WESTERN ENERGY ALLIANCE

September 29, 2023

Jomar Maldonado, Director for NEPA
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

RE: Council on Environmental Quality (CEQ) National Environmental Policy Act (NEPA) Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49,924, Docket No. CEQ-2023-0003

Dear Mr. Maldonado:

Western Energy Alliance (the Alliance) urges CEQ to revise the proposed Phase 2 rules to conform with the Congressional intent of the original NEPA statute and the Fiscal Responsibility Act of 2023 (FRA). As drafted, the proposed rules are contrary to the will of Congress in FRA which was expressly intended to reduce the time to process and approve NEPA documents such that energy and infrastructure projects could move forward in a reasonable manner to meet the needs of Americans while protecting the environment. Despite that express intent of Congress, the proposed rules contain extraneous provisions that run contrary to FRA and will increase litigation risk while further protracting already lengthy NEPA delays and related agency authorizations. The proposed rules must be revised substantially to be consistent with NEPA and FRA, legally defensible, and streamlined for efficiency. The Alliance appreciates the opportunity to comment.

The Alliance is the leader and champion for independent oil and natural gas companies in the West. Working with a vibrant membership base for nearly 50 years, the Alliance stands as a credible leader, advocate, and champion of industry. Our expert staff, active committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all. The majority of independent producers are small businesses, with an average of fourteen employees. Alliance members have deep experience and institutional knowledge about the NEPA process and its pitfalls in agency decision-making related to the federal onshore oil and gas program.

In Section I, we provide general comments on concrete aspects of the proposed rules that raise significant legal, policy, and implementation issues. In Section II, we provide comments on the proposal to incorporate the NEPA Guidance on Consideration of Greenhouse Gas (GHG) Emissions (Interim Guidance), 88 Fed. Reg. 1,196 (Jan. 9, 2023) into the proposed rules. In Section III, we provide comments on specific provisions of the proposed rules, as well as proposed revisions to clarify and improve some of those provisions.

I. General Comments

A. The Proposed Rules are Contrary to the Congressional Intent and the Fundamental Policy of the National Environmental Policy Act

NEPA is a policy statute with procedural, not substantive, provisions. Congress did not name this statute the "National Environmental *Protection* Act" or otherwise intend that this procedural statute drive substantive outcomes for a project or be used as a tool for substantive agency policymaking or policy implementation on a project-by-project basis.

The plain language of Section 101 of NEPA places its procedural environmental reviews into context and expressly states it is a national policy "to create and maintain conditions under which man and nature can exist in **productive** harmony, and [to] **fulfill the social, economic, and other requirements of present and future generations of Americans**." 42 U.S.C. 4331(a) (emphasis added).

Congress intended that NEPA's procedural environmental review process does not supersede other important considerations, including social and economic issues. This fundamental tenet is reflected in long-standing U.S. Supreme Court precedent: "Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citing *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980)). NEPA "does not dictate particular decisional outcomes;" it merely prohibits "uninformed" agency action. *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 37 (D.C. Cir. 2015).

Congress intended for NEPA to provide a neutral procedural review of environmental issues for major federal actions to inform agency decision-making and foster public access to information. The NEPA statute expressly states that NEPA "shall not relieve the Federal official of [their] responsibilities for the scope, ***objectivity,*** and content of the [NEPA document] or of any other responsibility under this act." 43 U.S.C. § 4332(d) (emphasis added).

The NEPA statute is programmatically designed to be project neutral, resource neutral, and impact neutral. Indeed, if federal agencies identify and disclose reasonably foreseeable significant and adverse impacts through the NEPA process, then they can still approve the project or major federal action despite those adverse impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action."); *Id.* at 351 (observing that the agency would not have violated NEPA if, after clearing the statute's procedural hurdles, it concluded that the benefits of a ski resort "justified the issuance of a special use permit [to develop that resort], notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd").

Congress did not design NEPA to prioritize resource and environmental issues or to promote and achieve the policy desires of a particular presidential administration. Placing an outsized emphasis on a single environmental issue, such as global climate change, would distract from federal agencies'

requirement to utilize a data-driven procedural review to take a "hard look" at reasonably foreseeable impacts from the proposed action or project before them. *Sierra Club v. U.S. Army Corps of Engineers, 803 F.3d 31, 37 (D.C. Cir. 2015).*

Moreover, NEPA does not expand a federal agency's substantive authority or statutory jurisdiction, nor confer powers beyond those granted to the agency by Congress. Yet with the proposed rules CEQ has expressly downplayed NEPA's procedural nature as a means of pursuing NEPA's purported "larger goals and purposes." (preamble p. 49930) CEQ runs counter to *Sierra Club v. U.S. Army Corps of Engineers* specifically in its intention of reorienting NEPA from a procedural statute to one which advances the administration's policy goals, particularly as related to climate change.

The proposed rules cannot be designed as a policy implementation tool to direct specific project outcomes, particularly when such outcomes would be contrary to the federal agency's governing statutes and jurisdictional authority and inconsistent with the purpose and need of the applicant's project.

By removing substantive policy goals from the proposed rules, CEQ would improve the durability, credibility, and defensibility of the NEPA regulations while avoiding the precedent for each incoming presidential administration to prioritize and implement its specific policy preferences through NEPA regulations. This revision would reduce litigation and reduce agency and regulatory confusion that inevitably results when agencies are whipsawed between competing rulemakings from successive Presidential Administrations.

Comment: The proposed rules need to be revised to align with the plain statutory language of NEPA, the underlying Congressional intent to make NEPA solely a procedural statute, the original policy of NEPA to not elevate environmental issues over economic or other considerations, and long-standing U.S. Supreme Court legal precedent on the contours and limitations of NEPA.

Comment: The proposed rules must be revised to be resource neutral, project neutral, impact neutral, and policy neutral. The provisions designed to achieve policy goals through the NEPA process must be removed in their entirety from the proposed rules.

B. The Proposed Phase 2 Rules are Contrary to the Intent and Plain Language of the Fiscal Responsibility Act of 2023

FRA amended NEPA to make it more streamlined, efficient, and pragmatic. *See* Fiscal Responsibility Act of 2023, Publ. L. No. 118-5, Sec 321 – Builder Act, 137 State. 10. 38 (2023). The proposed rules are contrary to the Congressional intent of FRA or otherwise are entirely deficient in implementing it as designed and promulgated by Congress.

First, the proposed rules circumvent FRA's stringent page limits and deadlines for NEPA documents by expanding the definition and application of "extraordinary circumstances" to the point of rendering FRA's statutory provisions meaningless.

Second, the proposed rules impose mandatory analyses and other requirements on agencies that will only increase the page counts of NEPA documents beyond the limits imposed by FRA and will likely either significantly delay NEPA document completions well beyond FRA's time requirements or will result in rushed analyses that are more susceptible to legal challenge. The fundamental inconsistencies between FRA and the proposed rules will create more agency and regulatory confusion in terms of how to comply with these requirements and in turn, result in more delays for NEPA documents and federal permitting.

When combined with FRA provisions, the proposed rules require federal agencies to do more analyses and documentation in less time and with fewer pages. The result will be that federal agencies will not be able to satisfy the requirements of both FRA and the proposed rules, which in turn would likely result in less comprehensive NEPA analyses and provide more fodder for legal challenges to NEPA documents for agency decisions. These legal challenges will result in further project delays and regulatory uncertainty, thereby exacerbating the very problems Congress intended to address and solve in FRA's Builder's Act provisions.

