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September 29, 2023

Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503
ATTN: Amy B. Coyle, Deputy General Counsel

**RE: Council on Environmental Quality Docket Number CEQ-2023-0003 Notice of Proposed Rulemaking: National Environmental Policy Act Implementing Regulations Revisions Phase 2**

Dear Deputy General Counsel Coyle:

## I. Introduction and Comments Summary

The Women's Mining Coalition (WMC) is submitting these comments on the Council on Environmental Quality's (CEQ's) proposed rulemaking to revise its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA)[1], Docket Number CEQ-2023-0003 as published on July 31, 2023, in the Federal Register, Vol. 88 No. 145[2] (Proposed Rule). In this Federal Register announcement, CEQ states that the Proposed Rule implements the Fiscal Responsibility Act's (FRA's) amendments to NEPA and calls this proposed rule the "Bipartisan Permitting Reform Implementation Rule." Under this guise of bipartisanship, CEQ purports "to provide for an effective environmental review process that promotes better decision making; ensure[s] full and fair public involvement; provide[s] for an efficient process and regulatory certainty; and provide for sound decision making grounded in science, including consideration of relevant environmental, climate change, and environmental justice effects." (88 Fed. Reg. at 49,924).

In the FRA, Congress focused on streamlining and expediting NEPA review, establishing deadlines and page limits for the preparation of environmental documents. 42 U.S.C. § 4336(e), (g) (two-year deadline to complete EISs; one-year deadline to complete EAs; 150-page limit for an EIS; 75-page limit for an EA, excluding appendices). Demonstrating how serious it was in addressing NEPA delays, Congress further provided for project proponents to take legal action to resolve NEPA-based delays. *Id.* § 4336(g)(3). Other efficiencies Congress legislatively created include identifying the circumstances when an agency does not need to conduct a NEPA review (Sec. 106), allowing the adoption of another agency's categorical exclusions (Sec. 109), clarifying lead-agency designations and responsibilities (Sec. 107), setting forth time frames and

[1] The regulations implementing NEPA are at 40 CFR Part 1500-1508.
[2] The 63-page Proposed Rule is at: https://www.govinfo.gov/content/pkg/FR-2023-07-31/pdf/2023-15405.pdf

circumstances when an agency can rely on programmatic environmental documents (Sec. 108), and expounding upon the definition of "major federal action[s]" (Sec. 111(10)).

In enacting the FRA, Congress also directed that federal agencies undertake a more-expedient NEPA process that reduces delays and paperwork burdens that Congress has identified as creating an impediment to our permitting of desperately needed projects in the U.S. In doing so, Congress placed limits on the scope of NEPA reviews while ensuring adequate consideration of environmental impacts so that agencies can continue to engage in informed but more efficient decision-making. CEQ purports to account for these significant NEPA reforms in the current rulemaking process but in truth, its revisions send NEPA and permitting in the wrong and opposite direction, defying and undermining Congress' recent and repeated directives.

On July 28, 2023, the White House issued a press release on CEQ's proposed NEPA rule that claims the Proposed Rule change will "...accelerate America's clean energy future,...will help us speed the build-out of our clean energy future,...improve the permitting process in order to meet our ambitious climate and clean energy goals,...and...accelerate the deployment of clean energy, transmission, broadband, clean water and other crucial infrastructure."[3] Unfortunately, as explained in these comments, CEQ's proposed changes to NEPA's implementing regulations will not achieve any of CEQ's or the White House's stated objectives. Instead, the radical and unlawful changes in the Proposed Rule will insert confusion and uncertainty into the NEPA process that will exacerbate NEPA delays and increase NEPA litigation. If implemented, the Proposed Rule will create uncertainty due to an increased potential for litigation and intolerable delays in the NEPA process that will threaten the Nation's ability to build the infrastructure needed to achieve the Administration's stated energy transition and nationwide electrification goals. The Proposed Rule will also interfere with the timely development of the many minerals that are essential to the energy transition and which are required to strengthen domestic supply chains.

The Proposed Rule is unlawful and contravenes the bipartisan directives of the NEPA amendments in the FRA that are designed to streamline the NEPA permitting process. It is also inconsistent with congressional permitting directives in Section 40206(b)(4) of the Bipartisan Infrastructure Law (BIL), which is also known as the Infrastructure Investment and Jobs Act of 2021, in which Congress identifies the federal permitting process "as an impediment to mineral production and the mineral security of the United States." Section 40206(c) of this law clearly directs the Secretaries of the Interior and Agriculture "to improve the quality and timeliness of Federal permitting and review processes with respect to critical mineral production on Federal land" and directs the Secretaries that to "the maximum extent practicable [the Secretaries] shall complete the Federal permitting and review processes with maximum efficiency and effectiveness, while supporting vital economic growth. . . ."[4]

The permitting directives in the BIL are necessary to support the energy transition and to decrease our dependency on foreign minerals. The sweeping changes in CEQ's Proposed Rule, however, ignore these Congressional mandates and will produce permitting delays and litigation that will impede the energy transition and increase the Nation's already dangerous reliance on other

[3] The release is available here: https://www.whitehouse.gov/ceq/news-updates/2023/07/28/biden-harris-administration-proposes-reforms-to-modernize-environmental-reviews-accelerate-americas-clean-energy-future-and-strengthen-public-input/.
[4] *See* 30 U.S.C. § 1607(c).

countries for the minerals we need to ensure our national defense and economic wellbeing, and to support modern society.

The following summarizes how the Proposed Rule unlawfully uses this administrative rulemaking in ways that exceed CEQ's authority under NEPA and therefore violate this law. The proposed changes would increase permitting timelines and lead to more litigation because the Proposed Rule:

- Changes CEQ's NEPA regulations from a procedural analysis of environmental impacts, as NEPA itself provides, into regulations that suggest agencies must prefer or select an environmentally preferable outcome – one that may be inconsistent with the agency's purpose and need pursuant to its statutory obligations to issue permits that authorize certain levels of environmental impacts in order for a project to occur;

- Adds climate change and environmental justice, which unlawfully exceeds CEQ's statutory authority under NEPA;

- Eliminates the express requirement in CEQ's NEPA regulations for public comments on a proposed project to be specific and to be raised in a timely fashion (i.e., in compliance with the comment period deadlines for public comments to be submitted on draft and final NEPA documents) which could lead to concerns being voiced at any point in the NEPA process – and potentially lead to commenters unlawfully attempting to raise new issues during litigation;

- Removes the requirement that agencies consider economic and employment impacts from the NEPA analysis thereby fundamentally changing the scope of NEPA documents, improperly ignoring how projects may benefit stakeholders, which may include environmental justice communities, and making the analysis of socioeconomic consequences meaningless;

- Increases the time it will take agencies to complete the NEPA process, which is contrary to Congress' recent amendments to NEPA in the FRA and its permitting directives in Section 40206 of the BIL;

- Includes new requirements for the use of categorical exclusions that, contrary to Congressional directives, will make use of this efficient regulatory tool more difficult;

- Arbitrarily and unnecessarily changes material terms that have decades of caselaw interpreting them (e.g., significant to important; impacts to effects) which will lead to uncertainty and litigation further delaying permitting projects under NEPA;

- Responds inadequately to the Congressional directive in the FRA that adverse impacts associated with the no action alternative need to be discussed in NEPA documents; and

- Fails to include procedures to implement the FRA directive authorizing sponsor-prepared draft EIS documents.

About WMC

WMC is a grassroots organization with over 200 members nationwide. Our mission is to advocate for today's modern domestic mining industry, which is essential to our Nation. WMC members work in all sectors of the mining industry including hardrock and industrial minerals, coal, energy generation, manufacturing, transportation, and service industries. We convene annual Washington, D.C. Fly-Ins to give our members an opportunity to meet with members of Congress and their staffs, as well as with federal land management and regulatory agencies to discuss issues of importance to both the hardrock and coal mining sectors.

WMC members have extensive experience with NEPA, including participating in the NEPA process to develop Environmental Assessments (EAs) and Environmental Impact Statements (EISs) for numerous proposed mineral projects on Bureau of Land Management (BLM)-administered public lands and on National Forest System lands. WMC submitted detailed comments in 2018, 2020, and 2021 in response to CEQ's request for comments on previously proposed changes to the NEPA regulations. These comments are incorporated by reference as though fully set forth herein.

## II. The Seismic Shift to Declare NEPA Suggests Certain Substantive Outcomes Is Ultra Vires and Unlawful

### A. The Proposed Rule Unlawfully "Re-interprets" NEPA's Procedural and Disclosure Purpose

The Proposed Rule unlawfully "reinterprets" NEPA, which CEQ and U.S. federal courts have long recognized as an environmental analysis and disclosure statute into an environmental protection law that emphasizes achieving an environmentally preferable alternative and a specific environmental outcome. This proposed change is unlawful because it exceeds CEQ's legal authority under NEPA.[5] Administrative agencies cannot use a rulemaking process to change NEPA in ways that Congress has not. Moreover, CEQ's Proposed Rule has significant potential to conflict with other environmental statutes.

As enacted by Congress in 1969 and confirmed by the Supreme Court, NEPA is a procedural statute that outlines how federal agencies must thoroughly evaluate and disclose the environmental impacts that would result from a proposed project when deciding whether to issue a permit for that project. In preparing Environmental Assessments (EAs) and Environmental Impact Statements (EISs), federal agencies must take a hard look at the environmental impacts that would result from a proposed action and reasonable alternatives to that action that may avoid, minimize, or mitigate impacts. NEPA documents thus inform agencies and the public about how a proposed action and alternative actions would impact the environment.

NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756–57 (2004). NEPA does not prescribe substantive environmental outcomes. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371

[5] "Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency [may] add pages and change the plot line." *W. Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quotation and citation omitted).

(1989) "NEPA imposes procedural requirements, not "substantive environmental results"). It "is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizen's Council*, 490 U.S. 332, 349-50 (1989); *see also Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1177 (9th Cir. 2011) ("NEPA … does not impose any substantive requirements on federal agencies—it exists to ensure a process" (internal quotation marks and citation omitted")). And "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Id.*

CEQ's sudden, inexplicable, and unauthorized declaration that NEPA now requires not just process but certain substantive outcomes is ultra vires, unlawful, and violates the Major Questions Doctrine. Similar to the circumstances in *West Virginia v. EPA*, after decades of the agency (as well as numerous federal courts, including the Supreme Court, (*see,* Section II.D. of these comments)) interpreting NEPA to be procedural, without explanation or any Congressional authorization, CEQ is now suddenly seeking to impose substantive requirements under its NEPA regulations. Moreover, it's doing so at a time when Congress, through bipartisan efforts, has repeatedly mandated permitting reform out of grave concerns for national energy security, supply chain issues, and a dangerous and alarmingly increasing reliance on foreign sources of critical minerals. The Supreme Court will "typically greet" assertions of "extravagant statutory power over the national economy" with "skepticism." *W. Virginia v. EPA*, 142 S.Ct. 2587, 2609 (2022) internal quotation marks omitted). CEQ is asserting highly consequential power beyond what Congress could reasonably be understood to have granted through its enactment of NEPA and, particularly in light of its recent amendments to NEPA under the FRA. Like the agency in *West Virginia v. EPA* arguing that Congress empowered it to substantially restructure the American energy market, claiming "to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority", *id.* at 2610 (brackets and internal quotation marks omitted), CEQ is claiming unprecedented authority under NEPA to mandate substantive requirements in conflict with its own long-standing interpretation of that statute.

Just as *West Virginia* noted EPA's action during the first four decades of the Clean Air Act's (CAA's) existence, recognizing that how an agency has previously acted on major questions under the same statute is relevant – and, indeed, important – in determining the lawfulness of current action. Similarly, a federal court reviewing CEQ's Proposed Rule (if enacted) should consider CEQ's about-face from its decades-long interpretation of NEPA with no Congressional change in the statute to support its shift. As the Court recognized in *West Virginia*, "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body. *Id.* at 2616. "Congress could not have intended to delegate a decision of such economic and political significance [as how much coal-based electricity generation should be permissible in the U.S.] to an agency in so cryptic a fashion." *Id.* at 2608 (internal quotation marks omitted). The Supreme Court's explanation that EPA's view of its own authority was "not only unprecedented; it also effected a fundamental revision of the statute," *id.* at 2596, is also true of CEQ's apparent view that it can, through regulation, create new requirements and fundamental revisions to NEPA. It cannot. Therefore, it is clear that the Proposed Rule is unlawful and must be withdrawn and revised consistent with its judicially approved decades-long interpretation.

B. <u>The Proposed Rule Improperly and Unlawfully Expands the Alternatives Analysis via the Emphasis on an Environmentally Preferable Alternative</u>

It is instructive to compare how the environmentally preferable alternative is used in CEQ's 1978 NEPA regulations[6] (the regulations that were in effect prior to the recent cycle of rulemakings that started in 2018) with how it is used in the Proposed Rule. Two sections of the 1978 rule discuss the environmentally preferable alternative:

1. §1504.2 Criteria for referral, which establishes a protocol for involving CEQ to mediate and resolve an interagency disagreement about "proposed major federal actions that might cause unsatisfactory environmental effects", and directs agencies to "weigh potential adverse impacts considering: (a) Possible violation of national environmental standards or policies: (b) Severity; (c) Geographical scope; (d) Duration; (e) Importance as precedents; and (f) Availability of environmentally preferable alternatives;" and

2. §1505.2(b) Record of decision in cases requiring environmental impact statements, which requires agencies to: "Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors *including economic and technical considerations and agency statutory missions*." (emphasis added).

In contrast to this limited consideration of the environmentally preferable alternative in the 1978 rule, which directs *disclosure* of the environmentally preferable alternative in a Record of Decision (ROD) for an EIS, the Proposed Rule implies agencies should consider selecting the environmentally preferable alternative as the agency preferred alternative. The Proposed Rule mentions the environmentally preferable alternative seven times. Additionally, the preamble to the Proposed Rule refers to the environmentally preferable alternative twenty times. The extensive discussion of the environmentally preferable alternative in the preamble to the Proposed Rule improperly positions this alternative as a selectable alternative and, some might try to argue, the yardstick against which to measure a project proponent's proposed action or an agency's preferred action.

Section 1508.1(l) of the Proposed Rule defines the term "environmentally preferable alternative" to mean: "the alternative that will best promote the national environmental policy as expressed in section 101 of NEPA." 88 Fed. Reg. at 49,987. However, the preamble of the Proposed Rule overlooks that NEPA Section 101(a)[7] mandates a careful balancing of environmental factors that requires federal agencies to:

> ...use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, 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.

The preamble similarly disregards the directive in NEPA Section 101(b) that requires federal agencies to:

[6] 43 Fed. Reg., Vol. No. 230 pp. 55,973-56,007 (Nov. 29, 1978).
[7] 42 U.S.C. § 4331(a).

> "...assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; and achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities."

The environmentally preferable alternative in the Proposed Rule cannot ignore the statutory mandates in NEPA Section 101 to *fulfill the social and economic requirements of present generations of Americans* and to *attain the widest range of beneficial uses of the environment* while avoiding environmental degradation or undesirable or unintended consequences. Nor can CEQ adopt the Proposed Rule because it conflicts with NEPA Section 101 – as demonstrated in the discussion of the environmentally preferable alternative in the preamble to the Proposed Rule.

The Proposed Rule's disregard for the balancing directives in NEPA Section 101 is clearly evident in proposed Section 1502.14(f), which states that the environmentally preferable alternative "may be the proposed action, *the no action alternative*, or a reasonable alternative." (emphasis added). The explicit correlation of the environmentally preferable alternative with the no action alternative plainly demonstrates that the Proposed Rule conflicts with NEPA Section 101 because it authorizes agencies to select the no action alternative rather than an action alternative that impacts the environment but complies with all applicable regulatory requirements. It also conflicts with an agency's purpose and need as defined by its statutory obligations.

Consequently, the environmentally preferable alternative in the Proposed Rule is a far cry from the 1978 CEQ rule that requires agencies to describe an environmentally preferable alternative in a ROD for an EIS but at the same time directs agencies to consider *including economic and technical considerations and agency statutory missions*" in selecting the agency's preferred alternative. An agency's statutory mission means its obligations pursuant to other statutes to review permit applications and issue or deny permit applications. (See Section II.C., below).

Moreover, requiring analysis of an environmentally preferable alternative conflicts with well-established precedent that alternatives "that do not accomplish the purpose of an action are not reasonable and need not be studied in detail by the agency." *Citizens Comm. to Save our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1031 (10th Cir. 2002) (citations omitted). An agency need only evaluate alternatives that are "reasonably related to the purposes of the project." *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004) (internal quotation marks omitted). The purpose-and-need statement ensures that agencies develop only those alternatives that are reasonable and that they do not spend time analyzing alternatives that fail to achieve purposes of the proposed action. As numerous federal courts have recognized, the "goals of an action delimit the universe of the action's reasonable alternatives." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). In enacting NEPA, "Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be." *City of Grapevine v. Dep't of Transp*., 17 F.3d 1502, 1506 (D.C. Cir. 1994) (quoting *Citizens Against Burlington, Inc*., 938 F.2d at 199).

For this same reason, the Proposed Rule's suggestion that agencies may evaluate alternatives outside the scope of the agency's jurisdiction should be removed as inherently infeasible and in violation of Congress' directives to streamline NEPA. A "proposed alternative is reasonable only

if it will bring about the ends of the federal action." *Citizens Against Burlington*, 938 F.2d at 195 The Proposed Rule should direct agencies to develop reasonable alternatives that satisfy the purpose and need for the proposed action and that are technically and economically feasible, not alternatives that cannot be carried out by the lead agency because they are beyond the agency's jurisdiction. And CEQ admits that "NEPA and the CEQ regulations generally do not require" consideration of alternatives outside the scope of an agency's jurisdiction. 88 Fed. Reg. at 49,948. If this provision is not removed from the Proposed Rule it will place unnecessary burdens on agencies further delaying the NEPA process without adding to informed decision-making or increasing efficiencies – all in contravention of Congress' intent to improve the processing time for NEPA reviews. It also conflicts with the Proposed Rule's stated purpose to "reduce paperwork" and "emphasize important environmental issues and alternatives." *Id.* at 49,967 (proposed 40 C.F.R. § 1500.2(b)).

Similarly, the Proposed Rule's removal of language from the current regulations requiring that agencies "[l]imit their consideration to a reasonable number of alternatives." 40 C.F.R. § 1502.14(f) unnecessarily and inexplicably creates an open question regarding the number of alternatives an agency must consider. The current limitation is consistent with long-standing CEQ guidance and case law and CEQ provides no justification for such a seismic shift in policy. CEQ has stated in agency guidance that "[w]hen there are potentially a very large number of alternatives, *only a reasonable number* of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS." CEQ, "Forty Most Asked Questions Concerning CEQ's [NEPA] Regulations," Question 1, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981) (emphasis added); *see also Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978) ("[c]ommon sense also teaches us that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man"); *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1996) (an agency "need not consider an infinite range of alternatives, only reasonable or feasible ones"). This is yet another change that is likely to exacerbate rather than improve permitting delays and to subject NEPA decisions to increased and unnecessary litigation risk.

