IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Wild Virginia, Virginia Wilderness Committee, Upstate Forever, South Carolina Wildlife Federation, North Carolina Wildlife Federation, National Trust for Historic Preservation, Mountaintrue, Haw River Assembly, Highlanders for Responsible Development, Defenders of Wildlife, Cowpasture River Preservation Association, Congaree Riverkeeper, The Clinch Coalition, Clean Air Carolina, Cape Fear River Watch, Alliance for the Shenandoah Valley, *and* Alabama Rivers Alliance,

Plaintiffs,

v.

Council on Environmental Quality *and* Mary Neumayr, in her official capacity as Chair of the Council on Environmental Quality,

Defendants,

American Farm Bureau Federation, American Forest Resource Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, American Road & Transportation Builders Association, Chamber of Commerce of the United States of America, Federal Forest Resource Coalition, Interstate Natural Gas Association of America, *and* National Cattlemen's Beef Association,

Defendants-Intervenors.

Civ. No. 3:20-cv-45-JPJ

Hon. James P. Jones

BUSINESS ASSOCIATIONS' BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

MICHAEL B. KIMBERLY*
JOSHUA D. ROGACZEWSKI
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000

Attorneys for Defendants-Intervenors

** pro hac vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Cases—continued

Statutes and Regulations

Statutes and Regulations—continued

Statutes and Regulations—continued

Other Authorities

INTRODUCTION

NEPA was enacted in 1970 to ensure that federal agencies consider environmental effects before undertaking major federal actions that will significantly impact the environment. The Council on Environmental Quality (CEQ)—which was established by NEPA to supervise the statute's implementation by federal agencies—promulgated its original regulations interpreting the statute in 1978. CEQ's original regulations have scarcely been modified in the intervening 42 years, and it shows. The regulations' definitions of key terms do not reflect contemporary methods of statutory interpretation, spawning volumes of conflicting judicial precedent. Meanwhile, particularly litigious groups that oppose the use and development of land and natural resources have exploited the resulting confusion, using relentless lawsuits to transform NEPA reviews from their original purpose—ensuring science-based analysis and consideration of potential environmental impacts of major federal actions—into an endless administrative process in which the principal concern is to avoid legal challenges.

The result is an impenetrably complex regulatory program that applies in circumstances that Congress never could have intended, requires analyses that often serve no practical purpose, and results in endless litigation intended to obstruct and delay.

CEQ set out in 2018 to update, clarify, and simplify its NEPA regulations—an undertaking long overdue. It took and responded to two rounds of comments from the public, carefully considering the interests of stakeholders and its duties under the plain text of the statute and Supreme Court precedent. The agency's efforts culminated in a final regulation (the NEPA Rule) that was published in the Federal Register on July 14, 2020, and that takes effect on September 14, 2020.

On that effective date, however, the Rule will have no immediate impact. Its revised standards will likely have to be propagated in subsequent rulemakings by many of the agencies that actually conduct NEPA reviews—agencies like the U.S. Forest Service (*see* 36 C.F.R. § 220.1, *et seq*.), the U.S. Army Corps of Engineers (*see* 33 C.F.R. § 230.1, *et seq*.), and the Federal Energy

Regulatory Commission (*see* 18 C.F.R. § 380.1, *et seq*.). Even for those reviews to which its standards are ready to be applied, the Rule will not produce immediate results—it will take time for revised standards to influence the course of new and pending NEPA reviews, before those reviews are finally concluded and any spade of dirt is turned. And because "NEPA imposes only procedural requirements" and does not dictate "particular results" (*Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-757 (2004)), the impact on plaintiffs simply is not ascertainable prospectively, before its standards are actually applied to particular federal actions.

Plaintiffs nevertheless ask this Court for the extraordinary (and extraordinarily unwarranted) remedy of a preliminary injunction against implementation of the NEPA Rule. Their interminably long complaint and motion turn on two basic premises: (1) that the NEPA Rule unlawfully narrows the scope of environmental reviews and unlawfully weakens the standards applied in those reviews; and (2) that they face imminent irreparable harm if the Rule is not immediately enjoined.

