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Council on Environmental Quality
730 Jackson Place NW
Washington, D.C. 20503

RE: Docket Number CEQ-2023-0003
Council on Environmental Quality
Comments on NEPA Implementing Regulations Revisions Phase 2

To Whom It May Concern:

The National Hydropower Association ("NHA") and the Northwest Hydroelectric Association ("NWHA") (together, the "Associations") appreciate the opportunity to provide comments on the Council on Environmental Quality's ("CEQ") proposed Phase 2 revisions to the National Environmental Policy Act ("NEPA") implementing regulations ("Proposed Rule").[1]

NEPA review is an integral part of the federal licensing process for hydropower projects, and the hydropower industry understands the importance of adequately assessing the environmental impacts of a proposed action. The Associations support the inclusion of provisions outlining expectations for consideration of climate change and environmental justice in the NEPA context. Such considerations are important to understanding the impacts and benefits of projects. However, clarity with respect to how such considerations are assessed would be helpful and is needed.

The Associations also support the efficiency provisions in the Fiscal Responsibility Act of 2023 ("FRA"), and revisions to the CEQ regulations to the extent that they conform the rule to the FRA.

However, the changes proposed do not effectively achieve the stated goals of the rulemaking. As discussed in more detail below, our industry has serious concerns that the Proposed Rule goes beyond CEQ's statutory authority under NEPA, fails to follow the intent of Congress as codified in the FRA, and is inconsistent with CEQ's own stated purposes for the regulatory revisions. Our industry is also concerned that the Proposed Rule undermines the Biden Administration's

[1] *See* 88 Fed. Reg. 49,924 (July 31, 2023).

goal of facilitating improved, more efficient permitting for renewable energy projects, which are important to addressing climate change.

Furthermore, the Proposed Rule makes innumerable modifications to the existing rule, some of which it suggests are merely clarifications to the 1978 NEPA regulations. Our industry believes that the intended effect of these changes has not been adequately explained in the Proposed Rule and that, by tweaking language that is the subject of decades of judicial precedent, the Proposed Rule threatens to create confusion and lead to relitigating questions that have previously been resolved by the courts.

These issues are addressed in our detailed comments below.

I. NHA and NWHA Background

NHA is a national non-profit association dedicated to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage, and new marine and hydrokinetic technologies. NHA's membership consists of over 300 organizations, including consumer-owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

NWHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy while protecting the fisheries and environmental quality that characterize our Northwest region. NWHA's membership represents all segments of the hydropower industry: public and private utilities; independent developers and energy producers; manufacturers and distributors; local, state, and regional governments including water and irrigation districts; consultants; and contractors.

Many of the Associations' members hold licenses issued by the Federal Energy Regulatory Commission ("FERC"). FERC conducts NEPA reviews prior to issuing new or original licenses, as well as when amending licenses. FERC licensees therefore have a significant interest in the NEPA process that is the subject of the Proposed Rule.

II. Importance of Hydropower in Achieving Climate Goals

NHA's members own roughly 85% of the U.S. hydropower generating capacity, which includes over 100 Gigawatts ("GW") of hydropower and pumped storage capacity. The Northwest produces approximately 50% of the United States' hydropower.

Hydropower is a clean, flexible, and reliable energy source that supports an estimated 72,000 well-paying jobs in the United States.[2] The sector also generates more than 6 percent of the country's utility-scale electricity and nearly one-third of all utility-scale renewable power. In

[2] U.S. Department of Energy, *U.S. Hydropower Workforce: Challenges and Opportunities* (October 2022), available at https://www.energy.gov/eere/water/articles/new-report-highlights-hydropower-industrys-demand-new-diverse-talent.

addition, pumped storage, which is a long-duration energy storage asset, provides the majority of energy storage on the grid.[3]

The federal government has recognized the value of hydropower in the United States as a reliable, flexible, and clean technology. The Infrastructure and Investment Jobs Act enacted in 2021 provides nearly $1 billion in incentives for capital improvements at existing infrastructure.[4] Another example are the tax credits within the Inflation Reduction Act enacted in 2022. The Inflation Reduction Act provides numerous tax credits to add new Megawatts ("MW") of hydropower generation and to incentivize investment into the domestic supply chain.[5]

Significantly, hydropower also plays an often-overlooked role in enhancing grid reliability. For example, while hydropower provides 6 percent of overall U.S. electricity generation, it provides approximately 40 percent of the nation's "black start" capability, which is vital in enabling the grid to restart (such as the 2003 Northeast blackout).[6] Additionally, hydropower provides numerous grid-enhancing services such as spinning and non-spinning reserves that correct supply and demand imbalance if another resource trips offline or to match the variability of wind and solar resources through regulation services. The chart below from a recent Brattle Group report highlights hydropower's unique ability to provide frequency control, spinning reserves, and other essential grid reliability services.[7]