Requiring analysis of an environmentally preferable alternative also defies Congress' recent amendments to NEPA in the FRA which specifically and intentionally require that the agency consider "a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, **that are technically and economically feasible, and meet the purpose and need of the proposal**". Section 102(c)(iii) (emphasis added). The mandate that agencies study alternatives that are technically and economically feasible was so important that Congress again directed in Section 102(F) that agencies "study, develop, and describe technically and economically feasible alternatives."

The preamble discussion at 88 Fed. Reg. 49,977 further subordinates the balancing factors in NEPA Section 101 by mischaracterizing the statute as directing agencies to select an alternative that will maximize environmental benefits. For example, the preamble discusses "climate change related effects; disproportionate and adverse effects on communities with environmental justice concerns; protecting, preserving, or enhancing historic, cultural, Tribal, and natural resources; and causing the least damage to the biological physical environment" as if these factors were specifically included in Section 101 of NEPA – which they are not. As CEQ's authority is limited

to that delegated to it by Congress, such a substantive expansion beyond its statutory directives is unlawful.

CEQ's Proposed Rule cannot establish a *de facto* zero-impact environmental standard, which would conflict with many other federal laws mandating environmental protection but do not impose_zero-impact standards. Consequently, the environmentally preferable alternative in the Proposed Rule (if retained) must be defined in the context of compliance with all applicable environmental protection laws and regulations – it cannot imply that a stricter standard or even a zero-impact standard should apply. Instead, NEPA documents must acknowledge, evaluate, and disclose how regulated discharges and emissions of pollutants, or surface disturbances that are unavoidable for projects to be developed, will meet applicable environmental regulatory standards.

Because the proposed definition of the environmentally preferable alternative is inconsistent with NEPA Section 101 and the environmental standards in other federal environmental laws, it is unlawful,[8] and will create confusion and conflicts that will spawn future litigation in which project opponents will assert that an agency must select the environmentally preferable alternative as the agency's preferred alternative. This litigation will obstruct and delay a wide range of critically important projects including renewable energy projects, new electric transmission and distribution facilities needed to achieve the Nation's electrification goals, and critical mineral mining and mineral processing operations that produce the raw materials used to manufacture wind turbines, solar panels, batteries that power EVs and store energy, and other low-carbon energy applications.

Section III below compares the environmentally preferable alternative to the agency preferred alternative and demonstrates how the Proposed Rule is improperly elevating the environmentally preferable alternative and subordinating the agency preferred alternative.

### C. NEPA Does Not Establish or Mandate Specific Environmental Protection Standards

Because NEPA neither requires agencies to select an environmentally preferable alternative that would avoid or even minimize environmental impacts, nor authorizes agencies to require a specific environmental protection or preservation result for a project, CEQ cannot do so through regulation.[9] Rather, agencies' authority to require and enforce environmental protection outcomes and standards is derived from other environmental statutes including but not limited to the Clean Water Act (CWA), the Clean Air Act (CAA), the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA). In the case of mining and other activities on BLM-administered land, the Federal Land Policy and Management Act (FLPMA), which is a land management statute, requires compliance with the Unnecessary and Undue Degradation (UUD) environmental

[8] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." (internal quotation marks omitted)); *see also United States v. Larionoff*, 431 U.S. 864, 873 (1977) ("[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated.").

[9] CEQ's proposed revisions that suggest otherwise exceed its Congressionally delegated authority, conflict with NEPA and are unlawful. *See Loma Linda University v. Schweiker*, 705 F.2d 1123, 1126 (9th Cir. 1983) ("[R]egulations must be consistent with and in furtherance of the purposes and policies embodied in the congressional statutes that authorize them."); *see also West Virginia v. EPA*, 142 S. Ct. at 2609 ("Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency [may] add pages and change the plot line." (citation and internal quotation marks omitted)).

protection mandate at 43 U.S.C. 1732(b). On National Forest System lands, the U.S. Forest Service (USFS) has a similar environmental protection directive at 36 C.F.R. Part 228.8 that requires minimizing adverse environmental impacts on National Forest surface resources.

The concept that federal agencies must select an environmentally preferable alternative is incongruent with the purpose of many other U.S. environmental laws that specifically authorize and regulate environmental impacts that change the environment in ways that involve incremental but allowable environmental degradation. For example, the CWA authorizes the issuance of National Pollutant Discharge Elimination System (NPDES) permits that allow highly regulated discharges of minor amounts of pollutants that meet stringent effluent limits into the Nation's waterways. Similarly, the CAA authorizes air quality permits that govern emissions of air pollutants that do not exceed strict air quality protection standards.

Elevating the environmentally preferable alternative to a selectable action alternative creates an obvious conflict between NEPA and the environmental permitting programs authorized under other federal environmental protection laws and regulations. Take, for example, a project involving an NPDES-regulated discharge to a body of surface water. Under the Proposed Rule, project opponents or hostile agencies will have a regulatory basis for asserting that no discharge (i.e., the no action alternative) is environmentally preferable to a regulated discharge of pollutants that comply with applicable effluent limits. The environmentally preferable alternative in the Proposed Rule thus creates a *carte blanche* invitation to project opponents to litigate projects asserting that agencies must select the environmentally preferable/no action alterative and deny projects that involve environmental impacts, even though the proposed impacts comply with other environmental statutes, regulations, and standards.

D. The Supreme Court Has Clearly Ruled that NEPA is a Procedural Statute

The Supreme Court has repeatedly affirmed that NEPA is a procedural statute and has clearly articulated the distinction between NEPA as an environmental information and disclosure law and the Nation's environmental protection laws. For example, in *Robertson v. Methow Valley Citizens Council*[10], the U.S. Supreme Court distinguishes between the purpose and scope of the laws governing an agency's regulatory programs and NEPA: "The Service's[11] regulations were promulgated pursuant to a broad grant of [statutory] authority , , , and were not based on NEPA's more direct congressional concern for environmental quality." *Robertson v. Methow Valley Citizen's Council*, 490 U.S. 332, 358 (1989). "Other statutes," the court said, "may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action." *Id.* at 351 (footnote omitted). "NEPA imposes no substantive requirement that mitigation measures [to address adverse environmental effects] actually be taken." *Id.* at 353 n.16. Although the EIS requirement and NEPA's other "action-forcing" procedures implement the "sweeping policy goals" of NEPA's Section 101 by ensuring that agencies take a "hard look" at environmental consequences and by guaranteeing "public dissemination of relevant information, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Id.* at 350.

The Court concluded: "There is a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been

[10] *Op cit.*
[11] This case involved a U.S. Forest Service Special Use Permit for a proposed ski area.

fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted. *Id.* at 352. NEPA requires the former. It does not require the latter.

Earlier Supreme Court decisions similarly establish that NEPA is a procedural law. In *Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, Inc*, 435 U.S. 519 (1978), the Court clarifies NEPA's procedural scope:

> "[T]he only procedural requirements imposed by NEPA are those stated in the plain language of the Act...NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."*Id.* at 548, 558.

In *Stryker's Bay Neighborhood Council v. Karlen,* 444 U.S. 223 (1980), the Supreme Court explains agencies' obligations pursuant to NEPA:

> "In *Vermont Yankee Nuclear Power Corp. v. NRDC*….we stated that NEPA, while establishing "significant substantive goals for the Nation" imposes upon agencies duties that are "essentially procedural." . . . . . *Vermont Yankee* cuts sharply against the [Second Circuit's] conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations. On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences.

## III. The Proposed Rule Radically Departs from CEQ's Own Longstanding NEPA Policy Guidelines

In 1981, CEQ issued the "Forty Questions" memorandum to federal agencies that has served as the seminal NEPA policy guidance document ever since.[12] The preamble to the Proposed Rule refers to it several times and mentions the Forty Questions memorandum in its explanation of the environmentally preferred alternative *See* 88 Fed. Reg. at 49,961.

The Forty Questions memorandum discusses both the agency's preferred alternative and the environmentally preferable alternative as illustrated in the following excerpts from the memorandum:

Forty Questions Memorandum Question 4a. Agency's Preferred Alternative. What is the "agency's preferred alternative"?

> A. The "agency's preferred alternative" is the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors. The concept of the "agency's preferred alternative" is different from the "environmentally preferable alternative", although in some cases one alternative may be both. [The agency's preferred alternative] is identified so that agencies and the public can understand the lead agency's orientation.

[12] *CEQ Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, March 23, 1981, as amended 1986.

Forty Questions Memorandum Question 6a. Environmentally Preferable Alternative. What is the meaning of the term "environmentally preferable alternative" as used in the regulations with reference to Records of Decision? How is the term "environment" used in the phrase?

> A. Section 1505.2(b) requires that, in cases where an EIS has been prepared, the Record of Decision (ROD) must identify all alternatives that were considered, "... specifying the alternative or alternatives which were considered to be environmentally preferable." The environmentally preferable alternative is the alternative that will promote the national environmental policy as expressed in NEPA's Section 101. Ordinarily, this means the alternative that causes the least damage to the biological and physical environment; it also means the alternative which best protects, preserves, and enhances historic, cultural, and natural resources.
>
> The Council recognizes that the identification of the environmentally preferable alternative may involve difficult judgments, particularly when one environmental value must be balanced against another. . . .Through the identification of the environmentally preferable alternative, the decisionmaker is clearly faced with a choice between that alternative and others, and must consider whether the decision accords with the Congressionally declared policies of the Act.