Comment: CEQ should revise the proposed rules by narrowly tailoring them to comport fully with the plain language and Congressional intent of FRA.

Specifically, the proposed rules should provide a precise and narrow definition of the "extraordinary complexity" trigger for the time and page limits of FRA. Without such a definition, there will be numerous unintended consequences that would be contrary to FRA.

For example, as discussed in Section I.D below, analysis of global, national, regional, and local climate change from potential impacts of a project or agency action is severely inhibited by the complete absence of a reliable scientific model that can analyze the incremental impact of greenhouse gas (GHG) emissions from a discrete action.

This substantial problem is compounded further in the absence of any significance criteria or thresholds for GHG emissions promulgated by Congress or a federal agency with statutory jurisdiction to promulgate such a standard. As a result, any attempted analysis of climate and GHG emissions would be very likely by its very nature "extraordinarily complex," triggering higher page counts on a more or less regular basis.

FRA amended NEPA and codified that effects must be considered in the NEPA process only when there is a reasonably close causal relationship between the proposed action/project and its reasonably foreseeable impacts. *See* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, Sec. 321(a)(3)(B)(i), 137 Stat. 10, 38 (2023) (providing NEPA analysis for only "reasonably foreseeable environmental effects of the proposed agency action").

In doing so, FRA codified long-standing U.S. Supreme Court precedent holding that NEPA requires a "reasonably close causal relationship," akin to the "familiar doctrine of proximate cause from tort law," between an agency's proposed action and identified effects from that proposed action.

Department of Transportation v. Public Citizen, 541 U.S. 752, 754 (2004); *Metropolitan Edison Company v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

Comment: The proposed rules need to be revised to narrowly prescribe and expressly codify this provision of FRA. Such a provision would further the Congressional intent and goals of FRA to promote timely and page efficient NEPA reviews by limiting the scope of effects to be analyzed to those that would be closely caused by the proposed action.

C. The Proposed Phase 2 Rules will Exacerbate NEPA Litigation and Project Delays

Since its enactment more than 50 years ago, NEPA, once profound, elegantly simple, pragmatic, and effective, has morphed into a juggernaut of a litigation tool. This NEPA litigation results in project delays, countless dollars of stranded investment, conflicting court decisions, and regulatory whiplash between different Presidential Administrations' policies, NEPA guidance, and rulemakings.

In practice, NEPA has become far removed from its original legislative intent, as promulgated, and passed by Congress. NEPA has become a litigation weapon used by activist organizations that focus on preventing federal agencies from approving fossil-fuel-related projects under their jurisdiction, thus impacting federal agencies' ability to carry out their statutory obligations for the benefit of the American people. NEPA has become an easy tool to delay indefinitely or even halt infrastructure and energy development, pipelines, mining of critical minerals, roads, bridges, water projects, and other vital infrastructure, even when the projects have included appropriate measures to mitigate potential impacts.

Over the past few years, anti-industry, anti-development, and even anti-renewables environmental groups have dramatically increased the use of litigation to stymie federal agency actions. Bureau of Land Management (BLM) Fiscal Year 2022 oil and natural gas statistics show clear evidence of this with 100% of proposed lease parcels being protested for the first time in the 25 years BLM has been tracking it. These groups are strategically choosing venues where the courts are known to take expansive views of NEPA's requirements.

Given CEQ's role in guiding all federal agencies' NEPA implementation, it should ensure it is providing regulations that are consistent, clear, streamlined and legally defensible. From a practical standpoint, however, the proposed rules do not mitigate, and indeed exacerbate, these litigation-related issues.

The proposed rules create a series of vague substantive concepts, subjective standards, and aspirational goals that are untethered and indeed contrary to the NEPA statute as amended by FRA.

Without being anchored to the NEPA statute's procedural provisions and long-standing U.S. Supreme Court NEPA legal precedent, these concepts will result in inconsistent and subjective interpretation and implementation that is the hallmark of arbitrary and capricious agency-decision making in violation of the Administrative Procedure Act (APA). This level of subjectivity will result in only confusion for the agencies, the project applicant, and the public; extensive delays in the NEPA process; and significant additional litigation and challenges to agency decisions.

Comment: The proposed rules need to be revised to delete these subjective and confusing concepts, including but not limited to:

1. Delete the requirement to identify "environmentally preferable alternatives." Proposed Section 1502.14(f). This proposed provision would place the lead agency in the untenable situation of needing to make a decision amongst competing interpretations of what is considered an "environmentally preferable alternative" from a wide array of stakeholders and advocacy groups that typically comment in opposition to particular agency actions or proposed projects. This entirely subjective concept simply exacerbates litigation risk and opens the door for even more inconsistent rulings from various federal courts throughout the country.

   For example, for a natural gas electric generation plant or natural gas back-up generation system for a solar project, some groups will consider the use of natural gas as per se environmentally undesirable, while other groups would value reliable electric generation and the related reduction in air emissions and GHGs from use of natural gas over other forms of energy and consider such an outcome as "environmentally preferable."

   It would be a Hobbesian choice for the agency, as its ultimate decision would likely be challenged in court by one group or another as not being "environmentally preferable." In turn, court decisions could be based in part on a judge's own subjective preferences or interpretation as to what constitutes "environmentally preferable" whether in the context of current national policies or not. These subjective concepts open Pandora's box for litigation, and completely undermine any form of regulatory certainty needed for the NEPA process.

   This provision also departs from long-standing NEPA structure, guidance and legal precedent that provides that reasonable alternatives must be technically and economically feasible while still accomplishing the intended purpose of the proposed action. See, e.g., CEQ 40 Most Asked Questions, 46 Fed. Reg. 18026 (March 23, 1981) ("Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint."); *Citizens' Comm. to Save our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1031 (10th Cir. 2002) ("Alternatives that do not accomplish the purpose of an action are not reasonable and need not be studied in detail by the agency."); *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1174-75 (10th Cir. 1999).

   By focusing on maximizing environmental benefits to define an "environmentally preferable alternative" without reference to the purpose and need for the project, the applicant's objectives or other economic and technical feasibility considerations, this provision will undermine the procedural requirements of NEPA and vastly expand the required analyses to be included in the NEPA document.

   Moreover, such a subjective provision would open the door to outcome-based decision-making that is contrary to NEPA and will result in voluminous NEPA documents that will only create confusion and ultimately increase legal challenges to any ultimate agency decision.

Such litigation could include challenges from project proponents whose projects are rendered economically or technically infeasible or otherwise do not meet the intended purpose and need for the project, as well as activist groups that advocate for a particular policy outcome, regardless of whether it is ultimately the best balanced outcome to meet the needs of society and for the environment.

2. Delete the requirement to analyze, "[p]possible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local plans, policies, and controls for the area concerned, including those addressing climate change." Proposed Section 1502.16(a)(6). The proposed requirement places an extensive burden on the agency and does not provide information to better inform agency-decision-making given that there is a myriad of climate change related plans and policies across all levels of government (federal, regional, state, tribal, and local) throughout the United States, with numerous different approaches, competing policies, constantly evolving regulations, and extensively different variables used to frame the parameters of these plans.

   Moreover, such a requirement increases the risk that certain non-federal plans would be elevated over federal statutory requirements and federal agency statutory authority, thus eroding the fundamental concept of federalism, which is a central component of the constitutional governance structure of the United States.