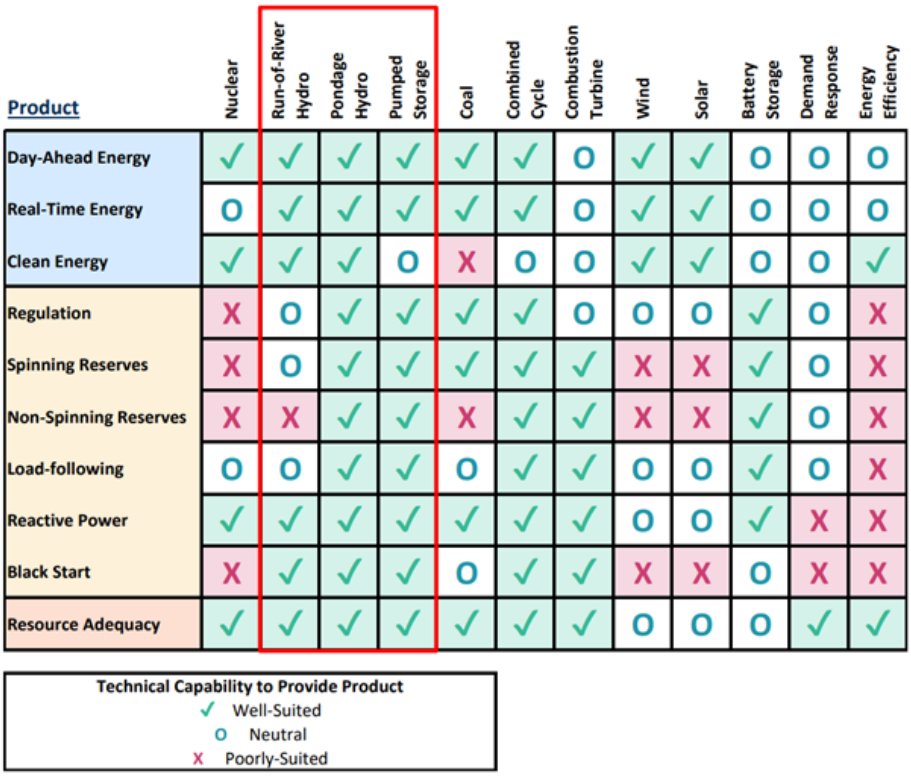
[3] U.S. Department of Energy, *How Does Pumped Storage Work*, available at https://www.energy.gov/eere/water/how-pumped-storage-hydropower-works.

[4] "H.R.3684 - 117th Congress (2021-2022): Infrastructure Investment and Jobs Act." Congress.gov, Library of Congress, 15 November 2021, https://www.congress.gov/bill/117th-congress/house-bill/3684

[5] "Text - H.R.5376 - 117th Congress (2021-2022): Inflation Reduction Act of 2022." Congress.gov, Library of Congress, 16 August 2022, https://www.congress.gov/bill/117th-congress/house-bill/5376/text

[6] U.S. Department of Energy, H*ydropower Plants as Blackstart Resources*, available at https://www.energy.gov/sites/prod/files/2019/05/f62/Hydro-Black-Start_May2019.pdf .

[7] The Brattle Group, *Leveraging Flexible Hydropower in Wholesale Markets, Principles for Maximizing Hydro's Value* (Apr. 2021), available at Leveraging Flexible Hydro in Wholesale Markets



Product	Nuclear	Run-of-River Hydro	Pondage Hydro	Pumped Storage	Coal	Combined Cycle	Combustion Turbine	Wind	Solar	Battery Storage	Demand Response	Energy Efficiency
Day-Ahead Energy	✓	✓	✓	✓	✓	✓	O	✓	✓	O	O	O
Real-Time Energy	O	✓	✓	✓	✓	✓	O	✓	✓	O	O	O
Clean Energy	✓	✓	✓	O	X	O	O	✓	✓	O	O	✓
Regulation	X	O	✓	✓	✓	✓	O	O	O	✓	O	X
Spinning Reserves	X	O	✓	✓	✓	✓	✓	X	X	✓	O	X
Non-Spinning Reserves	X	X	✓	✓	X	✓	✓	X	X	✓	O	X
Load-following	O	O	✓	✓	O	✓	✓	O	O	✓	O	X
Reactive Power	✓	✓	✓	✓	✓	✓	✓	O	O	✓	X	X
Black Start	X	✓	✓	✓	O	✓	✓	X	X	O	X	X
Resource Adequacy	✓	✓	✓	✓	✓	✓	✓	O	O	O	✓	✓