Although both alternatives need to be discussed in an EIS, Section 1505.2(b) of the 1978 rule and the Forty Questions memorandum restrict the environmentally preferable alternative to a disclosure obligation in a ROD. Under the 1978 NEPA rules, the environmentally preferable alternative is not typically a selectable action alternative because in most cases it would conflict with the agency's statutory obligations and the purpose and need for the agency to prepare a NEPA document as part of its environmental analysis and decisionmaking process.

In contrast to the requirement in Section 1505.2(b) that an agency identify the environmentally preferable alternative in a ROD, Section 1502.14(d) of both the 1978 rule and the Proposed Rule direct agencies to discuss the agency's preferred alternative if one has been identified at the Draft EIS stage of analysis, and requires agencies to select a preferred alternative in a Final EIS. The agency preferred alternative is the action alternative that is the foundation for an agency's decision on a proposed project.

The Proposed Rule inserts new language at Section 1502.14(f) that places an overwhelming focus on the environmentally preferable alternative that changes this alternative from a disclosure obligation in a ROD to a selectable action alternative that must be identified at the draft and final EIS stages. The Proposed Rule thus undermines the importance of the agency preferred alternative. In placing so much emphasis on the environmentally preferable alternative, the Proposed Rule implies that agencies should strongly consider selecting the environmentally preferable alternative as the agency preferred alternative.

Because the definition of environmentally preferable alternative includes the no action alternative, the Proposed Rule invites agencies to deny permit applications for proposed actions without giving proper consideration to the agencies' statutory obligations to review and issue permits for projects that involve environmental impacts. In its discussion of the agency preferred alternative in Question 4 of the Forty Questions, CEQ clearly acknowledges that agencies must meet their

statutory obligations and responsibilities. In the discussion of the requirement to disclose an environmentally preferable alternative in a ROD in Question 6, CEQ discusses the need to balance environmental values. There is no such balance in the Proposed Rule, which pits an agency's statutory obligations to issue permits under other environmental protection and land management statutes versus preventing impacts altogether by selecting the no action alternative as the environmentally preferable alternative. Nor does CEQ provide any explanation to justify this sudden and radical shift from its decades-long interpretation of NEPA on this very issue, rendering the change unsupported and unlawful.[13]

This significant expansion in agencies' discretion to select the no action alternative collides with their statutory responsibilities to issue permits. As discussed in Section II, the treatment of the environmentally preferable alternative in the Proposed Rule transforms NEPA from a procedural and disclosure law into a zero-impact, project veto law. The obvious result will be serious conflicts between an agency's purpose and need pursuant to its statutory obligations and authorities versus the newly implied authority in NEPA to choose the zero-impact, *status quo,* no action alternative. This will undoubtedly lead to an explosion of litigation challenging agencies' NEPA documents and permitting decisions.

Under the Proposed Rule, anti-project plaintiffs will have a regulatory basis to assert that an agency must select the environmentally preferable alternative in order to maintain the *status quo.* They will assert that no discharge to surface waters is environmentally preferable to issuance of an NPDES permit. No impact to air quality is a better environmental outcome than emitting air pollutants pursuant to a CAA permit. No disruption of habitat or species mortality is superior to an ESA take permit. Leaving the ground surface intact is superior to authorizing a Plan of Operations for mineral activities that authorizes surface disturbance.

Rather than improving the permitting process as Congress has directed federal agencies to do, CEQ's Proposed Rule is guaranteed to precipitate litigation. If implemented as written, the Proposed Rule will increase the uncertainty about if and when a project can be permitted and will make the federal permitting process even more arduous and costly. This outcome would be in stark contrast to this administration's multiple mandates to facilitate a transition to clean energy.[14]

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[13] An agency may revise its rules, consistent with statute, but must "examine the relevant data and articulate a satisfactory explanation for its actions." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (*citing Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency must provide a satisfactory explanation when it revises its rules)); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (same). Courts will conduct a more searching inquiry into the agency's rationale "when its prior policy has engendered serious reliance interests that must be taken into account." *Fox Television*, 556 U.S. at 515 (*citing Smiley v. Citybank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)). Such interests exist here: local governments, states, project sponsors, and citizens have for decades relied on the understanding of NEPA expressed in the Forty Questions memorandum and the 1978 implementing regulations. *See*, *e.g.*, 88 Fed. Reg. at 49,925 ("CEQ has routinely identified [Forty Questions] as an invaluable tool for Federal, Tribal, State, and local governments and officials, and members of the public, who have questions about NEPA implementation.").

[14] In considering enactment of the FRA, Congress documented the critical need for NEPA reform as follows: A recent study found that $157 billion in energy investment was stuck in the NEPA pipeline and that simply a 2-year NEPA deadline would spur $67 billion in energy investment. Killing energy projects by the bureaucratic red[-]tape nightmare and the slow-walking that we have seen is unacceptable.169 Cong. Rec. H2702 (May 31, 2023) (statement of Rep. August Pfluger). Another member of Congress explained that the amendments to NEPA are intended to "help projects of all types whether we are talking about a road, a bridge, a transmission line, a renewable energy project, a pipeline, or a port … [because] a project shouldn't take longer to permit than it takes to build …." 169 Cong. Rec. S1877 (June 1, 2023) (statement of Sen. Shelley Capito).

Rather than implementing the NEPA amendments as Congress intended, CEQ's Proposed Rule sets up agencies for failure by adding more complexity to the process while imposing shorter timeframes and page limits. CEQ's revisions create unnecessary and detrimental litigation risk for agencies and will impose additional delays and expenses on project sponsors.

## IV. The Proposed Rule is Inconsistent with The U.S. Mining Law, FLPMA, and the Organic Act of 1897

Just as the Proposed Rule cannot ignore the scope and purpose of other environmental statutes as discussed above, it must also acknowledge the scope and purpose of the federal laws governing the Nation's public lands and National Forests. The U.S. Mining Law gives citizens the right to enter and use lands open to location for mineral exploration and mining purposes that comply with the UUD environmental protection mandate in Section 1732(b) of FLPMA for projects on BLM-administered lands. The Organic Act of 1897, establishing the Forest Service, as well as and subsequent laws[15] similarly direct that the Nation's forest be used responsibly for multiple uses that include mining.

The surface management regulations found at 43 CFR Subpart 3809 govern locatable mineral exploration and mining projects on BLM-administered public lands. These regulations require all mineral activities to comply with the FLPMA UUD mandate.

The UUD mandate is exceptionally effective at protecting the environment because it is a dynamic, activity-specific, and site-specific regulatory mechanism applicable wherever multiple use activities occur on public lands. The FLPMA UUD standard, which applies to all activities on BLM-administered lands, is not a zero-impact, no-use standard. To the contrary, UUD recognizes that some changes to the land (i.e., degradation) are both necessary and due (i.e., unavoidable) in order for multiple uses of the land to occur. The UUD policy in FLPMA Section 302(b) thus authorizes necessary degradation of the public lands resulting from multiple uses. In implementing the UUD directive, BLM has the necessary authority to custom tailor the interpretation and application of UUD for all types of multiple uses to fit the activities involved and the site-specific environmental and resource conditions at each particular multiple use project.

The environmentally preferable alterative in the Proposed Rule must not conflict with the multiple use and UUD mandates in FLPMA. However, the provision in Section 1502.14(f) of the Proposed Rule that conflates the environmentally preferable alternative with the no action alternative directly conflicts with the FLPMA mandate to use public lands for multiple use purposes. The Proposed Rule cannot authorize BLM to deny permit applications by selecting the no action alternative for proposed renewable energy projects, rights-of-way for transmission lines, grazing, mineral exploration and mining, or other authorized multiple uses on public lands that otherwise comply with the UUD standard.

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[15] Other statues governing the use of National Forest System lands include, but are not limited to, the Multiple Use-Sustained Yield Act, the Forest and Rangeland Renewable Resources Planning Act of 1974, and the National Forest Management Act.

Despite the urgent need to expand the Nation's transmission and energy distribution systems to reach the administration's nationwide electrification goals and to produce the critical minerals needed to power EVs and to construct the transmission grid, the Proposed Rule will encourage litigation that will delay and obstruct these types of projects. The Proposed Rule is thus at cross purposes to the many programs this administration is pursuing to achieve an accelerated energy transition. Rather than facilitating this transition, the Proposed Rule will derail it, setting the transition back years – if not decades.

Multiple use projects on BLM-administered lands that comply with the FLPMA UUD mandate are the *de facto* environmentally preferable alternative because UUD limits impacts to only those effects that are unavoidable for a project to proceed and are thus necessary and due. Therefore, for projects pursuant to FLPMA, the environmentally preferable alternative must be broadly understood to mean the action alternative that best complies with UUD. The environmentally preferable alternative cannot be the no action alternative because that is tantamount to a project veto. It must be either the project proponent's proposed action or another action alternative.

Although the federal land management agencies (e.g., the BLM and the USFS) have broad authority to regulate multiple use activities on public lands and National Forests to minimize environmental impacts, the U.S. Mining Law limits that authority for locatable mineral projects on lands that are open to location under that law. The Mining Law confers claim owners the right to use and occupy their mining claims for mineral purposes. In tandem, FLPMA dictates that mineral activities must not create UUD. Consequently, the surface land management agencies cannot select the no action alternative in a NEPA document for a proposed mineral exploration or development project and deny the project proponent's Plan of Operation unless the project proposal will create UUD or fails to comply with the similar environmental protection mandate in the USFS' surface management regulations for locatable minerals at 36 C.F.R. Part 228.8.