3. Delete the provision allowing agencies to include within their NEPA documents "reasonable alternatives not within the jurisdiction of the lead agency." Proposed Section 1502.14(a). Because the purpose and need statement for a proposed action drives the reasonable range of alternatives, any project alternative outside of the lead agency's jurisdiction is necessarily beyond the control of the agency and outside the purpose and need for the project, and is therefore not reasonable. Nor would the agency have the authority to adopt such an alternative, as it would not have statutory or regulatory jurisdiction to do so. This provision only adds an undue burden on federal agencies, increases litigation risk and paperwork, while decreasing regulatory certainty for the NEPA process and for administration of the underlying permitting statutes for which the proposed project is based.

4. Delete proposed Section 1506.12 providing for "innovative approaches" to NEPA compliance to address "extreme environmental challenges." This subjective concept is untethered to any governing criteria or standards. This provision would allow arbitrary, capricious, and unilateral deviation from the NEPA regulations by an agency to address perceived "extreme environmental challenges." The examples provided cover essentially every resource area, including land, water, air, climate, species, and cultural resources. Essentially, under these examples, any potential significant impact could be deemed "extreme" to trigger departure from the NEPA regulations. This subjective provision should be removed from the proposed rules.

D. The Proposed Phase 2 Rules are an Improper Tool to Create and Implement *De Facto* National Energy and Climate Policies

The proposed rules cannot serve as a strawman to create and implement *de facto* national energy and climate policies. Given the complexity of these issues, Congress is the appropriate branch of government to promulgate legislation to address them. Moreover, the complex issues related to global climate change and domestic energy should not be addressed through new regulations for a procedural statute such as NEPA.

Climate change is a complex, global issue, and it is difficult to analyze its potential environmental effects at the project, local, regional, and global levels. At present, federal agencies, industry, academia, and the scientific community still do not have sufficient and reliable scientific information or modeling that can accurately predict the effects of GHGs on climate change based upon site-specific information for a particular project or discrete agency decision.

Challenges to obtaining viable data to inform agency decision-making through the NEPA process include:

- Federal agencies lack precise computational models for local projections of expected climate, and climate change that may or may not result from GHG emissions at the upstream project level.

- Federal agencies lack historic detailed inventories and monitoring systems for an adequate baseline understanding of local conditions that is needed to assess potential climate change impacts.

- Without such models or baseline inventories, it is feasible neither to identify impacts from a discrete project nor to identify impacts locally, and federal agencies are limited to reacting to already-observed potential climate change effects within their resource areas.

Comment: Neither Congress nor the Executive Branch of the federal government have adopted threshold significance criteria that would guide agencies on what levels of impact would result in a determination that a proposed action would have a significant effect upon climate change and/or related impacts to local ecosystems.

In other words, it is widely recognized that current science and modeling cannot link individual projects' GHG emissions to specific changes in climate or other potential direct, indirect, or cumulative effects on the environment. This lack of scientific and computational certainty opens the door for very subjective and tenuous assumptions for NEPA analysis parameters that will lead only to speculative and inconsistent analyses that will not inform or facilitate agency decision-making and will be ripe for legal challenge. The proposed rules only exacerbates these complex issues, to the benefit of no one.

E. The Proposed Phase 2 Rules Impermissibly Expands NEPA Analysis to Include Consideration of Global and Extra-Jurisdictional Effects

Proposed Section 1501.3(d)(1) would require agencies to consider effects in "global, national, regional, and local contexts as well as the duration, including short-and long-term effects." While CEQ states that this provision is designed to restore text from the original 1978 regulations, it significantly expands the scope of consideration provided in those original rules.

The prior versions of this regulation instructed agencies to consider "the affected area (national, regional, **or** local)" "as appropriate to the specific action." 40 C.F.R. 1501.3(b)(1) (emphasis added).

The proposed rules add "global" considerations and also change from the disjunctive "or" to an all-encompassing "and" that requires an agency to consider all four contexts. Moreover, as written, it is confusing as to whether this provision instructs agencies to consider the geographic context (as reflected in the prior regulations), or is designed to be more expansive, given that the proposed provision instructs that "Agencies shall analyze the significance of an action in several contexts." Proposed Section 1501.3(d)(1).

Comment: Proposed Section 1501.3(d)(1) should be revised to provide agencies the flexibility to consider appropriate geographic contexts based upon the site-specific action and not require evaluation of global, national, regional, and local contexts. This revision would create more efficiency in the NEPA process and decrease unwarranted additional paperwork and expenditure of agency resources on issues not germane to the agency's significance evaluation.

The proposed rules cannot broadly extend NEPA extraterritorially to outside of the United States. Legally, there is a federal presumption against the extraterritorial application of federal statutes to outside the United States and the U.S. Supreme Court uses this legal canon to determine the geographic scope of federal statutes. The proposed rules must adhere to this important legal doctrine.

Under the U.S. Supreme Court's current legal framework, the court first examines "whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016). If this presumption has not been rebutted, then the court examines "whether the case involves a domestic application of the statute" and if this focus is found in the United States, then application of the statutory provision is considered domestic and not to be applied internationally. *Id.* at 2101.

NEPA does not provide a clear, affirmative indication that it applies extraterritorially. Absent a rare cross-border project, such as an electric transmission line or pipeline between the United States and Canada or Mexico, NEPA is purely a domestic statute, designed to provide a procedural review of environmental effects for proposed actions within the United States. Even for cross-border projects, NEPA analysis is appropriately confined to analyzing potential effects occurring within the United States and not extended to other countries.

The consideration of global contexts would vastly expand global climate considerations that are outside of the statutory jurisdiction of federal agencies and therefore not legally appropriate to be encompassed in the NEPA process. Moreover, federal agencies do not have the tools, resources, or expertise needed to conduct global analyses.

By focusing on global effects, particularly global climate effects, Proposed Section 1501.3(d)(1) opens the door to subordinating important local considerations and national priorities and considerations, such as securing reliable, affordable sources of domestic energy, job creation, and national energy security. NEPA should not expand into global analyses, particularly given the presumption against the extraterritorial reach of federal statutes and given that countries like China and India account for significant global GHG emissions beyond the control of the United States.

Comment: The proposed rules should be significantly narrowed to only allow extraterritorial context consideration on the rare occasion when a portion of a federal action or project occurs outside of the United States, such as our examples of transmission lines or pipelines that cross into Mexico or Canada.

The proposed rules' over-emphasis on climate effects to the detriment of other important policy considerations, particularly in the global context, will result in overbroad and disproportionate impacts analyses and will have unintended consequences. Indeed, in its discussion on significance determination, the preamble for the proposed rules states: "For example, leases for oil and gas extraction or natural gas pipelines have local effects, but also have reasonably foreseeable global indirect and cumulative effects related to GHG emissions." 88 Fed. Reg. at 49935. This example is inappropriate, misleading, and would result in unintended consequences. It should be deleted from the preamble for the final rule.

As written, the proposed rules essentially convey that any GHG emissions resulting from a federal action such as an onshore BLM lease sale result in per se significant indirect and cumulative effects under NEPA. This assumption turns NEPA on its head and is not supported by evidence, such as that showing the role of natural gas in reducing overall U.S. GHG emissions.[1] Such a NEPA standard would have numerous unintended consequences, including paralyzing federal agencies from being able to fulfill their statutory mandates directed by Congress and rendering NEPA a superfluous, voluminous paperwork exercise that would not better inform agency-decision-making.