Technical Capability to Provide Product
✓ Well-Suited
O Neutral
X Poorly-Suited

In April 2021, the President announced new greenhouse gas reduction targets for the United States: a 50 to 52 percent reduction of economy-wide net greenhouse gas pollution by 2030, based on 2005 greenhouse gas emission levels.[8] The United States has further set a goal to reach 100 percent carbon-free electricity by 2035.[9] The nation's hydropower infrastructure is a critical resource for achieving the Administration's climate policy goals. The 2016 DOE Hydropower Vision Report ("Vision Report") outlines the potential for adding energy generation to non-powered dams. The Vision Report shows that by 2050, 4.8 GW of new energy generation could be added to existing infrastructure within the United States with the potential for 6.3 GW of added generation at existing hydropower plants due to upgrades.[10] Further, the Vision Report shows the potential for 35.5 GW of new pumped storage in the United States by 2050.[11]

[8] The White House, *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies* (Apr. 22, 2021), available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/ .

[9] *Id.*

[10] Department of Energy Hydropower Vision Report (2016), available at https://www.energy.gov/sites/default/files/2018/02/f49/Hydropower-Vision-021518.pdf .

[11] *Id.* at 16.

Operating licenses for 459 existing hydropower facilities are scheduled to expire by 2035, accounting for 17 GWs of hydropower at risk of being surrendered.[12] 17 GWs is broken down to 9,076 MW of conventional hydropower capacity and 8,381 MW of pumped storage capacity that provides electricity for 4.8 million homes per year and accounts for 38 percent of the total U.S. energy storage capacity all while avoiding 22 million metric tons of CO2 emissions per year.[13]

III. Impacts of the Proposed Rule on Hydropower Projects

The relicensing processes for hydropower facilities involves extensive review, with NEPA review being one component. The original licensing processes for new conventional and pumped storage hydropower projects are also subject to extensive review, including NEPA. Additionally, the licensing process for FERC-regulated hydropower projects involves significant outreach to the public, Tribes and environmental justice communities. Many of these processes are governed by existing guidance and regulation, and have been the subject of litigation.

The ability to complete the NEPA process in a timely manner is critical to successfully maintaining the existing hydropower facilities, as well as bringing new hydropower online in the time period demanded by the Biden Administration's greenhouse gas reduction and carbon-free electricity targets. As explained in the detailed comments below, while the Proposed Rule is intended to implement the efficiency measures adopted by the FRA, other changes to the Proposed Rule undermine those measures by unnecessarily complicating and confusing the NEPA process. The Proposed Rule increases the scope and number of issues to be evaluated through the NEPA process, creates confusion in a number of areas that will result in extended timelines, and increases litigation risk over the NEPA analysis by injecting requirements into the process that lack clarity. Thus, the Proposed Rule has the effect of undermining the Biden Administration's stated goal of facilitating improved permitting for renewable energy projects, which are important to addressing climate change.

IV. NEPA Context

The purpose of NEPA is to inform federal decision-making by ensuring that the environmental impacts of a proposed action are well understood. It is also intended to provide information and an opportunity to participate to the public. Although NEPA is a procedural statute, it has become one of the lengthiest and most litigated aspects of project permitting.[14]

NEPA review is in addition to the reviews conducted as part of the underlying federal and state permitting associated with a project. Those federal and state regulatory programs are substantive, and often include environmental and/or health-based standards for permit approval, including mitigation requirements. While NEPA provides an important opportunity for a comprehensive analysis of the environmental impacts of a project, it was never intended to

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[12] Oak Ridge National Labs, *Cost of Mitigating the Environmental Impacts of Hydropower Projects* (2021), available at https://hydrosource.ornl.gov/dataset/cost-mitigating-environmental-impacts-hydropower-projects.

[13] National Hydropower Association, *Hydropower At Risk Fact Sheet* (2021), available at https://www.hydro.org/wp-content/uploads/2022/11/Hydropower-At-Risk-2035.pdf .