Because mineral deposits have fixed locations that cannot be moved, the range of technically and economically feasible alternatives for project facilities is typically much more limited compared to other types of multiple use projects. The environmentally preferable alternative for a mineral project is the action alternative that minimizes environmental impacts consistent with the UUD FLPMA standard on BLM-administered lands and the 36 C.F.R. Part 228.8 requirement to minimize adverse impacts on USFS-administered lands. It can never be the no action alternative, which is inconsistent with the Mining Law, FLPMA, and the Organic Act.

By stating in Section 1502.14(f) that the environmentally preferable alternative may be the no action alternative, CEQ is empowering anti-mining groups to challenge BLM's and the USFS' NEPA decisions with assertions that the agencies should be selecting the no action alternative to avoid the impacts associated with the proposed mineral exploration and development activities. While this is legally inaccurate and ultimately should fail, CEQ must avoid creating this obvious conflict with the Mining Law, FLPMA, and the Organic Act. In the final rule, CEQ must clarify that the environmentally preferable alternative (if analyzed) must be consistent with and defined by the scope of federal agencies' regulatory and land management authorities. There are very few instances in which a federal regulatory agency will have the authority to outright reject a proposed project – especially a locatable mineral project – and select the no action alternative.

If CEQ wishes to insert a new project veto authority into NEPA, it must work with Congress to amend this law. CEQ cannot use this rulemaking process to turn NEPA into a project-vetoing mechanism.

## V. The Proposed Rule Improperly Eliminates Language Guiding Public Comments on NEPA Documents

Section 1503.3(b) of the Proposed Rule strikes the following important language pertaining to the scope of public comments and deadlines for submitting public comments:

> Comments on the submitted alternatives, information, and analyses and summary thereof (§ 1502.17 of this chapter) should be as specific as possible. Comments and objections of any kind shall be raised within the comment period on the draft environmental impact statement provided by the agency, consistent with § 1506.11 of this chapter. If the agency requests comments on the final environmental impact statement before the final decision, consistent with § 1503.1(b), comments and objections of any kind shall be raised within the comment period provided by the agency. Comments and objections of any kind not provided within the comment period(s) shall be considered unexhausted and forfeited, consistent with § 1500.3(b) of this chapter.

The wholesale removal of the language shown above will invite litigants to raise new issues and concerns at any point in the process – even after an agency has issued its NEPA decision (e.g.; a Finding of No Significant Impact for an EA or a ROD for an EIS) in conflict with exhaustion requirements under the Administrative Procedure Act. Eliminating Section 1503.3(b) may even encourage plaintiffs to try sandbagging agencies by raising new issues throughout the course of litigation. Again, this defies Congress' directives under the FRA to make NEPA more efficient.

By excising Section 1503.3(b), CEQ has created "The Endless NEPA Process," where project opponents may try to pursue serial complaints challenging an agency's NEPA decision. The significant potential for protracted litigation is contrary to the Congressional directives in the BIL, IRA and FRA (see Section VIII) and will insert intolerable delays and uncertainty into the NEPA process. This completely impractical revision to NEPA will chill investment in all types of renewable energy and infrastructure projects needed to achieve the Nation's decarbonization goals.

Further, CEQ's reasons for omitting the exhaustion requirement do not hold up. CEQ proposes the omission "[b]ecause the fundamental question" raised by an exhaustion requirement is "the availability of a cause of action under the APA, and not a question of interpreting NEPA." 88 Fed. Reg. at 49,931 (Jul. 21, 2023). It says that exhaustion is "more appropriate for the courts to determine," presumably because it involves a threshold question of admissibility. *Id.*

But courts are not the only bodies that can require exhaustion. As the Supreme Court has observed, "requirements of administrative issue exhaustion are largely creatures of statute." *Sims v. Apfel*, 530 U.S. 103, 107 (2000). Even more germane, "it is common for an agency's regulations to require issue exhaustion in administrative appeals." *Id.* at 108. Indeed, contrary to CEQ's suggestion, agencies commonly issue regulations requiring exhaustion *even where they lack explicit statutory authorization*.

For example, without explicit authorization in the CWA, the Army Corps of Engineers includes an exhaustion requirement in its regulations governing the administrative appeal of permitting decisions made under Section 404 of the CWA. *See* 33 CFR § 331.12 ("No affected party may file a legal action in the Federal courts based on a permit denial or a proffered permit until after a final Corps decision has been made and the appellant has exhausted all applicable administrative remedies under this part."). The EPA, too, requires exhaustion in its regulations on appeal of permit decisions made under various sections of the CWA, the Resource Conservation and Recovery Act (RCRA), and the Safe Drinking Water Act (SDWA). *See* 40 C.F.R. § 124.19(l)(2) ("For purposes of judicial review under the appropriate Act, final agency action on a permit occurs when agency review procedures under this section are exhausted and the Regional Administrator subsequently issues a final permit decision."). None of these statutes explicitly authorizes such requirement.

CEQ next points to two cases purportedly indicating that the law on exhaustion is in flux and so should not be decided by regulation. *See* 88 Fed. Reg. at 49,931. These cases, both from district courts, do not prove its point. The first, *Pacific Coast Federation of Fishermen's Associations v. Department of the Interior*, 929 F. Supp. 2d 1039 (E.D. Cal. 2013), holds in relevant part that "comments submitted by third parties may form the basis of a NEPA lawsuit, so long as the comments brought sufficient attention to the issue" raised by a different party in court. *Id.* at 1046. The second, *Wyoming Lodging and Restaurant Association v. Department of Interior*, 398 F. Supp. 2d 1197 (D. Wyo. 2005), simply reiterates the Supreme Court's conclusion in *Department of Transportation v. Public Citizen* that "'the agency bears the primary responsibility to ensure that it complies with NEPA . . . and an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.'" *Id.* at 1210 (quoting *Public Citizen*, 541 U.S. 752, 765 (2004)).

Both cases reached these conclusions only after stating the general, uncontested proposition that exhaustion is usually required. *Pacific Coast Federation* treats the third-party comment rule as an exception to the established rule that "plaintiffs [must] exhaust administrative remedies before bringing suit in federal court." 929 F. Supp. 2d at 1045. *Wyoming Lodging and Restaurant Association* begins by stating that "a party wishing to challenge agency action must participate in the public process so that it alerts the agency of the party's positions and contentions and, therefore, allows 'the agency to give the issue meaningful consideration.'" 398 F. Supp. 2d at 1209 (quoting *Public Citizen*, 541 U.S. at 764; *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553–54 (1978)). Only then does the court note an exception to this rule where the issue raised in court was so obvious that the agency should have grasped it regardless of its non-receipt of comments on the issue.

It is entirely proper for federal regulations to reflect federal case law. As the commentary to the Proposed Rule notes, the 1978 NEPA implementing regulations "reflected CEQ's interpretation of the statutory text and Congressional intent, expertise developed through issuing and revising the CEQ guidelines and advising Federal agencies on their implementation of NEPA, *initial interpretations of the courts*, and Federal agency experience implementing NEPA." 88 Fed. Reg. at 49,927 (emphasis added). And the current rule's exhaustion requirement, which simply sets the comment period as the window within which issues must be raised if they are to be preserved on appeal, is consistent with federal law. The Ninth Circuit states the principle succinctly: "As a general rule, we will not consider issues not presented before an administrative proceeding *at the appropriate time*." *Marathon Oil Co. v. United States*, 807 F.2d 759, 767–68 (9th Cir. 1986) (citations omitted and emphasis added).

Moreover, this regulatory exhaustion requirement would not preclude a court from granting the kind of exceptions recognized in *Pacific Coast Federation* or *Wyoming Lodging and Restaurant Association*. First, because it deals only with timeliness, it does not prohibit a party from litigating issues a third party raised during the comment period or from litigating eminently obvious problems with a NEPA review. Second, federal courts treat regulatory exhaustion requirements differently from statutory exhaustion requirements. The latter "implicate concerns of separation of powers and, therefore, the failure to comply with the requirements deprives [courts] of jurisdiction." *Marathon Oil Co.*, 807 F.2d at 768. But "courts reviewing agency action" where a regulation requires exhaustion only "*regularly ensure* against the bypassing of that requirement by refusing to consider unexhausted issues"—that is, courts have not held that they lack jurisdiction in these cases. *Sims*, 530 U.S. at 108; *see also South Carolina v. Dep't of Labor*, 795 F.2d 375, 377 (4th Cir. 1986) (concluding that a regulatory exhaustion requirement did not create a jurisdictional bar). This means that a court could consider the exceptions noted above, or other. *See*, *e.g.*, *Marathon Oil Co.*, 807 F.2d at 768 (noting an "exceptional circumstances" exception to the general rule it propounds).

The regulatory exhaustion requirement stated in the current rule is consistent with NEPA's emphasis on agency compliance with deadlines. For example, NEPA requires that the head of each federal agency engaged in NEPA review "annually submit to the Committee on Natural Resources of the House of Representatives and the Committee on Environment and Public Works of the Senate a report that—(A) identifies any environmental assessment and environmental impact statement that such lead agency did not complete by the [requisite deadline]; and (B) provides an explanation for any failure to meet such deadline." 42 U.S.C. § 4336a(h)(1). The existing exhaustion requirement also comports with the intent of the FRA and Executive Order 11991, which first directed CEQ to develop NEPA implementing regulations. *See* 169 Cong. Rec. S1877 (June 1, 2023) (statement of Sen. Shelley Capito) ("By amending [NEPA] for the first time since 1982 [in the FRA], we will help projects of all types . . . . Simply put, a project shouldn't take longer to permit than it takes to build, and that should be true regardless of what type of project is under consideration."); EO 11991 (May 1977) (CEQ's NEPA implementing regulations "will be designed to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives.").

