Predictability: Project developers and financers must have an appropriate level of certainty regarding the scope and timeline for project reviews, including any related

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

The Coalition and the members we represent are committed to working constructively with CEQ to develop implementing regulations that would properly assist federal agencies in complying with NEPA. However, the Proposed Rule neither removes unnecessary barriers to projects essential to the United States' economy and security nor adheres to the established, permissible limits of NEPA analysis. As detailed below, federal agencies conducting NEPA

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

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

These trends must be reversed – not exacerbated.

II.

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

Section 101 incorporates notions of practicability and "other essential considerations of national policy." NEPA's policies are "supplementary" to agency authorities, which reflect those "other essential considerations." As recognized in numerous decisions issued since NEPA's enactment, NEPA exists to inform the public and federal decision-makers about the

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

CEQ's Proposed Rule would thus fundamentally revise NEPA from being a procedural statute focused on the analysis of effects and alternatives to a substantive statute that all but formally requires agencies to prefer or fast-track certain types of projects and impose certain types of substantive requirements. If Congress had intended NEPA to be the statutory vehicle for specific policy outcomes or CEQ to be enabled with substantive authority, it certainly could have [illegible] effects and [illegible] ys to CEQ [illegible] oth [illegible] NEP [illegible] d

CEQ overstates its case. The current NEPA rule does not, as CEQ asserts in its preamble, take an "inappropriately narrow view of NEPA's purpose . . . ."

based on enumerated substantive requirements. It merely requires the agencies to identify the

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

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

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

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

before. In *Public Citizen*, the Court explained that some effects "'caused by' a change in the

The Proposed Rule would build on the well-established role of mitigation in NEPA

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

CEQ had previously included helpful language tracking the holdings and interpretations of *Metropolitan Edison Company* and *Public Citizen*

this instruction in its 2022 Rule, basing the removal on perceived and unspecific "ambiguities" that resulted from the 2020 Rule's amendment to Section 1502.13. But to evaluate alternatives based on factors besides an applicant's proposal (and an agency's statutory authority) is to turn NEPA into a paperwork exercise divorced from the concrete proposed action that is reviewed under NEPA's provisions. Likewise, were an agency to consider factors besides its own statutory authority in determining the purpose and need of the project, the agency would necessarily analyze potential alternatives that the agency lacks legal authority to implement. NEPA's goal of informing the public about the environmental effects of agency actions is not served by considering a purpose and need (and related alternatives) unrelated to applicant proposals or agency legal authorities. Accordingly, CEQ should reintroduce this

processes and requirements from other environmental laws with the NEPA process." Respectfully, limiting the ability of other agencies to fulfill NEPA through other statutory reviews would be inefficient and counterproductive; in short, it "would be a legalism carried to the extreme."

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

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

The Coalition urges CEQ to retain existing NEPA regulations that exclude farm ownership and operating loans and loan guarantees, issued by the Farm Service Agency ("FSA") from the definition of "major federal action." These generally local loans and loan guarantees are not significant federal actions, with FSA regulations limiting direct loans to $600,000 and loan guarantees to $1,750,000. As the FSA explains, these loans continue a "long tradition of providing a financial safety net for America's farmers and ranchers to sustain economically viable agricultural production." Although courts have concluded that some loans or other financial incentives can rise to the level of major federal action – for example, the authorization of a project to issue $1.75 billion in tax-free bonds , or restructuring hundreds of million of dollars in loans – the FSA's loan and loan guarantee programs involve much, much smaller outlays of financial assistance to America's small farmers and the banks that support them. The NEPA exclusion for these loans and loan guarantees should be retained.

The FRA provides that "loans, loan guarantees, or other forms of financial assistance where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effect of the action" are not "major Federal action[s]" for NEPA purposes. FSA loans and loan guarantees clearly fall into this category, as they involve limited or no meaningful federal control over an applicant's use of the loans and loan guarantees. In the case of direct loans, the FSA evaluates an applicant's agricultural productivity and assists the applicant in developing a farm operating plan to improve the chances of successful repayment – the FSA does not exercise significant control over an applicant's activities outside that limited context. In the context of FSA loan guarantees, CEQ has also already observed that "[t]he mere possibility of [F]ederal funding in the future is too tenuous to convert a local project into [F]ederal action." In proposing to strike language excluding FSA loans and loan guarantees, CEQ states, without any further explanation, that the agency "considers it best left to agencies to identify exclusions from the definition of major Federal action absent specific statutory authority like those for the Small Business stato p ndinn-Ginn

> **S .—In making a determination under this subsection, an agency—**
>
> **(A) may make use of any reliable data source; and**
> **(B) is not required to undertake new scientific or technical research unless the new scientific or technical research is essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable.**

Inexplicably, CEQ does not even discuss the FRA's

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

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

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

> **By removing the phrase requiring a commenter to "provide as much detail as necessary to meaningfully participate and fully inform the agency of the commenter's position," the agency is likely to reduce transparency and meaningful and actionable public engagement. If commenters do not provide clear comments, it will be more difficult for agencies to address environmental issues before taking action. This proposal is at odds with the stated objectives of the Proposed Rule.**
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> **CEQ proposes to reduce the time that agencies have to develop their own proposed NEPA procedures from 36 months to 12 months. Given the complexity and burdensome features of CEQ's proposed rule, the Coalition suggests that iÀ î ή this is an unreasonably short period of time for agencies to develop and propose their respective NEPA procedures. However, CEQ should be clear that agencies should not delay any NEPA reviews of proposed federal actions pending finalization of their own NEPA procedures.**
>
> **CEQ proposes to require that agencies continually review their agency-specific NEPA procedures and revise them – the Coalition believes this requirement could reduce or eliminate stability as agencies engage in a process of constant revision.**
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noted above, Coalition members are taking meaningful and effective steps to mitigate greenhouse gas emissions in their operations while simultaneously furthering Congress' and this Administration's goals in passing and implementing the Infrastructure Investment and Jobs Act, the CHIPS and Science Act, the Inflation Reduction Act, and the FRA. Achieving the goals of these acts will require new projects throughout all sectors and industries, and these projects will have a variety of environmental effects – which will need to be considered, as appropriate, via NEPA processes.

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

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

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

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

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

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

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

B. CEQ should not include the proposed "Context and Intensity" factors.

CEQ proposes to return to "context" and "intensity" instead of "potentially affected environment" and "degree," for determining significance, explaining that this framing has "long provided agencies with guidance [as to] how the intensity of an action's effects may inform the significance determination."

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

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

D. Lead agencies should actively manage the process.

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

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

CEQ proposes a new "informal dispute resolution" process for resolving interagency disputes over the environmental review process. This dispute resolution process would likely further complicate the NEPA process for a particular project, frustrate deadlines for the completion of the NEPA process, and tax CEQ's limited resources. By allowing any "[f]ederal agency" to request informal dispute resolution, CEQ m th wi n Ŏ # partisan goaenŃ cy

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

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

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

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

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

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

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

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

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

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

VIII. CONCLUSION

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

Sincerely,

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

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