[14] Congressional Research Service, *National Environmental Policy Act: Judicial Review and Remedies* (Sept. 22, 2021).

require duplicative assessments and additional studies or second guess other regulatory programs.[15]

Many of the projects subject to NEPA, including hydropower projects, are large infrastructure projects. These large infrastructure projects are needed to support this country's energy generation and transportation needs. With respect to energy, the Biden Administration has urged the rapid transition to clean energy. As discussed above, hydropower is an important component of this transition, both because it is a source of clean power, but also because it is a reliable and consistent energy source that supports solar, wind and other renewable energy sources. Transmission and distribution lines are also important in ensuring that the energy generated from these renewable sources, such as hydropower, reaches the areas it is needed. The rapid transition to clean energy can only occur if these infrastructure projects can be licensed/relicensed/permitted promptly. This is one reason that Congress directed a streamlined review process in the FRA. Congress also attempted to narrow the scope of the review such that the impacts assessed must be reasonably foreseeable, and that the range of alternatives considered is reasonable. Such alternatives must be technically and economically feasible, and meet the purpose and need of the proposal.[16]

V. Detailed Comments

A. The Proposed Rule is Contrary to the Intent of the FRA and the Biden Administration's Clean Energy Targets.

The Proposed Rule must be considered in light of the context outlined above: through enactment of the FRA, Congress has directed a streamlined NEPA review process, and the Biden Administration, supported by Congress, has urged the advancement of renewable energy projects to address climate change. CEQ states in the Preamble to the Proposed Rule that it is seeking to "provide for an effective environmental review process that promotes better decision making" and "provides for an efficient process and regulatory certainty."[17] The Proposed Rule does not accomplish these goals. Below are just a few examples of how the Proposed Rule undermines the efficiency measures of the FRA, works at cross-purposes to the advancement of clean energy projects, and fails to provide regulatory certainty.

First, as described in greater detail below, the Proposed Rule ignores the FRA's directive to consider only "reasonable" alternatives. This will add complexity and delay to the NEPA process with no corresponding benefit. It is not clear how agencies are meant to meet the more restrictive page limits and timelines enacted in the FRA and implemented through the Proposed

[15] *See* 42 U.S.C. § 102(2)(C) ("Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review process.").

[16] 42 U.S.C. § 102(2)(C)(iii).

[17] 88 Fed. Reg. 49,924 (July 31, 2023).

Rule, while at the same time addressing the arguably expanded alternatives analysis found in the Proposed Rule.

Second, the Proposed Rule disregards the FRA's direction to "make use of reliable data and resources" by eliminating the important clarification from the 2020 Rule that "[a]gencies are not required to undertake new scientific and technical research to inform their analyses." By removing this provision, the Proposed Rule creates confusion by suggesting that even the best *available* science may no longer be considered sufficient. Moreover, this change will likely lead to unfettered demands from the public that an agency delay its action to continually undertake additional research to evaluate the impacts of a proposed action. The fact that the Proposed Rule does not *require* that agencies undertake new scientific research is of little consequence. Absent a clear standard for when new scientific research is needed, consistent with the text of NEPA, the uncertainty and litigation risk will result in agencies undertaking time-consuming new scientific research even in circumstances where it is not needed.

Moreover, NEPA provides that determinations made in an environmental impact statement ("EIS") and Environmental Assessment ("EA") are to be based on "any reliable data source." Agencies are "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."[18]

Thus, the example offered by CEQ that historical, cultural or biological effects may be "revisited and reassessed periodically" is not consistent with the text of NEPA. Nor is it consistent with the standards under the Endangered Species Act and National Historic Preservation Act, which only require the use of best available science/data. Thus, the Proposed Rule will inhibit an agency's ability to combine or coordinate the NEPA analysis with analysis done under these other statutes. NEPA provides that its terms are to be consistent with other statutory requirements. It does not make sense for NEPA to create a scenario where projects are caught in a do-loop of constantly updating information as part of a procedural evaluation above and beyond what is required for the issuance of permits addressing the same aspect of the project.

Additionally, removing this provision runs counter to the goal included at Section 1506.4 to reduce duplication and paperwork. Streamlining the permitting process and allowing agencies to rely on existing studies would facilitate efficiencies. However, the removal of this language fosters the creation of new reviews and studies as part of the NEPA process, instead of relying on the best *available* science prepared and relied upon under other regulatory programs and federal agency authorities.

Third, the Proposed Rule expands the impacts analysis by providing that the "context" to be evaluated in a significance determination is not just the project area, but the global, national,

[18] 42 U.S.C. § 4336(3)(B). It is not enough that the Proposed Rule retains the provision stating that "incomplete or unavailable information need only be obtained when it is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable." That standard does not cover many situations where an agency many now think that it needs to create new information, i.e. where existing information may be both complete and available, but has not been revisited recently.

regional, and local environment.[19] The Proposed Rule provides no clarity on how to determine when the global or national context should be evaluated, opening the door for such an analysis on every agency action. It is also unclear whether the reference to "global" is meant to be limited to climate change related impacts, or whether broader global analyses are required to evaluate all other resource impacts. Clarity is needed on this point.