The exhaustion requirement, as it currently exists, acknowledges that application of a judicial exhaustion requirement relying on background APA principles is not sufficient to ensure efficient NEPA review. Without a regulatory exhaustion requirement, an agency might delay its decision on a proposed action so that it can consider late-submitted comments. Indeed, the commentary on the Proposed Rule notes this possibility. *See* 88 Fed. Reg. at 49,931 (Though they are not required to do so, "agencies have discretion to consider and respond to comments submitted after a comment period ends. The exhaustion requirement established in the 2020 regulations could encourage agencies to disregard important information presented to the agency shortly after a comment period closes, and such a formalistic approach would not advance NEPA's goal of informed decision making."). This view that agencies might indefinitely extend the review process by responding to late-arriving comments is inconsistent with NEPA, the FRA, and EO 11991.

CEQ misreads the case law; disregards NEPA, as amended by the FRA; ignores EO 11991, its own charter for developing NEPA implementing regulations; and appears oblivious to exhaustion

requirements in regulations promulgated by other agencies, when it suggests that exhaustion is an unsettled doctrine that has no place in its NEPA implementing regulations. The existing NEPA regulation exhaustion requirement accurately states federal law. CEQ should reinstate that requirement in the final rule.

## VI. The Proposed Rule Improperly Eliminates Economics and Employment in Evaluating Project Impacts

Section 1503.3(a) of the Proposed Rule asks the public to provide comments on EIS documents and proposed actions that are "as specific as possible" but then improperly strikes language referencing "economic and employment impacts, and other impacts affecting the quality of the human environment." NEPA documents currently evaluate the socioeconomic impacts of a proposed action including any economic and employment impacts associated with a proposed project. The proposed strikeout of economic and employment effects would make the socioeconomic evaluation in the Affected Environment and Environmental Consequences sections of a NEPA document incomplete and meaningless.

The proposed exclusion of economic and employment impacts is a thinly veiled attempt to diminish and obscure the positive socioeconomic impacts that are typically associated with many types of projects that create jobs and generate tax revenue for local communities and states. The proposed elimination of economics and employment suggests CEQ has a strong bias against project development – perhaps to bolster the merits of the no action alternative.

Excluding economics and employment ignores Congress' declaration of NEPA's foundational purpose:

> ...it is the continuing policy of the Federal Government...to use all practical means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, 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. NEPA Section 101(a) (42 U.S.C. § 4331(a).

In NEPA Section 102, Congress clearly directs agencies to:

> ...utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment; §102(a) *id.* § 102(a) (42 U.S.C. § 4332(A)),

and to:

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on [*inter alia*] . . . the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. *id.* § 102(c) (42 U.S.C. § 4332(C)(iv)).

These sections of NEPA make it clear that the scope of a NEPA analysis must consider economic and employment factors because they are important parts of "man's environment" that affect the "quality of the human environment." Congress has explicitly defined the scope of NEPA to include both the natural and the human environment. It is thus improper to remove economics and employment from the NEPA regulations because they are based in statute and are important elements of the human environment.

## VII. The Final Rule Must be Clear that NEPA Does Not Require the Development of New Science or Methodologies

CEQ's revisions on the use of methodologies and scientific accuracy in the NEPA process create serious concerns and conflict with Congress' amendments to NEPA in the FRA. In addressing the information that agencies may rely on for their NEPA analyses, CEQ proposes to remove the word "existing" from "reliable data," thereby suggesting that agencies may need to gather new scientific information, as opposed to relying on existing reliable data. 88 Fed. Reg. at 49,978–79 (1502.23(a)); *see also id*. at 49,979 (in 40 C.F.R. § 1502.23(b), removing clarification that "[a]gencies are not required to undertake new scientific and technical research to inform their analyses"). This unjustifiable revision likely will create confusion and fodder for project opponents in litigation. It also contravenes Congress' clear directive on this very issue under its recent amendments to NEPA in the FRA.

The FRA amended NEPA Section 106(B)(3) specifically directing that in determining the appropriate level of NEPA review an agency "is not required to undertake new scientific or technical research unless the new scientific or technical research is essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable." 42 U.S.C. § 4336(b)(3)(B). Rather than going the opposite and wrong direction by removing the word "existing," CEQ should revise the Proposed Rule consistent with Congress' directive and make clear that new scientific or technical research is only required where essential to a reasoned choice among alternatives, if the overall costs and time frame to obtain it are reasonable.

## VIII. The Presumption that Most Projects Adversely Affect Environmental Justice Communities is False and Reflects a Strong Anti-Project Bias

The improper deletion of economic and employment factors from Section 1503.3(a) reveals that the Proposed Rule is strongly biased against project development. This bias is especially evident in the Proposed Rule's assumption that projects always create adverse impacts that disproportionately harm environmental justice communities. This is simply untrue and conjures up an overly simplified and anachronistic image of a factory smokestack belching unregulated pollutants into the air in a poor urban setting.

A wide range of projects that create jobs and pay taxes have the significant potential to benefit disadvantaged and environmental justice communities. For example, mining projects have a proven history of bringing jobs, economic diversification, and numerous socioeconomic benefits to rural communities where employment opportunities are limited. Because many mines are located in rural and remote areas with limited job opportunities and public services, a mining operation commonly represents a community's and even a region's best opportunity to improve the quality of life for everyone.

Many mining companies make substantial financial investments in their local communities to build or improve schools, upgrade roads and internet services, subsidize medical services, offer vocational training to prospective employees, and provide scholarships and other educational opportunities for their workforces. These investments represent voluntary donations in addition to the state and local taxes the mines pay.

A mine's medical clinic and health care facilities may be the only medical services for many miles in some remote settings. At a March 3, 2021, Senate Committee on Environment and Public Works hearing, Alaska Senator Dan Sullivan presented Figure 1 from a JAMA Internal Medicine study[16] showing a widespread and substantial increase in life expectancy in some rural Alaska Native communities during the period 1980 to 2014. Senator Sullivan attributed the increased life expectancy to the contributions that oil, gas, and mining have made in rural areas to improve the quality of and access to medical services and to build clean water and sanitation facilities.

Given today's focus on Environment, Social, and Governance (ESG) factors, many companies make concerted efforts to work with stakeholders, including area tribes, during project permitting. These stakeholder dialogues with communities and area tribes typically start at the early stages of project planning and development so companies can share information about a proposed project and listen to the communities' and tribes' values, concerns, and goals for their future.

Many mining companies make a special effort to engage tribes in early and frequent dialogues with the objective of addressing tribal concerns and finding common ground to work together on programs to benefit tribes. Examples of beneficial outcomes from dialogues with Native American communities include:

- Workforce development initiatives
- Training facilities
- Environmental restoration projects
- Environmental and cultural resources monitoring programs
- Ethnographic and ethnohistory research projects
- Business arrangements and agreements
- Education funding and scholarship programs
- Culture and language preservation programs.

Table 1 lists examples of the many positive outcomes resulting from mining company stakeholder engagement programs with communities and tribes.

**Table 1**
**Examples of Mining Company - Stakeholder Engagement Results**

| **Partial List of Benefits Resulting from Community and Tribal Engagement** |
|---|
| Education: |
| Scholarships and educational benefits and assistance |
| Partnerships with K-12 schools, universities, and community colleges |
| Teacher technical and leadership training |

[16] https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2626194

| Partial List of Benefits Resulting from Community and Tribal Engagement |
|---|
| STEM (science, technology, engineering, and math) recruitment and educational programs<br>Support for at-risk students<br>Inclusive education initiatives to ensure educational equity for women, girls, and people of color<br>Summer youth employment programs for Native American teens to teach workforce skills<br>Student internships and job shadowing<br>Academic assistance to high school students<br><br><u>Employment:</u><br>Local and tribal employment commitments<br>Job and occupational training<br><br><u>Environment:</u><br>Conservation easements<br>Environmental restoration and improvement projects<br>Company-funded independent community environmental sampling and monitoring programs<br><br><u>Community:</u><br>Community Advisory Boards<br>Good Neighbor Agreements<br>Community improvement grants<br>Community foundations<br>COVID 19 response measures to provide PPE, food assistance, and cash donations<br>Small business grants and loans to support economic development and diversification<br>Profit-sharing agreements to benefit communities during and after mining |

Table 1 clearly illustrates that mining projects typically create major beneficial impacts that can substantially alleviate poverty and hardship and improve the "quality of the human environment". Yet the Proposed Rule's elimination of economic and employment impacts in future NEPA analyses, and its strong bias that projects harm environmental justice communities, seeks to sweep these benefits under the rug. The Proposed Rule must be revised to maintain the decades-long *status quo* that requires NEPA documents to include a comprehensive socioeconomic analysis that includes economic and employment information.

