel on NEPA compliance. Even the most motivated, organized, and effective agency can do only so much when operating within the shadow of possible litigation.

V. Suggestions for Conforming CEQ's Regulations with Congress's Recent Amendments to NEPA

CEQ should withdraw the Proposal, and focus its rulemaking efforts on modifying the 2020 Rule for the limited purpose of addressing the changes made to NEPA under the FRA. CEA's comments above point out flaws in the current Proposal. Here, we offer suggestions and solutions that address the FRA's amendments to NEPA and would advance efficiency in the NEPA process and reduce litigation risks for agencies. Those suggestions include the following:

- Maintaining political neutrality in all new provisions incorporated into the regulations;
- Not going forward with newly proposed provisions that impose untested and ill-defined concepts and requirements for additional analysis, like the environmental justice and climate-related impacts provisions that are likely to lead to future litigation and uncertainty;
- Rejecting the reinstatement of the 1978 regulatory provisions which led to litigation uncertainty and which interpreted different statutory language;
- Returning to the 2020 Rule's definition of effects since the FRA amendments do not support consideration of cumulative impacts; and
- Clarifying new statutory provisions, for example:
    - Identifying how the new language in NEPA § 102(2)(C) narrows the scope of analysis and eliminates requirements previously imposed by the courts and CEQ, like the analysis of cumulative impacts, that were based upon the broader terms found in the prior statutory provisions;
    - Avoiding confusion, by changing all occurrences of "proposed actions" in CEQ's Proposal to "proposed agency action" to incorporate the statutory language now found in NEPA § 102(2)(C);
    - Instructing agencies to clarify in their NEPA regulations exceptions "where compliance would be inconsistent with other statutory requirements" to reflect the addition of this language in NEPA §102(2)(C);
    - Explaining how agencies incorporate the threshold determinations found in NEPA §106(a) into the NEPA process;
    - Outlining best practices for developing a schedule for completion under NEPA § 107(a)(2)(D);
    - Providing guidance on the procedures lead agencies should prescribe for allowing project sponsors to prepare environmental assessments (EA) and environmental impact statements (EIS), per NEPA § 106(f);

- Interpreting how concepts like supplementation and reevaluation, as well as situations involving remands from litigation, interact with the new deadline provisions in NEPA § 106(g);
- Explaining whether CEQ interprets and anticipates the new right to petition a court to address delays will be evaluated under a framework similar to a 5 U.S.C. § 706(1) claim or as something simpler that focuses on determining the proper date the clock on the deadline began to run;
- Providing a process by which agencies can complete the reporting requirements under NEPA §106(h); and
- Clarifying the phrase "no or minimum" from NEPA § 111(10)(B)(i).

/s/

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