This example from the preamble also fails to weight the benefits of domestically sourced oil and natural gas and fails to recognize that if production does not occur in the United States, then production must be imported from overseas, likely from countries that produce with higher GHG emission intensity and little or no environmental regulation.

[1] *U.S. Energy-Related Carbon Dioxide Emissions, 2021*, U.S. Energy Information Administration, Figure 7, December 14, 2022, showing that fueling switching to natural gas has provided 58% of the GHG emissions reductions in the electricity sector whereas noncarbon sources, mainly wind and solar energy, have contributed only 42%.

As BLM explained in its Lease Sale Environmental Assessments for sales conducted in June 2022, there are substantial limits to its NEPA analyses at the lease sale stage due to the uncertainty of numerous key variables to estimate GHG emissions from a leasing decision and the lack of any scientific model to estimate potential effects stemming from these emissions. Specifically, BLM explained:

> The uncertainty that exists at the time the BLM offers a lease for sale includes crucial factors that would affect actual GHG emissions and associated impacts, including but not limited to the future feasibility of developing the lease, well density, geological conditions, development type (vertical, directional, horizontal), hydrocarbon characteristics, specific equipment used during construction, drilling, production, abandonment operations, production and transportation, and potential regulatory changes over the 10-year primary lease terms. (BLM New Mexico Environmental Assessment for the June 2022 Competitive Oil and Gas Lease Sale, EA-DOI-P000-2021-001-EA, at 70.)

BLM also explained the incredible complexity of estimating effects from individual agency actions upon global climate: "[c]limate change is a global process that is affected by the sum total of GHGs in the Earth's atmosphere" and that "[t]he incremental contribution to global GHGs from a single proposed land management action cannot be accurately translated into its potential effect on global climate change or any localized effects in the area specific to the action." *Id.* at 70-71.

BLM's narrative provides a good overview of the complex issues confronting agencies in attempting to assess GHG emissions and potential climate effects. In light of these scientific limitations, and the absence of defined thresholds that determine whether GHG emissions from a proposed action are significant for purposes of global climate impacts, BLM utilized GHG emissions as a proxy for assessing climate impacts.

Federal courts have upheld and endorsed BLM's methodology for evaluating GHG emissions as a surrogate for analyzing climate impacts using a comparative approach to give context to the scale of emissions from the proposed agency action being analyzed when compared to state-wide and nation-wide emissions. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309-10 (D.C. Cir. 2013); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 77 (D.D.C. 2019).

Comment: In the event that the provisions regarding climate effects, global context, and significance determinations are retained, then the proposed rules should add a provision that comparative qualitative analyses (e.g., using emissions as a proxy for impacts) are appropriate in the absence of tools and frameworks to develop reliable quantifiable effects determinations.

Comment: The proposed rules should be revised to be resource and impact neutral, and to provide agencies with the discretion and flexibility to structure NEPA documents in a pragmatic manner that is reflective of the proposed action under review and the reality of the scientific and other limitations on conducting NEPA analyses on complex issues such as global climate change.

F. The Proposed Phase 2 Rules Need to Expressly Recognize Agency Jurisdictional Limits for NEPA Analysis and the Rule of Reason Legal Standard that Governs Judicial Review of NEPA Documents

Congress has not enacted any laws to empower any federal agency to regulate climate change. The proposed rules must be revised and significantly scaled back to avoid overreach into the purview of Congress on whether to empower federal agencies to regulate climate change.

It is well settled under U.S. Supreme Court precedent that a federal agency's statutory authority conveyed by Congress guides the scope of environmental review for a proposed agency action under NEPA. *See Dep't. of Transp. v. Public Citizen*, 541 U.S. 752, 767-770 (2004) (explaining that under NEPA, an agency need not evaluate an environmental effect where it "has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions"); *accord West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) ("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.'") (brackets in original); *La. Public Serv. Com. v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it").

NEPA's "rule of reason" also limits the scope of environmental review and analysis required. *Dep't. of Transp. v. Public Citizen*, 541 U.S. 752, 767-770 (2004) (explaining that the "rule of reason" limits agency obligation under NEPA to considering environmental information of use and relevance to decision-makers. The agency need not evaluate an environmental effect where it "has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions").

In other words, the contours of NEPA analysis must necessarily be guided by both the scope of the proposed action and the contours of an agency's jurisdictional limits. NEPA does not require an agency to analyze the environmental impacts of actions that are outside the agency's jurisdiction. *Public Citizen*, 541 U.S. at 767.

This fundamental legal tenet is critical within the context of NEPA analyses of GHG emissions, particularly for upstream oil and natural gas projects, and projects on federal lands involving the U.S. Department of the Interior and its bureaus and agencies, such as BLM.

For example, the Mineral Leasing Act (MLA) and the Federal Land Policy and Management Act (FLPMA) require BLM to conduct quarterly competitive oil and natural gas lease sales for lands that are eligible and available for leasing. 30 U.S.C. § 181 et seq.; 43 U.S.C. § 1701 *et seq.*; 43 C.F.R. § 3120.1-2(a). The proposed rules cannot be used to categorically prevent or limit the leasing, development, and production oil and natural gas resources managed by BLM, and BLM cannot take certain actions (e.g., impose limits or mitigation measures) based upon any information it compiles regarding downstream emissions, which BLM does not have the authority to regulate. BLM must continue to abide by its statutory authorities and requirements imposed by MLA.

BLM does not have the statutory or jurisdictional authority to regulate GHGs, and significantly, the NEPA process cannot be used as a surrogate for promulgating de facto GHG regulations under the

Clean Air Act or other regulatory programs within the jurisdiction of EPA. While BLM may nonetheless choose to analyze (but not regulate) GHGs under NEPA, the contours of this analysis are necessarily guided by NEPA's governing "rule of reason."

Congress has not authorized or empowered BLM to establish national energy or climate policy, and BLM cannot use NEPA to make policy decisions outside the boundaries of its statutory obligations. While some may wish to see BLM limit the leasing and production of oil, natural gas, and coal as part of an overall strategy to curtail the use of fossil fuels, the agency has no statutory authority to do so. BLM is obligated to follow its statutory mandates under MLA and FLPMA to promote development of the nation's federally owned oil and natural gas resources. Only Congress may establish national energy or climate policy and Congress has not amended MLA or otherwise directed BLM to restrict the nation's supply of oil and natural gas resources.

Comment: Congress has not authorized or empowered CEQ to establish national energy or climate policies, and CEQ cannot use a NEPA rulemaking to make policy decisions outside the boundaries of an agency's statutory and jurisdictional limits. The proposed rules must be revised to expressly prohibit agencies from expanding the scope of NEPA analysis to actions and activities that are beyond the statutory and regulatory jurisdiction of a federal agency.

Comment: The proposed rules must be revised to explain and limit analysis parameters for GHGs and climate change analysis based upon the jurisdictional limits of the federal agency to regulate actions outside of its regulatory purview.

G. Agencies Cannot be Compelled to Adopt and Impose Mitigation Measures Under the NEPA Process

Proposed Section 1501.6(c) requires agencies to impose mandatory and legally enforceable mitigation measures, and to develop monitoring and compliance plans for those mitigation measures.