## IX. The Proposed Rule Is Contrary to the Permit Streamlining Directives in the BIL, the IRA, and the FRA and is Therefore Unlawful

In the last three years, Congress has clearly spoken that permitting delays are harming the country and has directed federal agencies to streamline the permitting process by enacting three bills: the BIL, which was enacted in 2021 and identifies permitting as a significant impediment to domestic production of critical minerals; the IRA, which was enacted in 2022 and establishes tax credits for EV batteries manufactured with domestically produced critical minerals; and the FRA, which was enacted earlier this year and explicitly amends NEPA with the intent to streamline the NEPA process. These bills mandate improving the permitting process in order to build the energy transition infrastructure and to increase domestic production of the critical minerals essential for the energy transition, electrification of the Nation's transportation fleet, and reducing U.S. reliance on foreign minerals.

Congress' focus on the need to improve the permitting process is driven in part by the widespread recognition that the Administration's goal to achieve net-zero $CO_2$ emissions is closely linked to the availability of the many minerals needed to build clean energy technologies and infrastructure and to build and power EVs. It is well documented that this energy transition goal is materials intensive. The World Bank Group, the International Energy Agency (IEA) and other authorities have projected skyrocketing demand for copper, lithium, cobalt, nickel, graphite, aluminum, and other minerals used in clean energy technologies and infrastructure. For example, the IEA's 2021 report *The Role of Critical Minerals in Clean Energy Transitions*[17] projects that "mineral demand for clean energy technologies would rise by at least four times to meet climate goals, with particularly high growth for EV-related minerals."

S&P Global's August 2023 report, *Inflation Reduction Act: Impact on North America metals and mineral markets*[18]*,* predicts that this law alone will precipitate the following increased demand between now and 2035 for four key minerals: lithium (15%), nickel (14%), cobalt (13%), and copper (12%) *Id*. a*t 7.* S&P Global also predicts that copper production needs to double by 2030 to support the 2050 global net-zero goal.

One of the key findings in the S&P Global report is that "extended and uncertain timelines for permitting in the U.S. and around the world are a major obstacle to bringing new [copper] supply online to narrow that shortfall." *Id.* at 20. The report finds that permitting challenges adversely affect the other minerals that are the focus of their study (e.g., lithium, nickel, and cobalt) and that social license and permitting delays could compromise mineral self-sufficiency. *See id.* at 7. It cites the complexity of lengthy, multi-agency permitting processes and post-permit litigation risks as the primary reasons that permitting is so difficult and fraught with uncertainties. *See id.* at 10, 13.

*The BIL*

In 2021 with the enactment of the BIL, Congress started focusing on the connection between critical minerals and permitting delays stating in Section 14206(b) that:

> (3) to the maximum extent practicable, the critical mineral needs of the United States should be satisfied by minerals responsibly produced and recycled in the United States; and
>
> (4) the Federal permitting process has been identified as an impediment to mineral production and the mineral security of the United States.

*The IRA*

In 2022, Congress enacted the IRA which contains subsidies and stimulus measures for many mineral-intensive technologies including EVs and off-shore wind turbines. It also includes provisions to promote domestic mineral development by creating tax incentives that are tied to

[17] https://iea.blob.core.windows.net/assets/ffd2a83b-8c30-4e9d-980a-52b6d9a86fdc/TheRoleofCriticalMineralsinCleanEnergyTransitions.pdf
[18] https://cdn.ihsmarkit.com/www/prot/pdf/0823/Impact-IRA-Metals-Minerals-Report-FINAL-August2023.pdf

minimum percentages of domestically produced minerals[19] in the batteries that power EVs. The minimum percentage of domestically produced minerals required in an EV battery must be substantial to qualify for the IRA's tax credit. In 2024, 50% of the minerals used to manufacture an EV's battery must come from domestic sources in order to claim the tax credit. The percentage increases rapidly to 80% by 2027.

The domestic mineral requirements in the IRA's EV battery tax credit program must be interpreted in the context of the permitting and critical minerals directives in the BIL. Congress expects that permit streamlining will play a key role in increasing domestic mineral production so that EV batteries can qualify for the IRA tax credits. The IRA contains other permit streamlining provisions including but not limited to Section 60115, *Environmental Protection Agency Efficient, Accurate, and Timely Reviews.* Section 11001(a)(10) of the Act includes $100,000,000 to "provide for more efficient and more effective environmental reviews by the Chief of the Forest Service in satisfying the obligations of the Chief of the Forest Service under the National Environmental Policy Act."

*The FRA*

President Biden signed the FRA into law on June 3, 2023. The permitting provisions in this law expressly amend NEPA by, *inter alia,* establishing NEPA document completion deadlines (two years for an EIS and one year for an EA), page limits (150 pages for an EIS and 75 pages for an EA), and authorizing project proponents to prepare draft EIS documents in coordination with and under the supervision of a federal agency. The FRA also directs agencies to develop procedures for sponsor-prepared EIS documents. Unfortunately, the Proposed Rule gives short shrift to this new dictate by omitting any guidance on sponsor-prepared EIS documents.

The FRA inserts the following language defining the scope of alternatives that must be examined in a NEPA document:

> a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal; Section 321(a)(B)(iii) (42 U.S.C. § 4332(C)(iii)).

However, the Proposed Rule's focus on the environmentally preferable alternative obfuscates the technologically and economically feasible criteria explicitly stated in the FRA and directly conflicts with the proposal's purpose and need.

Similarly, the Proposed Rule barely acknowledges the clearly-stated requirement in the FRA mandating agencies to evaluate and disclose any negative environmental impacts associated with the no action alternative. The Proposed Rule perfunctorily mentions this requirement in Section 1502.16(a)(3), directing agencies to include "[a]n analysis of the effects of the no action alternative, including any adverse environmental effects."

Given the anti-project bias of the Proposed Rule, it is not surprising that CEQ has glossed over this important analysis because a detailed analysis of the no action alternative would reveal

[19] Minerals produced in countries that have a free trade agreement with the U.S. can also satisfy the domestic mineral percentage requirement in the IRA.

numerous adverse environmental impacts associated with the no action alternative for a wide range of proposed projects. For example, denial of Plans of Operation for mining projects would mean reduced supplies of minerals like copper, rare earths, lithium, nickel, cobalt and other minerals essential to manufacturing renewable energy technologies and infrastructure and EV batteries. It would also increase the Nation's reliance on minerals from countries where there are inferior environmental protection requirements compared to mining in the U.S.

The no action alternative for proposed transmission projects could mean that solar and wind facilities would be stranded with no way to connect to the electric grid, and therefore might never be built – or if built – might never operate. The no action alternative for a $CO_2$ pipeline might mean that a carbon sequestration project would never be feasible because there would be no way to transport the captured carbon. There would also be adverse socioeconomic impacts associated with all of these scenarios because local communities and states would be deprived of the jobs, tax revenues and other benefits associated with proposed projects.

The BIL, the IRA, and the FRA must be read together as a package of permitting and critical mineral directives that CEQ must not disregard by proposing a rule that will not advance the Congressional intent in each of these laws. Regrettably, that's exactly what the Proposed Rule does by elevating the environmentally preferable alternative, authorizing agencies to reject projects that involve surface water discharges, air emissions, habitat and species impacts, or land disturbances that comply with applicable environmental protection statutes but that create an impact that is greater than the no action alternative.

Rather than taking meaningful steps to improve the NEPA process, as Congress is demanding in the BIL, IRA, and FRA, the Proposed Rule flouts the Congressional intent of each of these bills and creates new permitting obstacles. The serious permitting challenges discussed in the August 2023 S&P Global report will be magnified if the Proposed Rule is finalized as written. As a result, the Nation will become increasingly reliant on foreign minerals, and the country will fail to achieve – or even come close to achieving – its 2030 and 2050 $CO_2$ reduction goals.

Another example of how the Proposed Rule fails to promote permit streamlining is its imposition of a new requirement for EAs that, if implemented, will leave little functional difference between an EA and an EIS, thereby defying Congress' expressed intent to streamline NEPA reviews. Because the EA process is much more streamlined than the EIS process, the Proposed Rule's requirements for public review of draft EA documents is contrary to the permit streamlining mandates in Congress' recently enacted laws demanding improvements to the permitting process. In the FRA, Congress specifically requires that an EA "shall be a concise public document prepared by a Federal agency to set forth the basis of such agency's finding of no significant impact or determination that an environmental impact statement is necessary," 42 U.S.C. § 4336(b)(2), which is not required to be published in draft form for public review and comment before it can be finalized. The current regulations require that an EA must "*[b]riefly* provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact" and "*[b]riefly* discuss the purpose and need for the proposed action, alternatives as required by section 102(2)(E) of NEPA, and the environmental impacts of the proposed action and alternatives, and include a listing of agencies and persons consulted." 40 C.F.R. § 1501.5 (emphasis added).

This is a much difference process from an EIS which is a "detailed statement" for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also id*. § 4336(b)(1). An EIS is a far more detailed and time intensive environmental review that requires procedural steps that are not required for an EA, including: (1) publication of a notice of intent in the Federal Register; (2) public scoping; (3) release of a draft EIS for public comment; and (4) consideration of public comments prior to issuing a final EIS. 40 C.F.R. §§ 1501.9, 1501.3, 1501.4.

Agencies are not required to prepare a draft EA for public comment under the existing regulation and interpreting case law. *Id*. § 1501.5(e) (agencies shall involve the public "to the extent practicable"); *Earthworks v. Dep't of the Interior*, 496 F. Supp. 3d 472, 498 (D.D.C. 2020)(BLM "is not required to publish a proposed EA for comment as it is when preparing an EIS"). But the Proposed Rule requires that if an agency publishes a draft EA, "the agency shall invite public comment and consider those comments in preparing the final [EA]." 88 Fed. Reg. at 49,970 (40 C.F.R. § 1501.5). In contravention of Congress' directives to streamline permitting, the Proposed Rule increases the amount of time it will take for an agency to complete an EA. CEQ should remove this provision from the Final Rule.