Both premises are demonstrably wrong. The Rule brings CEQ's interpretation of NEPA's text in line with Supreme Court precedent and contemporary methods of statutory interpretation, and the passage of its forthcoming effective date will not have *any* immediate impact on plaintiffs, let alone an irreparable one. Plaintiffs' contrary arguments elevate their own policy preferences over the most natural (and often only permissible) interpretations of the statutory text and judicial precedent and ignore the reality of how the NEPA Rule will actually be implemented. Plaintiffs' motion accordingly should be denied.

BACKGROUND

A. Statutory and regulatory framework

1. Congress enacted NEPA in 1970, establishing an express federal policy to "create and maintain conditions under which man and nature can exist in productive harmony," while "fulfill[ing] the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a).

The centerpiece of Congress's effort to promote this policy is a requirement that, for any "major Federal action[] significantly affecting the quality of the human environment," federal agencies prepare "a detailed statement" on "the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C). When an agency determines that an action will have a significant effect on the environment, an environmental impact statement (EIS) must be prepared. An EIS must contain, among other things, information on "the environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided should the proposal be implemented," and "alternatives to the proposed action." *Id.*

It is "well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process" to be followed when agencies propose major federal actions that may impact the environment. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Nor does NEPA regulate primary conduct, as do other environmental laws like the Clean Water Act, the Clean Air Act, or the Endangered Species Act—most of which are much longer and more detailed than NEPA. *See Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978); *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981)). As a purely procedural statute, NEPA requires only that the agency assess the environmental consequences of an action before proceeding with the action under review. Thus, as long as "the adverse environmental effects of [a] proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson*, 490 U.S. at 350.

2. NEPA is silent concerning the details of how environmental reviews are to be undertaken. Congress thus established CEQ within the Executive Office of the President to oversee federal agencies' compliance with the statute. 42 U.S.C. §§ 4342, 4344.

President Nixon issued Executive Order 11,514 shortly after NEPA's enactment, directing CEQ to "[i]ssue guidelines to Federal agencies for the preparation of" EISs "as required by

[NEPA]." Exec. Order 11,514, 35 Fed. Reg. 4,247, 4,248 (Mar. 7, 1970). These guidelines "were advisory in nature, and were for the purpose of assisting federal agencies in complying with NEPA." *Andrus v. Sierra Club*, 442 U.S. 347, 356-357 (1979). "In 1977, however, President Carter, in order to create a single set of uniform, mandatory regulations" (*id.* at 357), issued Executive Order 11,991, which modified the grant of authority in E.O. 11,514 by directing CEQ to "[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA]." Exec. Order 11,991, 42 Fed. Reg. 26,967, 26,967 (May 24, 1977). Executive Order 11,991 requires that CEQ's regulations be "designed to make the [NEPA] process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives." *Id.* It also directed federal agencies to "comply with the regulations issued by [CEQ]." *Id.* at 26,968.

3. CEQ promulgated its NEPA regulations in 1978. Under those regulations, when an agency believes that a federal agency action could have a significant impact on the human environment, the agency must take a number of steps to determine whether an EIS is required.

Under those original regulations (which are still in effect today), if a particular project is of a type determined categorically to have no significant environmental impacts, the agency need not complete any environmental assessment to comply with NEPA. Individual agencies must list, in their respective NEPA regulations, those projects that are likely to be considered categorical exclusions, or CEs. 40 C.F.R. § 1507.3 (2018).[1] Agencies' procedures must also "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." *Id.* § 1508.4 (2018). In such extraordinary circumstances, an action covered by a CE will nonetheless require a NEPA review.

[1] In addition, certain types of projects are statutorily exempted from NEPA—some of which Congress specifically excluded in response to the problem of lengthy delays during NEPA review. *See, e.g.*, 16 U.S.C. § 6591b (exempting insect and disease treatment of federal forests from NEPA).