1. NEPA Compliance

The mandatory mitigation provision of Proposed Section 1501.6(c) is a dramatic departure from NEPA and U.S. Supreme Court precedent. Because NEPA is a procedural statute, it does not mandate a particular environmental outcome. As a result, the Supreme Court has held that a discussion of mitigation should be included in a NEPA analysis to ensure adequate consideration of the potential environmental consequences of the proposed project, but a requirement to mitigate is inappropriate. *Robertson,* 490 U.S. at 351-53 (holding that the appeals court erred "in assuming that NEPA requires that action be taken to mitigate the adverse effects of major federal actions").

NEPA simply requires an agency to undertake "a reasonably complete discussion of possible mitigation measures." *Robertson*, 490 U.S. at 352. "Because NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures." *Id.* at 353 n.16.

As the Supreme Court explained, "one important ingredient of an EIS is the discussion of the steps that can be taken to mitigate adverse environmental consequences." *Robertson*, 490 U.S. at 351. Significantly, the Supreme Court went on to explain that "[t]here is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and substantive requirement that a complete mitigation plan be actually formulated and adopted on the other." *Id.* at 351.

Comment: CEQ must alter proposed Section 1501.6(c) to remove the requirements that agencies impose mandatory and legally enforceable mitigation measures and to develop monitoring and compliance plans for those mitigation measures.

2. Agency Statutory and Jurisdictional Limits on Imposing Mitigation

Proposed Section 1508.1(s) of the proposed rules provides a mitigation hierarchy that prioritizes avoidance of impacts, followed by minimization, rectification, reduction, elimination, or compensation for impacts.

Federal agencies cannot impose mitigation measures outside of their statutory jurisdiction and defined regulatory authority, and NEPA cannot be used as a vehicle to expand an agency's statutory jurisdiction. For example, under the federal onshore oil and gas program administered by BLM, no statute or regulation requires avoidance of impacts, let alone compensatory mitigation for impacts.

BLM's governing statutes limit its mitigation authority to significant adverse impacts. Pursuant to MLA implementing regulations, BLM may require reasonable measures "to minimize adverse impacts to other resource values . . . ." 43 C.F.R. § 3101.1-2. FLPMA mandates that use of public lands may be subject to conditions to "minimize adverse impacts on . . . resources and values . . . ." 43 U.S.C. § 1732(d)(2)(A). Similarly, BLM regulations provide that Applications for Permits to Drill may "require reasonable mitigation measures to . . . minimize adverse impacts . . . consistent with granted lease rights." 43 C.F.R. § 3171.13(a)(2) (emphasis added).

BLM's statutes and regulations reasonably tailor and limit mitigation to adverse impacts and do not extend to cover any and all impacts. In addition, these legal authorities do not authorize compensatory mitigation or otherwise allow BLM to impose a requirement to eliminate impacts.

Comment: CEQ must alter proposed Section 1508.1(s) to remove the mitigation hierarchy that prioritizes avoidance of impacts.

3. Compensatory Mitigation is Not Lawful on Federal Lands

The proposed rules would allow for monetary compensation to mitigate project impacts. In general, compensatory mitigation involves monetary payments or in-kind contributions to conduct activities off-site from a project that are intended to offset adverse impacts of a proposed action on-site. This

compensatory mitigation provision raises numerous legal issues and far exceeds the statutory parameters of NEPA.

No statute or regulation authorizes compensatory mitigation requirements on federal lands. While BLM may consider voluntary proposals for compensatory mitigation and state-mandated compensatory mitigation, BLM does not have any statutory or legal authority to require monetary payment for mitigation impacts from a proposed action. Moreover, federal agencies cannot impose *ad hoc* compensatory mitigation requirements on individual projects that could be used to make those projects uneconomic.

Comment: CEQ must remove the provisions that allow for monetary compensation for mitigation. The proposed rules should be revised to expressly state that an agency cannot use NEPA to impose mitigation measures that are outside of the agency's statutory authority and regulatory jurisdiction.

4. Additional Comments on Mitigation

The proposed rules on mitigation are contrary to NEPA. Requiring mandatory mitigation measures to address potential resource impacts would unlawfully transform NEPA from a procedural statute into a substantive, environmental protection statute. Only Congress can amend the NEPA statute.

Comment: The proposed rules should be revised to return mitigation measures to being discretionary to address adverse impacts only and not require mitigation for any potential impacts.

Comment: The proposed rules should be revised to expressly state that mitigation measures must be governed by a rule of reason; be technically and economically feasible to implement; and agreed upon in advance with a private-sector project proponent.

H. The Proposed Phase 2 Rules' Expansion of the Range of Alternatives is Contrary to NEPA, Imposes Undue Burdens on Agencies and Project Proponents, and will Result in Extensive NEPA Delays and Litigation

For alternatives to be analyzed, the proposed rules require that the lead agency identify "the environmentally preferable alternative or alternatives." Proposed Section 1501.14(f). The environmentally preferable alternative is defined as the alternative that "will best promote the national environmental policy…by maximizing environmental benefits, such as addressing climate change-related effects…" 88 Fed. Reg. 49924, at 49, 977.

The proposed rules relating to the range of alternatives exceed the parameters of NEPA established by Congress and are contrary to FRA. Under NEPA, an agency could perform all required NEPA analyses and determine that the preferred alternative is not the most environmentally beneficial, but still proceed to approve that alternative. Moreover, under NEPA, an agency may still choose an alternative that has significant adverse effects as long as the agency analyzed and disclosed those effects. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

Comment: The requirement for identification of "the environmentally preferable alternative or alternatives" should be removed. As discussed previously in Section 1.C, this phrase is open to a wide array of subjective interpretation, which will lead to more expansive NEPA documents and increased litigation risk.

1. The Purpose and Need for the Project Must be Given Deference in Framing a Reasonable Range of Alternatives, Particularly for Private Sector Projects

Under well-established legal precedent, the range of alternatives is derived by the purpose and need for the proposed action. When a private-sector company proposes to exercise its property rights, the agency is supposed to provide due deference to the proponent's purpose and need for the project. *City of Grapevine, Texas v. Dep't of Transportation*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) ("where a federal agency Is not the sponsor of a project, 'the Federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the citing and design of the project;") (citations omitted).

Comment: The proposed rules must be revised to reflect that Congress intended that NEPA analyze only reasonable alternatives that meet a non-federal applicant's goals. "Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (also explaining "Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action.").

"An agency need not consider alternatives that 'extend beyond those reasonably related to the purposes of the project.'" *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1071 (9th Cir. 2012) (citation omitted); *see also Partners in Forestry Co-op., Northwood All., Inc. v. U.S. Forest Serv.*, 638 F. App'x 456, 464 (6th Cir. 2015) ("Rather, the number of alternatives that an agency considers is within its discretion, as long as it takes into account the project's purpose and environmental consequences.").

Comment: The proposed rules should retain the provision from the 2020 CEQ NEPA regulations that require that an "agency shall base the purpose and need on the goals of the applicant and the agency's authority." 85 Fed. Reg. 43,303, at 43,365 (July 16, 2020). By focusing on the actual purpose and need for the proposed project, agencies will be able to better focus their NEPA analyses on realistic, pragmatic, and reasonable alternatives that will better inform agency decision-making and the public.