Because the Proposed Rule fails to act on the permit streamlining and domestic mineral production directives in the BIL, IRA, and FRA, it violates these laws. For this reason alone, CEQ should be required to withdraw the Proposed Rule and develop a new proposed rule that focuses on implementing the permitting directives in these recently enacted laws.

## X. The Proposed Rule Burdens the Use of Categorical Exclusions & Will Spawn New Litigation of Previously Resolved Issues Under the Existing Rule

Congress was clear in amending NEPA through the FRA that use of categorical exclusions (like other NEPA processes) must become more efficient, amending Section 109 to make it easier for an agency to adopt categorical exclusions (CEs) listed on another agency's NEPA procedures. Congress defined "Categorical Exclusion" to mean "a category of actions that a Federal agency has determined normally does not significantly affect the quality of the human environment" within the meaning of Section 102(2)(C). This definition tracks almost identically with existing §1500.5(a) requiring that agencies reduce delay by "[u]sing categorical exclusions to define categories of actions that normally do not have a significant effect on the human environment … and therefore do not require preparation of an environmental impact statement."

CEQ's Proposed Rule substantially revises the CE provisions adding unnecessary complexity, raising litigation risk and, unlawfully defying Congress' repeated directives to make permitting and the NEPA process more efficient. First, CEQ makes wholesale revisions to §1501.3 governing the determination of the appropriate level of NEPA review by removing the clear and understandable section (a) which currently explains how agencies should assess the appropriate level of NEPA review, including considering whether the proposed action "[n]ormally does not have significant effects and is categorically excluded." CEQ asserts that its changes will facilitate "a more efficient and predictable review process" but, in truth, they will do just the opposite and turn what has been a functional and efficient tool into something that eviscerates the benefits of CEs.

Other changes would create confusion and potential litigation over the analysis required for adoption of a CE and then future application of that already adopted CE. Litigants recently have raised this very issue trying to interfere with efficient use of a CE for exploration of critical minerals. CEQ's current NEPA regulations do not require a separate analysis of cumulative effects in an agency's CE review but instead provide only that once "an agency determines that a categorical exclusion identified in its agency NEPA procedures covers a proposed action, the agency shall evaluate the action for extraordinary circumstances." 40 C.F.R. §1501.4(b). Agencies are not required to prepare a separate analysis of cumulative effects as part of that extraordinary circumstances review. Moreover, as the Ninth Circuit and other courts have confirmed, CEQ's pre-2020 regulation requiring consideration of "connected actions" and "indirect" and cumulative environmental impacts applies only to environmental impact statements, and not CEs.[20] As federal courts have recognized, requiring cumulative impacts analysis for a CE "would effectively render useless the purpose of categorical exclusions generally."[21]

After years of litigation over this very issue, CEQ now inexplicably seeks to make significant changes to CE provisions to open up questions and litigation risk that would only interfere with efficient use of CEs. The Proposed Rule, in §1500.3(b) inserts a confusing "scope of action and analysis" provision for agencies in determining the appropriate level of NEPA review. With references to connected actions (which in the current rule is clear applies only for an EIS), potential effects and scope, and other revisions, CEQ unnecessarily complicates the creation and application of CEs. The Proposed Rule also substantially revises the "significance determination" requiring agencies to examine the "intensity" of any effects including new considerations such as the "degree to which the proposed action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, park lands, Tribal sacred sites, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas." Critically, CEQ creates the new requirement that agencies consider the "degree to which an action may relate to other actions with adverse environmental effects, including actions that are individually insignificant but significant in the aggregate" and further providing that "[s]ignificant cannot be avoided by terming an action temporary that is not temporary in fact or by segmenting it into small component parts." §1501.3(d)(2)(iii)-(vi).

CEQ's Proposed Rule further complicates establishment and application of CEs by revising §1501.4(a) to go beyond NEPA's definition of a CE to add a new requirement that agencies consider whether the actions normally "have a significant effect on the human environment "individually or in the aggregate." This likely will raise questions about whether the language revisions require cumulative effects analysis, an issue already resolved by federal courts in the negative, and spawn further litigation, undermining Congress' directives and clear intentions to streamline permitting and make the NEPA process more efficient, in its modifications to CE provisions in the Proposed Rule. CEQ also adds a new requirement for agencies to document determinations and publish them which likely only creates further delay.

[20] *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1096-97 (9th Cir. 2013); *Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402, 411 (6th Cir. 2016) ("the agency must determine whether a CE applies and whether an 'extraordinary circumstance' exists that precludes the use of a CE; the agency is not required to independently evaluate cumulative impacts because this process already takes cumulative impacts into account."); *Utah Env't Cong. v. Bosworth*, 443 F.3d 732, 740 (10th Cir. 2006) (the Forest Service need not prepare a cumulative effects analysis when relying on a CE).

[21] *Utah Env't Cong.*, 443 F.3d at 740-41.

Finally, CEQ add an entirely new section to purportedly make clear that CEs also may be established through land use planning, or programmatic decisions so long as agencies comply with six new requirements including, that the agency "[s]ubstantiates its determination that the category of actions normally does not have significant effects, individually or in the aggregate", "[e]stablishes a process for determining that a categorical exclusion applies to a specific action or actions in the absence of extraordinary circumstances", and allowing categorical exclusions to include mitigation to ensure that any environmental effects are not significant "so long as a process is established for monitoring and enforcing any required mitigation measures, including through the suspension or revocation of the relevant agency action". §1501.4(c). But if all of these new requirements and processes were not enough to eviscerate the effective use of CEs, the Proposed Rule goes on to provide that categorical exclusions may provide criteria for their expiration because, among other things, "[i]ndividual actions covered by the categorical exclusion are too close to one another in proximity or time." §1501.4(d)(4)(ii). This is yet another issue that federal courts have conclusively resolved in a manner to ensure efficient use of CEs (and, as discussed herein, ruling that such proximity is not a relevant consideration), that CEQ's Proposed Rule would undermine, in contravention of Congress' mandates to improve not exacerbate lengthy NEPA processes and related litigation.

## XI. Conclusions

Given the broad awareness that the NEPA process creates significant barriers to the timely development of the many projects needed to realize the Nation's energy transition and vehicle electrification goals, it is hard to understand why CEQ has proposed this counterproductive and unlawful rule which will only exacerbate current permitting challenges. Instead of developing a rule that would help implement the permit streamlining intent of the NEPA amendments in the FRA and respond to Congressional directives in the BIL and IRA to address permitting delays, CEQ's Proposed Rule will lengthen permitting time frames and lead to substantially more litigation challenging agencies' NEPA documents.

The Proposed Rule includes mechanisms that will delay and even stop all types of projects requiring a federal permit that triggers the need for one or more federal agencies to prepare a NEPA document. Under the Proposed Rule, project opponents will have increased abilities to challenge renewable energy projects, transmission and power distribution facilities, natural gas and $CO_2$ pipelines, critical minerals mining and processing proposals, carbon capture, utilization, and sequestration facilities, and other key infrastructure projects essential to the energy transition and electrification of the transportation sector. Instead of facilitating the Administration's goals and policies to replace fossil fuels with renewable and low-carbon energy sources in order to achieve prescribed $CO_2$ emission reduction goals, the Proposed Rule will create obstacles that will delay projects and seriously jeopardize the energy transition.

The Proposed Rule improperly seeks to use this rulemaking process to transform NEPA's scope and purpose from a procedural law, designed to evaluate and disclose the environmental impacts associated with a proposed action, to a substantive and action-forcing environmental law that requires specific environmental outcomes in order for a proposed action to occur. This proposal to convert the National Environmental *Policy* Act into the National Environmental *Protection* Act is contrary to Congress' intent in enacting NEPA and conflicts with decades of NEPA case law including several Supreme Court rulings. As discussed above, the Proposed Rule raises the same major questions doctrine issues as *West Virginia v. EPA* where the Supreme Court clearly ruled

that federal agencies cannot change a law; that job is reserved for Congress. Moreover, Congress has already enacted numerous environmental protection laws like the CWA, the CAA, the ESA, and others. Consequently, there is no statutory or regulatory environmental protection gap that needs to be filled with CEQ's draconian and unlawful Proposed Rule.

In proposing this rule, CEQ has largely ignored recent Congressional directives in the BIL, the IRA, and the FRA and has instead given project opponents new regulatory tools to slow down and challenge the NEPA process and create irreconcilable conflicts with other environmental statutes. Under the Proposed Rule, project opponents will use NEPA as a project veto to circumvent the environmental permitting authorities in the CWA, the CAA, and other environmental laws, and to supersede the land management directives in FLPMA and the Organic Act. If finalized as written, the Proposed Rule will provide project opponents with a regulatory basis to demand that federal agencies reject proposed projects and instead select an environmentally preferable alternative that is correlated with the no action alternative.

WMC strongly urges CEQ to jettison this ill-conceived and unlawful rule and propose a rule that is consistent with Congress' intent in enacting NEPA and with the clear directives in the BIL, the IRA, and most recently the FRA. Congress has clearly spoken – it is time to fix the permitting process. To respond to these repeated Congressional directives to improve the permitting process, CEQ should develop a proposed rule that focuses solely on implementing the NEPA amendments in the FRA.

WMC appreciates this opportunity to provide comments on the Proposed Rule and stands ready to work with CEQ to develop a new rule that will respond to the urgent need to improve and streamline NEPA.

Sincerely yours,

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