For projects not covered by a categorical exclusion, an agency begins its environmental review by preparing an environmental assessment (or EA), which determines whether impacts will be "significant" within the meaning of the statute. 40 C.F.R. § 1508.9 (2018). An EA includes a written description of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

If the agency concludes in the EA that a proposed action will have no significant impact on the environment, it issues a finding of no significant impact (a FONSI) and need not prepare an EIS. 40 C.F.R. §§ 1501.4(e), 1508.13 (2018). The FONSI must briefly present the reasons why the agency has determined that the project will not have a significant impact.

On the other hand, if an agency determines at any time during the preparation of an EA that the environmental impacts of a "major federal action[]" *will* be "significant[]," it must prepare an EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4(e) (2018). A notice of intent (NOI) to prepare an EIS is published in the *Federal Register*, and the public is afforded a period of at least 45 days to comment. 40 C.F.R. § 1508.22 (2018). An EIS is then drafted detailing how the project will affect the environment; addressing comments from the public; and listing "all reasonable alternatives" to the proposed action and explaining why the alternatives were not taken. *See* 40 C.F.R. §§ 1502.14-.16, 1502.19 (2018). The agency must take additional public comment on the draft EIS. 40 C.F.R. § 1503.1 (2018). This is followed by a waiting period before the issuance of a Record of Decision (ROD) describing the agency's decision, the alternatives the agency considered, and the agency's plans for mitigation and monitoring, if necessary. *Id.* § 1505.2 (2018).

4. The 1978 regulations define "Federal" actions as those potentially subject to federal control and responsibility, including "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(a) (2018). Any rule or proposal for infrastructure or development projects that involves federal lands, federal funding, or a federal agency, even if the agency's role is only to issue a permit or to provide a loan guarantee,

must be accompanied by a NEPA review. And under the 1978 regulations, a federal action is "major" if it will "significantly affect" the environment—meaning that the word *major* "reinforces but does not have a meaning independent of significantly." *Id.* § 1508.18 (2018).

Under the 1978 regulations, "effects" and "impacts" refer to a project's effects on the human environment, including "aesthetic, historic, cultural, economic, social, or health" effects, "whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8(b) (2018). In evaluating the various kinds of effects, agencies must analyze the context of the effect (for example, whether the effect is local, regional, or global) and the intensity of the effect (that is, the severity of the impact in light of its context). *Id*. § 1508.27 (2018).

CEQ's definition of "effects" has led to a compartmentalized analysis of environmental effects. As a matter of practice, agencies have often focused their resources on rigidly categorizing effects as either direct, indirect, or cumulative, rather than substantively evaluating effects as a whole. *See* 85 Fed. Reg. 43,304, 43,343 (July 16, 2020).

The significance of a project's impact depends to a large degree on the determined "scope" of the project. The 1978 regulations thus provide for a "scoping" process "for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action." 40 C.F.R. § 1501.7 (2018). Under these regulations, the scoping process ordinarily takes place after the EA and publication of a notice of intent to prepare an EIS. *Id*. The 1978 regulations provide further that, in addition to the proposed action, agencies should consider within the scope of every review the environmental effect of "connected" actions that are (1) automatically triggered by the action under review, (2) prerequisites to the action under review, or (3) "interdependent parts of a larger action and depend on the larger action for their justification." *Id*. § 1508.25(a)(1) (2018).

B. CEQ proposes to amend its regulations

Due largely to the risk of litigation and inconsistent judicial interpretations of key NEPA terms and requirements—including what constitutes an "effect" of a federal action—federal agencies

have implemented progressively more complex and burdensome requirements under NEPA over the years. When CEQ's regulations were first promulgated more than 40 years ago, they stated that EISs normally should be less than 150 pages, with a maximum length of 300 pages for proposals of "unusual scope or complexity." 40 C.F.R. § 1502.7 (2018). Today, compliance with those limits is the exception rather than the norm. The average length for a final EIS now exceeds 650 pages, and a quarter of all final statements exceed 750 pages. *See* 85 Fed. Reg. at 43,305. Similarly, CEQ originally recommended that the completion of an EIS should not take longer than one year; in reality, the average time now approaches five years. *Id.*; *accord* GAO, *National Environmental Policy Act*, GAO-14-370, at 14 (April 2014), perma.cc/9UTJ-3C4N.