2. Reasonable Alternatives must be Technically and Economically Feasible

It is well settled under NEPA that BLM must consider reasonable alternatives that will accomplish the intended purpose of the proposed action and are technically and economically feasible. Under the plain language of the original NEPA statute, "all agencies of the Federal Government shall…in consultation with the Council of Environmental Quality"…"insure that economic and technical

considerations" be given "appropriate consideration in decision-making." 43 U.S.C. § 4332(2)(B) (1970).

Similarly, in FRA, Congress reiterated this fundamental NEPA principle by amending NEPA to require that agencies consider "a reasonable range of alternatives to the proposed agency action . . . that are technically and economically feasible, and meet the purpose and need of the proposal." Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, Section 321(a)(3)(B)(iii) (codified in NEPA statute at 42 U.S.C. § 4332(2)(C)(iii) (2023)).

FRA's amendment to NEPA codifies long-standing guidance and legal precedent. "Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint." CEQ 40 Most Asked Questions, 46 Fed. Reg. 18026 (March 23, 1981). "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); *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1174-75 (10th Cir. 1999). An agency need not consider alternatives that "it has in good faith rejected as too remote, speculative, . . . impractical or ineffective." *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1039 (10th Cir. 2001); *see also Vermont Yankee*, 435 U.S. at 551.

Comment: The proposed rules must be revised to expressly comply with FRA's amendment to NEPA that limits the reasonable range of alternatives to those that are technically and economically feasible and that meet the purpose and need for the proposed action.

II. Potential Incorporation of the Interim GHG Guidance into the Proposed Phase 2 Rules

In the proposed rules, CEQ solicits comment whether it should "codify any or all of its 2023 GHG guidance". (88 FR 49945) In response, the Alliance opposes incorporation of CEQ's Interim GHG Guidance into the proposed rules. First and foremost, CEQ has not provided specific proposed regulatory provisions to comment on. Without any specifics, it is not possible to provide meaningful comments on conceptual integration of the Interim GHG Guidance into the proposed rules. Further, without that specific regulatory language, CEQ's proposal to incorporate the GHG Guidance does not comply with APA. Should CEQ wish to pursue codifying any or all of its 2023 GHG guidance, it should do so under a separate Notice of Proposed Rule Making. Please refer to the Alliance's comment letter regarding "CEQ Interim NEPA Guidance on Consideration of Greenhouse Gas Emissions and Climate Change Docket No. CEQ-2022-0005" dated April 10, 2023.

Second, as we detailed in our comments on the Interim GHG Guidance, there are fundamental legal, policy, technical, and practical issues that render this guidance unwieldly, unworkable, and unlawful. We incorporate by reference the Alliance's comments on the Interim GHG Guidance into these comments and provide these additional comments.

In sum, a fundamental premise of the Interim GHG Guidance is contrary to the NEPA statute and long-established U.S. Supreme Court precedent. As with the proposed rules, the Interim GHG Guidance elevates global climate change as the predominant resource issue to be analyzed and

mitigated and seeks to subordinate the United States' abundant oil and natural gas resources as well as private property rights to develop hydrocarbon assets. *See, e.g.,* Interim GHG Guidance, 88 Fed. Reg. at 1,204 (instructing that "agencies should evaluate reasonable alternatives that may have lower GHG emissions, which could include technically and economically feasible clean energy alternatives to proposed fossil fuel-related projects and consider mitigation measures to reduce GHG emissions to the greatest extent possible.").

Comment: CEQ must not incorporate the Interim GHG Guidance, particularly in advance of CEQ providing specific proposed regulatory language for the public to comment on.

A. The Interim Guidance is Unduly and Unreasonably Prejudicial to the Oil and Natural Gas Industry

The Interim Guidance focuses on perceived negative impacts from oil and natural gas projects, while not taking into account any of the numerous benefits these resources provide, such as the significant reduction in GHG emissions in the United States due to fuel switching to natural gas in the electricity generation sector, as well as serving as feedstock for the fabrication of materials needed to construct renewable energy projects and providing critical back-up generation for intermittent wind and solar energy sources. See, *e.g.,* 88 Fed. Reg. at 1,204 (stating that "[w]here relevant – such as for proposed actions that will generate substantial GHG emissions – agencies should identify the alternative with the lowest net GHG emissions or the greatest net climate benefit among the alternatives they assess.").

B. Unlawful Utilization of NEPA to Achieve Climate Policies

The Interim Guidance maintains that assessing projects' impact on climate change is within the purview of federal agencies' statutory obligations for NEPA reviews. As with the proposed rules, the Interim Guidance focuses on using NEPA as a policy tool to implement this administration's climate goals and objectives. It states that federal agencies should evaluate "how Federal actions will help meet climate change goals and commitments, or alternately, detract from them." 88 Fed. Reg. at 1,204. The Interim Guidance references the Biden Administration's pledge under the Paris Agreement to establish an economy-wide target of reducing U.S. net GHG emissions by 50 to 52% below 2005 levels by 2030 as a climate goal.

Moreover, the Interim Guidance directs agencies to "use the NEPA process to make informed decisions grounded in science that are transparent with respect to how Federal actions will help meet climate change goals and commitments, or alternatively, detract from them." 88 Fed. Reg. at 1,204. It also instructs agencies that "[a] programmatic NEPA review also may serve as an efficient mechanism in which to assess Federal agency efforts to adopt broad-scale sustainable practices for energy efficiency, GHG emissions avoidance and emissions reduction measures, petroleum product use reduction, and renewable energy use, as well as other sustainability practices." *Id.*

The Alliance does not support the premise that CEQ's Interim GHG Guidance should be codified in NEPA regulations and utilized as a tool to implement NEPA in a manner that drives specific policy

outcome-based results on GHG emissions and global climate change, particularly in the absence of any Congressional action to amend NEPA or otherwise to promulgate national energy and climate legislation, or empower federal agencies to regulate climate.

Congress did not promulgate NEPA as a substantive statute designed to protect the environment. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978). *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA does not dictate any substantive environmental result. Indeed, as the U.S. Supreme Court has recognized, NEPA is not violated even if a project will cause significant environmental impacts, so long as the agency is "informed" of the potential effects of its decision before it acts. *Robertson,* 490 U.S. at 350.

Importantly, federal agencies may not prioritize environmental concerns, or political climate goals, at the expense of project proponents or the development of their valid existing property rights. NEPA does "not require agencies to elevate environmental concerns over other appropriate considerations." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). As such, the Alliance does not agree with the Interim GHG Guidance that as part of NEPA analysis agencies "should mitigate GHG emissions associated with their proposed actions to the greatest extent possible…" 88 Fed. Reg. at 1197.

Comment: CEQ must not codify the Interim GHG Guidance into the NEPA regulations as a tool to drive specific climate change policy outcomes in the absence of any Congressional action to amend NEPA or otherwise to promulgate national energy and climate legislation.

C. NEPA Does Not Require Analysis of Remote or Speculative Impacts; NEPA Requires a Close Causal Relationship between the Proposed Action and Potential Effects to be Analyzed

The Interim GHG Guidance states: "As with any NEPA review, the rule of reason should guide the agency's analysis and the level of effort can be proportionate to the scale of the net GHG effects." 88 Fed. Reg at 1205. The emphasis on anchoring the scope of NEPA analysis to "net GHG effects" is contrary to NEPA and inappropriate. At a minimum, this presumes that climate mitigation must be imposed and/or that net effects presume an impact that must be analyzed and mitigated.