Fourth, the Proposed Rule requires agencies to evaluate climate change and environmental justice, without clearly indicating what a sufficient level of analysis would include. It is a fundamental principle of administrative law that "[r]egulated parties should know what is required of them so they may act accordingly."[20] It is also unclear whether CEQ plans to rely on its previous guidance to provide that additional detail. The result of this lack of clarity will be an inefficient agency review process and an endless cycle of litigation.

B. The Proposed Rule Improperly Converts NEPA into a Substantive Rather than Procedural Requirement.

The Proposed Rule includes several provisions that go beyond NEPA's statutory directive that agencies assess and take into account the environmental impacts of their decisions. These changes are inconsistent with NEPA, the intent of Congress, and longstanding judicial precedent. "It is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed—rather than unwise—agency action."[21] Each of the sections of the Proposed Rule discussed below go beyond the statutory limitations of NEPA and must be deleted or revised.

First, the Proposed Rule in Sections 1501.6(c) and 1505.2(c) requires that mitigation relied upon in an EA or EIS must be enforceable in certain contexts. This requirement suggests that CEQ has the authority to impose a substantive, result-based standard. CEQ does not, as confirmed by longstanding judicial precedent. The Ninth Circuit has explained that "a mitigation plan need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements."[22] Furthermore, this requirement is irreconcilable with *Methow Valley Citizens Council*, in which the Supreme Court concluded that requiring a complete mitigation plan before an agency can act would conflict with the principle that NEPA does not compel an agency to reach a particular substantive result.[23] To avoid improperly suggesting that NEPA compels the creation of enforceable mitigation, these Sections of the Proposed Rule should be deleted or clarified to state that when mitigation is not fully developed or is not a condition of the permit, the agency shall disclose the impacts that would occur absent the mitigation.

Second, the Proposed Rule requires a monitoring and compliance plan when an EA or EIS relies on mitigation as a component of the proposed action and to analyze the action's effects.[24] This

[19] 88 Fed. Reg. 49,954.

[20] *F.C.C. v. Fox Television Stations, Inc*., 567 U.S. 239 (2012).

[21] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989).

[22] *Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp*., 222 F.3d 677, 681 (9th Cir. 2000).

[23] 490 U.S. at 352-53.

[24] 88 Fed. Reg. 49,940, 49,953.

requirement suffers the same flaw as the Proposed Rule's requirement that mitigation be enforceable. NEPA does not grant agencies any authority to impose conditions that are independent from, or beyond, the agency's underlying statutory authority over the project.[25] The Proposed Rule would nevertheless require that agencies impose monitoring and compliance plans as a condition of reliance on mitigation, irrespective of whether the agency's underlying statutory authority provides them with the authority to do so.

Third, the Proposed Rule's elevation of particular environmental concerns above all others, namely environmental justice and climate change, improperly forces agencies to give greater weight to these considerations than other considerations, including other environmental considerations. "Congress in enacting NEPA ... did not require agencies to elevate environmental concerns over other appropriate considerations."[26] This is even more concerning given that there are no statutory or regulatory requirements associated with environmental justice and climate change. In other words, while the Associations agree that assessing environmental justice and climate change is an important aspect of evaluating the environmental impacts of a project, such assessments cannot trump other environmental impacts, for which Congress has established regulatory programs to address.

For example, Proposed Rule section 1505.3(b) "encourages" lead and cooperating agencies to incorporate mitigation measures addressing a proposed action's significant adverse human health and environmental effects that disproportionately and adversely affect communities with environmental justice concerns.[27] The Proposed Rule further forces agencies to give greater weight to certain environmental concerns above other considerations by requiring agencies to define the environmentally preferable alternative with reference to specific characteristics (namely, climate change and environmental justice). In addition, proposed section 1500.2(d) "[e]ncourage[s]…public engagement …, including *meaningful* engagement with communities with environmental justice concerns."[28] This section suggests that engagement with environmental justice communities is subject to a heightened standard.

Each of the proposed sections discussed above exceeds NEPA statutory authority and must be deleted or revised to be consistent with the statutory limitations of NEPA.

C. The Proposed Rule's Modifications to the Alternatives Analysis Are Improper and Contrary to NEPA and the Goals of the Biden Administration.

The Proposed Rule modifies the alternatives analysis by providing that agencies may consider alternatives outside of their jurisdiction and by requiring the agency to identify an environmentally preferable alternative. These changes are not only inconsistent with NEPA, the intent of Congress, and longstanding judicial precedent, but have the effect of undermining the

[25] *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.,* 859 F.2d 156, 170 (D.C. Cir. 1988).

[26] *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 97 (1983).