More fundamentally, agencies undertaking NEPA reviews have, in recent years, gathered and analyzed boundless amounts of data and evidence concerning distantly indirect effects for use in analyses that have often been irrelevant to their decisionmaking processes—all to minimize the risk that a court will later find the record insufficient. Along the way, regulated entities have been required to produce redundant documents to multiple agencies participating in a largely uncoordinated process, while their projects languish. Yet this vast over-inclusion and repetition has not, in fact, reduced the risk of litigation, which has persisted in the face of unclear and inconsistent regulatory and judicial interpretations of terms.

To address these problems, CEQ published an advanced notice of proposed rulemaking on June 20, 2018 (83 Fed. Reg. 28,591) and a notice of proposed rulemaking (NPRM) on January 10, 2020 (85 Fed. Reg. 1,684) proposing to "modernize and clarify the CEQ regulations" and "to facilitate more efficient, effective, and timely NEPA reviews" by "simplifying regulatory requirements, codifying certain guidance and case law relevant to these proposed regulations, revising the regulations to reflect current technologies and agency practices, [and] eliminating obsolete provisions." *See* 85 Fed. Reg. at 1,685. CEQ received and considered more than 8,000 unique comments on the NPRM.

C. The NEPA Rule

CEQ published the final NEPA Rule on July 16, 2020, and it becomes effective September 14, 2020. The rule clarifies and simplifies the agency's regulations in numerous respects and aims to bring the definitions of key terms and concepts more in line with the last 40 years of judicial precedent. The key provisions of the NEPA Rule include:

Clarifying when NEPA review is required. NEPA requires review of "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). CEQ's 1978 regulations rendered the word "major" redundant, providing that the word *major* "reinforces but does not have a meaning independent of significantly." 40 C.F.R. § 1508.18 (2018).

The NEPA Rule restores independent meaning to the word "major," clarifying that it refers to the "type of action, including the role of the Federal agency and its control over any environmental impacts," rather than to the extent of the environmental impacts of a project (which is addressed by the word "significant"). *See* 85 Fed. Reg. at 43,345. Under the NEPA Rule, in order to qualify as a major federal action, an agency action must be "subject to Federal control and responsibility." *Id.* at 43,375 (new 40 C.F.R. § 1508.1(q)). Thus, for example, the Rule clarifies that NEPA does not apply to "[l]oans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of such assistance," such as "farm ownership and operating loan guarantees by the [USDA] Farm Service Agency" or "business loan guarantees by the Small Business Administration." *Id.*

Clarifying the proper use of categorical exclusions. The Rule clarifies that a categorical exclusion is a "category of actions that the agency has determined, in its agency NEPA procedures. . . normally do not have a significant effect on the human environment." 85 Fed. Reg. at 43,374 (new 40 C.F.R. § 1508.1(d)). This definition is consistent with the 1978 regulations' recognition that an action that *normally* does not have a significant environmental effect may have such an effect in extraordinary circumstances and require an EIS. 40 C.F.R. § 1508.4 (2018). The

NEPA Rule also improves efficiency in agencies' adoption of CEs by providing that one agency "may adopt another agency's determination that a categorical exclusion applies to a proposed action if the action covered by the original categorical exclusion determination and the adopting agency's proposed action are substantially the same." 85 Fed. Reg. at 43,370 (new 40 C.F.R. § 1506.3(d)).

Encouraging early scoping of NEPA projects. Under the 1978 regulations, after an agency issues a notice of intent, it must conduct a scoping process, in which it determines the scope of the effects, alternatives, and other issues to be considered in the EIS. 40 C.F.R. § 1501.7 (2018). The NEPA Rule gives agencies flexibility to begin scoping even earlier, "as soon as practicable after the proposal for action is sufficiently developed for agency consideration"—*i.e.*, before an NOI is issued. 85 Fed. Reg. at 43,362 (new 40 C.F.R. § 1501.9(a)).