Comment: CEQ should not carry forward the concept from the Interim GHG Guidance into NEPA regulations that agencies should provide a "full burn" assumption to fossil fuel-related actions so the agency can provide "an upper bound estimate of GHG emissions by assuming that all of the available resources will be produced and combusted to create energy." 88 Fed. Reg. at 1205. While GHG emissions may be quantified at the project-level in certain circumstances, federal agencies do not have a tool to analyze or predict what impact, if any, these GHG emissions will have on global climate. Further, the assumption that all oil and natural gas will be burned for energy is erroneous. Both provide significant feedstock for fertilizer, electronics, pharmaceuticals, solar panels, and a vast array of consumer products. Erroneous assumptions meant to overestimate GHG emissions from oil and natural gas projects do not provide decision-makers with useful information and hence, would skew decision-making.

NEPA requires analysis of a project's environmental impacts caused by the proposed action. Regarding the causal connection between impacts on the environment from project level effects, the Supreme Court held that NEPA should be "read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. *Metro. Edison v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

Similarly, in *Department of Transportation v. Public Citizen*, the Supreme Court held that "NEPA requires a 'reasonably close causal relationship' akin to proximate cause in tort law," and "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." 541 U.S. 752, 754, 770 (2004).

Particularly in the oil and natural gas context, there is no close causal connection between project level GHG emissions and global climate change. At the project level, certain U.S.-based oil and natural gas projects may result in the emission of GHGs, but the potential effects of these emissions cannot be accurately quantified or predicted in the context of global climate change. This issue is exacerbated by the fact that a significant portion of GHG emissions come from China and India, and are beyond the control of the United States.

NEPA does not require the full disclosure of impacts that are remote or speculative. *Vermont Yankee*, 435 U.S. at 551. As discussed above, while GHG emissions may be quantified at the project-level in certain circumstances, federal agencies do not have any reliable or accurate tool or model to analyze or predict what impact, if any, these GHG emissions will have on global climate.

This limitation is based upon well-established legal precedent. The Supreme Court has characterized the "rule of reason" as requiring an agency "to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible." *New York Natural Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, 1311 (1976).

The speculative nature of potential effects from project-level GHG emissions on the global climate is particularly relevant to the boundaries of indirect and cumulative impacts analysis under NEPA. As recognized by the Supreme Court, agencies have discretion to limit the scope of their cumulative impact discussions based on reasonableness and practical considerations. *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976). It is well settled that agencies are not required to consider cumulative impacts that are too speculative or hypothetical to meaningfully contribute to NEPA's goals of public disclosure and informed decision-making. *Vermont Yankee*, 435 U.S. at 551 (recognizing that NEPA was not meant to require agencies to consider remote and speculative possibilities, the effects of which cannot be readily ascertained).

Comment: For the reasons stated above in Section II, CEQ should not codify in whole or in part its 2023 Interim GHG guidance.

III. Specific Comments

A. 1501.3(d)(2)(i) - Determine the appropriate level of NEPA review: "*A significant adverse effect may exist even if the agency considers on balance the effects of the action will be beneficial.*"

Comment: This statement correctly recognizes that projects associated with the human environment can be necessary and crucial for human flourishing and yet still have significant adverse environmental effects.

B. 1501.4 (b)(2)(c) - Categorical Exclusions: *". . . agencies may establish categorical exclusions through a land use plan, a decision document supported by a programmatic environmental impact statement or programmatic environmental assessment. . .*"

Comment: We support the establishment of Categorical Exclusions through programmatic analyses as well as the preservation of existing Categorical Exclusions.

C. 1501.4(d)(3) – Categorical Exclusions – Mitigation: *"Categorical exclusions . . . may [i]nclude mitigation measures that, in the absence of extraordinary circumstances, will ensure that any environmental effects are not significant, so long as a process is established for monitoring and enforcing any required mitigation measures, including through the suspension or revocation of the relevant agency action. . .."*

Comment: We oppose the requirement that mitigation measures for categorical exclusions must be legally binding, enforceable, and subject to monitoring. We oppose that suspension or revocation of the project authorization or permit is the appropriate remedy for potential non-successful implementation of mitigation measures. As discussed in Section I.G above, this mitigation provision is contrary to NEPA's statutory mandate and governing Supreme Court precedent.

D. 1501.5(c)(4) - Environmental Assessments: *"Provide a unique identification number for tracking purpose, which the agency shall reference on all associated environmental review documents prepared for the proposed action."*

Comment: We support this provision as it will benefit the public in reviewing and tracking NEPA documents.

E. 1510.10(a) - Deadlines and Schedule for the NEPA Process: *"Where applicable, the lead agency shall establish the schedule and make any necessary updates to the schedule in consultation with and seek the concurrence of joint lead, cooperating, and participating agencies and in consultation with project sponsors and applicants."*

Comment: This language is positive but fails to meet congressional intent for an efficient NEPA process. Lead agencies should be required to develop detailed schedules that list more than

general milestones such as when the draft Environmental Impact Statement (EIS) is completed or the final Record of Decision ROD.

The congressional intent of FRA regarding NEPA document completion is a major improvement from how agencies have completed NEPA documents in the past and a step-change in project management effectiveness is needed to meet congressional intent. As currently drafted, the proposed rules do not support the congressional intent and will leave agencies struggling to comply with the congressional timing requirements of FRA at best.

To address these issues, we recommend incorporating the following underlined text into the final rule:

"list the various stages of drafting chapters and appendices and both agency and cooperating agency reviews necessary to meet project milestones." "Schedules should be updated at a minimum of monthly for EAs and quarterly for EIS" and the "initial project schedule should be published at the same time the project is noticed in the Federal register."

F. 1501.10(e) - Deadlines and Schedule for the NEPA Process: "*The schedule for environmental impact statements shall include the following milestones:"*

Comment: As explained above, this language is positive but fails to meet congressional intent for an efficient NEPA process. As written, there is a strong likelihood that agencies will be unable to comply with the congressional timing requirements, especially given a lack of a robust project schedule. A list of milestones is not a project schedule as understood by those in the professional practice of project management.

G. 1501.10 - Deadlines and Schedule for the NEPA Process (b)(1), (2), and (3):

Comment: We appreciate CEQ's inclusion of EIS document time limits and the requirement to report annually on missed deadlines to Congress as required by statute.

H. 1501.11 - Programmatic environmental documents and tiering:

Comment: We support the section on project tiering. Programmatic NEPA documents must be narrowly tailored to a particular statutory or regulatory program.

I. 1501.12 Incorporation by reference into environmental documents:

Comment: We support the section on incorporating by reference environmental documents.

J. 1502.1 - Purpose of environmental impact statement (a): *"…so that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government."*

Comment: The Alliance opposes this draft provision. This phrase elevates the goals in the Act above the statutory requirements of other legislation such as the oil and natural gas leasing requirements under MLA or natural gas pipeline requirements under the Natural Gas Act.

The federal government is required to abide by all federal statutes, and regulations to implement a procedural statute such as NEPA. NEPA cannot be used to circumvent or supersede the statutory requirements of other federal statutes, particularly those related to energy and natural resources development.

At a minimum, this provision should be deleted, and a sentence added expressly stating that the goals of NEPA (and its implementing regulations) do not and cannot supersede the requirements of other federal statutes.