[27] 88 Fed. Reg. 49,954.

[28] 88 Fed. Reg. 49,949.

efficacy of the streamlining measures enacted in the FRA and, thus, the achievement of the Biden Administration's clean energy objectives.

By indicating that agencies may consider alternatives that are beyond their jurisdiction without limitation, the Proposed Rule significantly expands the alternatives that an agency may consider and that the public can call upon the agency to consider. In the context of hydropower, this revision creates the possibility that FERC could (or could be compelled to) consider wind or solar projects as alternatives to conventional hydropower projects; or to consider battery energy storage as an alternative to a pumped storage project. Consideration of such alternatives is inefficient and wasteful. It serves no purpose for an agency to consider actions that it neither has the power to require an applicant to undertake nor to authorize the applicant to undertake. Appropriately limiting the alternatives analysis to alternatives that an agency can require an applicant to implement (e.g. changes in configuration or other measures that reduce the environmental impacts of the project) will do much more to further the purposes of NEPA, than considering alternatives beyond the authority of the agency. Delaying the implementation of clean energy projects, such as hydropower projects, so that the authorizing agency may consider alternatives that the agency lacks the jurisdiction to approve or require, would have the effect of stifling the projects that are at the heart of the clean energy future of this Country.

Furthermore, allowing agencies to consider alternatives beyond their jurisdiction without limitation is contrary to established judicial precedent. Alternatives are not reasonable if they are not consistent with the purpose and need of the proposal, as shaped by the agency's statutory mandate.[29] An agency "cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process."[30]

Only in circumstances where the problem being addressed is national in scope and the action is an integral part of a coordinated plan to deal with a broad problem, has the D.C. Circuit found it appropriate for agencies to consider alternatives that are outside of their jurisdiction. As that Court explained, "within the context of a coordinated effort to solve a problem of national scope, a solution that lies outside of an agency's jurisdiction might be a 'reasonable alternative'; Such a holistic definition of 'reasonable alternatives' would, however, make little sense for a discrete project within the jurisdiction of one federal agency."[31] The Proposed Rule must be revised to clarify that agencies may only consider alternatives outside of their jurisdiction in the context of a coordinated effort to solve a problem of national scope.

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[29] *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.,* 565 F.3d 683, 709 (10th Cir. 2009); *S. Utah Wilderness All. v. United States Dep't of the Interior,* No. 2:13-CV-01060-EJF, 2016 WL 6909036, at *12 (D. Utah Oct. 3, 2016); *cf. City of Alexandria, Va. v. Slater,* 198 F.3d 862, 869 (D.C. Cir. 1999).

[30] 88 Fed. Reg. 49,942.

[31] *City of Alexandria*, 198 F.3d at 869; *see also Monarch Chem. Works, Inc. v. Exon,* 466 F. Supp. 639, 651 (D. Neb. 1979); *S. Utah Wilderness All.,* No. 2:13-CV-01060-EJF, 2016 WL 6909036, at *12 ("The Tenth Circuit employs two 'guideposts' in judging the reasonableness of alternatives: whether the agency actions fall within the agency's statutory mandate and whether the actions meet the agency's objectives for a particular project.").

The Proposed Rule also improperly requires that agencies identify the environmentally preferable alternative in both the draft and final EIS.[32] This requirement goes beyond the mandate of NEPA, which requires federal agencies to assess and understand the environmental impacts of their decisions, but does not mandate that agencies identify or choose the "environmentally preferable" alternative.[33]

Moreover, requiring identification of the "environmentally preferable" alternative while environmental analysis is ongoing is inconsistent with the purpose of the NEPA process and agency decisionmaking. Identifying an environmentally preferable alternative prior to the solicitation of input from the public, while the impacts of the action and its reasonable alternatives are still under consideration, is inconsistent with the very purpose of preparing an EIS in the first place. The EIS process is used to evaluate and understand the environmental impacts of the proposed action and its reasonable alternatives before an action agency makes a judgment regarding the merits of those alternatives.

Finally, the Proposed Rule at section 1502.16(a)(1) includes a fundamental change to the consideration of alternatives under NEPA by directing that the no action alternative serve as the "baseline"[34] against which the proposed action and other alternatives are compared. The addition of this sentence, coupled with the requirement to identify the "environmentally preferable" alternative, significantly alters the existing alternatives analysis. The current regulations require a comparison of the effects of reasonable alternatives to the proposed action.[35] While the no action alternative is to be included in that comparison, it does not serve as the alternative against which all other alternatives are assessed. Using the no action alternative as the point of comparison (coupled with the requirement to identify the environmentally preferable alternative) gives greater weight to the no action alternative, and effectively nullifies the purpose and need of the project.