K. 1502.1 Purpose of environmental impact statement (b): *"…shall inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse effects or enhance the quality of the human environment…"*

Comment: We suggest replacing the phrase "avoid and minimize" with "reduce to the extent practical" to conform to the plain language of the NEPA statute. NEPA expressly states: "to use all practicable means and measures …. to create and maintain conditions under which man and nature can exist" (emphasis added).

L. 1502.4 Scoping (a): *"Scoping may include appropriate pre-application procedures or work conducted prior to publication of the notice of intent."*

The rules as written are not clear on how this pre-application scoping will be completed. One can envision pre-application scoping in some cases significantly delaying NEPA initiation and leading inadvertently (or not) to circumventing the intent of new statutory time limits on NEPA analysis.

M. 1502.4 Scoping (e) (2): "A preliminary description of the proposed action and alternatives the environmental impact statement will consider;"

Comment: Requiring alternatives to be developed prior to the Notice of Intent (NOI) will likely lead to circumvention of new statutory time requirements. Alternatives are most often developed after the NOI is published and scoping initiated, and the proposal is a major departure from the normal process. The results from scoping should inform the formation of alternatives. Alternatives should be developed after scoping and not a requirement for the NOI. Attempting to ascertain alternatives before scoping would be inefficient as it would lead to development of alternatives that are not feasible or do not address specific issues related to project parameters or resources that may be identified during scoping.

N. 1502.11 Cover – EIS Cost:

CEQ's rationale for not including costs is not persuasive. Suggesting that providing the cost to complete a document is "burdensome" to federal agencies who are annually provided significant financial resources to complete their missions is frankly not defendable. Stating in the Notice of Rulemaking that "CEQ does not consider EIS costs to be germane to the purpose of an EIS" is not positive commentary on this administration's stewardship of American taxpayer funding.

In the Notice of Rulemaking, "CEQ recognizes the value in gathering information on overall costs, trends in costs, and approaches that can reduce costs, as this can provide a full picture of how and whether agencies are effectively using their resources, including to conduct environmental reviews." By its own statement, CEQ provides the strongest argument for maintaining the requirement to include preparation cost on the cover. Federal agencies should be required to capture the individual costs of preparing NEPA documents. If agencies area already gathering cost information, then it cannot be "burdensome" to print these costs on the EIS cover.

Comment: We strongly recommend that the revised rules include a provision that states the cost of completing the EIS on the front cover. Including preparation costs on the EIS cover helps the American public better understand the efficiencies of government actions.

O. 1502.14 Alternatives including the Proposed Action (f): *"Identify the environmentally preferable alternative or alternatives. The environmentally preferable alternative will best promote the national environmental policy expressed in section 101 of NEPA by maximizing environmental benefits…"*

Comment: For the reasons discussed in our comments above, we recommend deleting subsection f.

P. 1502.16 Environmental Consequences (a) (7) *"Any reasonably foreseeable climate change-related effects, including the effects of climate change on the proposed action and alternatives."*

Comment: This section as written is ambiguous and confusing. This provision should be deleted. As discussed in our comments above regarding determining the future magnitude and type of climate effects is quite challenging in the absence of any reliable scientific models to determine the potential climate change-related effects of any particular project. CEQ does not propose a time horizon for "foreseeable" climate effects, which further compounds the unworkable ambiguity of this provision.

Q. 1506.12 Innovative approaches to NEPA reviews (a) The agency is allowing for innovative NEPA approaches: *"The council may authorize an innovative approach to NEPA compliance that allows an agency to comply with the Act following procedures modified from the requirements of the regulations in this subchapter, to facilitate sound and efficient environmental review for actions to address extreme environmental challenges consistent with section 101 of NEPA. Examples of extreme environmental challenges may relate to sea level rise, increased wildfire risk, or bolstering the resilience of infrastructure to increased*

disaster risk due to climate change, water scarcity; degraded water of air quality; disproportionate and adverse effects on communities with environmental justice concerns; imminent or reasonably foreseeable loss of historic, cultural, or Tribal resources; species loss; impaired ecosystem health."

Comment: This provision should be eliminated for the reasons discussed in Section 1.C.4 in our comments above.

R. 1502.14(f) – Environmentally Preferable Alternative.

Comment: This provision should be eliminated for the reasons described in Section I.C.1. above. If retained, it should be revised to state: "The environmentally preferable alternative is the reasonable, technically, and economically feasible alternative that will best promote the national environmental policy expressed in Section 101 of NEPA to create and maintain conditions under which humankind and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans while achieving the purpose and need of the applicant."

S. Section 1500.3(b) – Public Participation Requirements.

Comment: The proposed rules should retain the text in Section 1500.3(b) regarding public participation in the NEPA process to comport with APA and the framework governing legal standing to bring claims within the jurisdiction of federal court established under Article III of the U.S. Constitution.

It is well settled under Supreme Court legal precedent that legal claims are waived when those issues are not raised in public comments on NEPA documents. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) ("Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration."); *Id.* at 764–65 (finding that respondents "forfeited any objection" to an EA that they failed to raise in comments).

"A party must first raise an issue with an agency before seeking judicial review." *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007). "This requirement serves at least two purposes. It ensures 'simple fairness' to the agency and other affected litigants." *Id.; see also L.A. Tucker Truck Lines*, 344 U.S. at 37 ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

Requiring public comment on NEPA documents "also provides [reviewing courts] with a record to evaluate complex regulatory issues; after all, the scope of judicial review under the APA would be significantly expanded if courts were to adjudicate administrative action without the benefit of a

full airing of the issues before the agency." *ExxonMobil*, 487 F.3d at 962; *see also Weinberger v. Bentex Pharms., Inc.,*412 U.S. 645, 654 (1973) ("Threshold questions within the peculiar expertise of an administrative agency are appropriately routed to the agency, while the court stays its hand.").

T. Section 1502.23(b) – Limitation on New Scientific and Technical Research

FRA specifies that "…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." Sec. 106(b)(3)(B)

Comment: The proposed rules should retain the text in Section 1502.23(b) that states that "[a]gencies are not required to undertake new scientific and technical research to inform their [NEPA] analyses." NEPA allows for the use of best available information, and the proposed rules should not impose such an onerous burden on agencies to conduct new scientific studies to inform their analyses, particularly on complex issues beyond the technical expertise and statutory and regulatory jurisdiction of the agency.

U. Other – Role of Project Applicants

Comment: The proposed rules must include a provision that implements the FRA requirement that agencies allow project applicants to prepare NEPA documents under agency supervision. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, Sec. 321(b), 137 Stat. 10. 40 (2023) (amending NEPA to require that a "lead agency shall prescribe procedures to allow a project sponsor to prepare an environmental assessment or an environmental impact statement under the supervision of the agency."). Providing a regulation to implement this statutory requirement will promote compliance by agencies and facilitate more consistent implementation. Applicant-prepared NEPA documents promote efficiency and reduce the burden and workload on agency staff.

Western Energy Alliance appreciates the opportunity to provide comments. We urge CEQ to consider the ongoing Congressional bipartisan efforts to streamline the NEPA process to allow development of reliable, affordable American energy to ensure national energy security. CEQ should withdraw the provisions of the proposed rules that add more complexity, delays, and litigation risk to the NEPA process, and retain those that promote streamlined and efficient NEPA reviews. Please do not hesitate to contact me with any questions.

Sincerely,

Kathleen M. Sgamma
President