D. The Proposed Rule is Misleading.

The Proposed Rule makes extensive and innumerable changes to the existing regulations, which CEQ has justified based on several distinct bases. One category of the changes is described as "minor revisions for clarity" to the text from the 1978 rule. The Preamble, however, does not clearly identify what changes fall into this category, as opposed to departures from the 1978 rule

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[32] 88 Fed. Reg. 49,948 - 949.

[33] *See, e.g., Methow Valley Citizens Council*, 490 U.S. 332 (citing *Strycker's Bay Neighborhood Council, Inc. v. Karlen,* 444 U.S. 223 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)); *Ohio Valley Envtl. Coalition v. U.S. Army Corps of Eng'rs*, 2014 U.S. Dist. LEXIS 114137 at *9-10 (S.D. W.V. 2014); *San Luis & Delta-Mendota Water Auth. v. Salazar,* 2009 U.S. Dist. LEXIS 45113 (9th Cir. 2009).

[34] The use of the term "baseline" is similar to the term "environmental baseline" used in the Endangered Species Act context. See 50 C.F.R. § 402.02. How "environmental baseline" is defined has been the subject of litigation and recent regulatory actions have attempted to provide clarifying definitions. *See, e.g., American Rivers & Ala. Rivers Alliance v. FERC*, 895 F.3d 32 (D. D.C. 2018). Introducing this term in the NEPA context is similarly likely to lead to confusion and litigation.

[35] *See* 40 C.F.R. § 1502.16(a)(1)("The comparison of the proposed action and reasonable alternatives shall be based on this discussion of the impacts.").

which are intended to have a substantive effect (or that are justified on other bases). Not only does this make the Proposed Rule misleading, but the effect of this will be to reopen litigation over countless issues that were previously resolved by the courts based on the language of the 1978 rule.

Describing changes to the 1978 rule as "clarifying" is misleading to the public. Not only do many of these changes fail to provide any additional clarity whatsoever, but other departures from the 1978 rule are substantive in nature. CEQ must clearly articulate the intended effect of each change to allow the public to understand and comment on the change, as required by the Administrative Procedures Act ("APA").

The APA requires that a notice of proposed rulemaking "shall include ... either the terms or substance of the proposed rule or a description of the subjects and issues involved."[36] Whether the agency's notice is sufficient must be measured against the standard contemplated by Congress when it enacted Section 553: "[a]gency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument related thereto."[37] A facially sufficient notice may be rendered inadequate by an agency's affirmative mischaracterization of its import and impact.[38]

By downplaying the significance of the changes to the 1978 rule, the notice of proposed rulemaking mischaracterizes the import and impact of those changes. For example, CEQ proposes to update references to ''public involvement'' to ''public engagement.'' Although this is a word change from the 1978 rule, it is not merely a clarification. It is intended to have the substantive effect of requiring Federal agencies to be "more interactive and collaborative compared to simply including or notifying the public of an action."[39]

To the extent that the changes to the 1978 rule are intended to be "clarifying," many in fact do not provide any clarity whatsoever. For example, the Proposed Rule replaces ''significant'' in many instances with another adjective, such as 'important'' or ''substantial,'' without providing any definition of those terms, or whether they differ from the term "significant." Another example is in proposed section 1500.2(b), in which "real" is replaced with "important," such that federal agencies must now emphasize "important," rather than "real," environmental issues and alternatives. This suggests that some environmental issues may be important, while others may not, but gives no basis for determining which is which.

NEPA has historically been the most litigated federal environmental statute and is the subject of extensive legal interpretation. Even minor modifications for "clarity" to the 1978 rule will inevitably lead to additional litigation over issues that were previously resolved by courts based on the language in the 1978 rule. Reopening previously resolved issues to needless litigation

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[36] 5 U.S.C. § 553(b)(3).

[37] *Nat. Res. Def. Council, Inc. v. Hodel,* 618 F. Supp. 848, 874–75 (E.D. Cal. 1985) (citing S.Rep. No. 752, 79th Cong., 1st Sess. 14 (1945), *reprinted* in "Administrative Procedure Act: Legislative History," S.Doc. No. 248, 79th Cong., 2d Sess. 185, 200 (1946)).

[38] *Nat. Res. Def. Council, Inc. v. Hodel*, 618 F. Supp. at 874–75.

[39] 88 Fed. Reg. 49,942.

threatens to delay the NEPA process for individual agency actions and undermines the Biden Administration's clean energy and climate change reduction goals by delaying the very projects needed to reach those targets.

E. The Proposed Rule Fails to Provide Clarity on Addressing Environmental Justice.

The Proposed Rule marks the first time that the regulations explicitly require the consideration of environmental justice. The Proposed Rule builds on decades of executive orders and guidance, much of which is confusing and lacking in specificity about how to implement environmental justice goals. Thus, this rulemaking provides the opportunity to provide needed clarity and certainty. As drafted, it does not do so. For example, although the definition of "environmental justice" proposed to be codified in the Proposed Rule is based on Executive Order 14096 (the most recent environmental justice executive order), the definition is different from that in the existing guidance, but the Proposed Rule does not explain the import of that difference, nor does it identify the criteria for assessment of environmental justice.

Traditionally, environmental justice means ensuring that all people have meaningful involvement in federal permitting decisions. This is assessed by identifying environmental justice communities that may be impacted by a proposed action, and then tailoring outreach efforts to include those communities and incorporating their input. The Proposed Rule references "just treatment and meaningful involvement," but does not provide further explanation or criteria for ensuring meaningful involvement.

Under existing guidance regarding "fair treatment," the NEPA analysis should consider whether a proposed action's environmental impacts will have a disproportionate impact on an environmental justice community that is both significant and adverse. The definition of "environmental justice" under the Proposed Rule, however, appears to expand the environmental justice analysis beyond consideration of environmental impacts.

Additionally, CEQ uses the term "communities with environmental justice concerns" (which again is different from the term "environmental justice communities" that is used in the current environmental justice guidance) but then does not define that term. This will create confusion, particularly given the fact that the U.S. Environmental Protection Agency has criteria for identifying environmental justice communities, and many states have adopted their own statutes, regulations and guidance that define environmental justice communities. The Proposed Rule misses the opportunity to bring consistency and clarity regarding how environmental justice impacts will be assessed and how environmental justice communities will be defined.

This lack of clarity in the definition of environmental justice communities is exacerbated by the unclear provisions requiring mitigation measures and alternatives analysis specific to environmental justice impacts. For example, the mitigation related to environmental justice impacts is addressed at Section 1505.3(b), while mitigation to mitigate environmental harm is addressed at Section 1505.2(c). This suggests that these are separate mitigation measures. It is also unclear the authority for an agency to require mitigation measures to address environmental justice impacts. As noted above, NEPA does not authorize or require mitigation for

environmental impacts. Such mitigation can be required as part of the permitting process associated with other environmental statutes/permitting actions or can be voluntarily offered.

Similarly, there are separate provisions in the alternatives analysis related to environmental justice impacts. It is unclear from the text whether alternatives must be proposed solely based on potential impacts to environmental justice communities, or whether the assessment of various alternatives must include consideration of impacts to environmental justice communities. In other words, it is unclear whether impacts to environmental justice communities are a driver for developing an alternative, or a factor to consider when evaluating alternatives that still achieve the purpose and need of the project. The Associations request clarification on this point.

Finally, as drafted, the environmental justice provisions confuse how Tribes are addressed in the environmental justice process as compared to how Tribal interests are considered in the government-to-government consultation process. Under current environmental justice guidance, environmental justice communities are minority communities and/or low-income communities.[40] Minority communities include all non-Caucasian populations, including indigenous communities and Tribal communities. The Proposed Rule references minority communities, indigenous communities and Tribal communities in the environmental justice context. But the Proposed Rule does not explain why this distinction is necessary in the context of an analysis of environmental impacts on those communities. This creates confusion, particularly because there are other regulatory provisions that require Tribal consultation and protection of historic and cultural resources, including those of indigenous and Tribal communities. As currently written, it is unclear how the environmental justice-related provisions align with those other requirements.

VI. Conclusion

Contrary to the statutory authority established by NEPA, the legislative direction from Congress in the FRA, the goal of the Biden Administration to advance the development of renewable energy projects, and CEQ's stated purpose of the Proposed Rule, the Proposed Rule will create confusion, cause litigation, and result in significant delays in the permitting of projects. This includes renewable energy projects, such as hydropower projects, which are critical to addressing climate change and are already subject to lengthy and substantial permitting processes. Significant changes are needed prior to finalizing the Proposed Rule. The Associations respectfully suggest that CEQ eliminate all proposed revisions other than those dictated by the FRA, and revise the provisions relating to climate change and environmental justice to provide more clarity and standards for conducting such reviews. This is especially needed given that there are no statutes or regulations that address these issues or provide a framework for their evaluation.

Thank you for your consideration of these comments.

[40] *See, e.g.,* Envt'l Protection Agency, *Promising Practices for EJ Methodologies in NEPA Reviews* (Mar. 2016).

Sincerely,

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