Clarifying which environmental "effects" must be considered. Under the 1978 regulations, the process for identifying and reviewing an action's effects is highly complex. Those regulations direct agencies to analyze all "direct, indirect, or cumulative" impacts. 40 C.F.R. § 1508.8 (2018) (parenthetical omitted). "Indirect effects" must be "reasonably foreseeable" (40 C.F.R. § 1508.8(b) (2018)), and "[c]umulative impact" means "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions" (40 C.F.R. § 1508.7 (2018)). Under this approach, agencies have expended considerable resources classifying potential environmental effects according to the direct-indirect-cumulative trichotomy and analyzing potential effects whose causal connection to the proposed action would be remote at best.

The NEPA Rule replaces this tripartite framework for determining relevant environmental effects with a clearer standard based on the concept of proximate cause. The rule defines "effects" as "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives."

85 Fed. Reg. at 43,375 (new 40 C.F.R. § 1508.1(g)). Drawing word-for-word from *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), it clarifies that "[a] 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA" and that "[e]ffects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action." *Id.* (new 40 C.F.R. § 1508.1(g)(2)).

The Rule also clarifies how agencies should determine when effects are "significant" within the meaning of NEPA. In particular, it removes a provision of the 1978 regulations that directed agencies to consider whether the effects of a project would be "highly controversial." 40 C.F.R. § 1508.27(b)(4) (2018). This provision had become, in effect, a heckler's veto allowing opponents of a project to prevent an agency from issuing a FONSI. Moreover, as the Final Rule explains, the provision made no sense because "the extent to which effects may be controversial is subjective and is not dispositive of effects' significance." 85 Fed. Reg. at 43,322.

Defining the range of reasonable alternatives. NEPA requires an EIS to analyze "alternatives to the proposed action" (42 U.S.C. § 4332(2)(C)(iii)), a requirement that CEQ's 1978 regulations interpreted to mean "*all* reasonable alternatives" (40 C.F.R. § 1502.14 (2018) (emphasis added)). CEQ guidance, however, has long advised that agencies do not need to analyze every conceivable reasonable alternative, and that "[w]hen there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

The NEPA Rule clarifies this standard by specifying that, rather than analyzing *all* reasonable alternatives, an agency's obligation is to analyze "a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant." 85 Fed. Reg. at 43,376 (new 40 C.F.R.

§ 1508.1(z)). The rule also clarifies that an agency need not consider alternatives that are outside the agency's jurisdiction and thus beyond its power to implement, except when considering these alternatives is "necessary for the agency's decision-making process." *Id.* at 43,330.

Preventing duplicative analyses. The NEPA Rule recognizes that courts have held that analyses under a number of other statutes that are functionally equivalent to NEPA—including the Clean Air Act, the Ocean Dumping Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act—may substitute in whole or in part for a NEPA analysis. 85 Fed. Reg. at 43,341. Consistent with these precedents, the rule permits agencies to "designate and rely on one or more procedures or documents under other statutes or Executive orders as satisfying some or all of the requirements in [NEPA], and substitute such procedures and documentation to reduce duplication." *Id.* at 43,373 (new 40 C.F.R. § 1507.3(c)(5)).

Clarifying comment and litigation procedures. The NEPA Rule adds new regulations related to public comments to ensure that comments are as helpful as possible to agencies and submitted at a time when the agency is able to take them into account. The rule provides that comments must be submitted within the time limits prescribed for comment periods and should be "as specific as possible." 85 Fed. Reg. at 43,358 (new 40 C.F.R. § 1500.3(b)(3)). Comments that are not timely submitted are "forfeited as unexhausted" (*id.*), consistent with the well-established doctrine requiring private parties to exhaust positions before agencies if they wish to later press those positions in court. Agencies are directed to certify in each ROD "that the agency has considered all of the alternatives, information, analyses, and objections submitted." *Id.* at 43,369 (new 40 C.F.R. § 1505.2(b)). If an agency so certifies, it is "entitled to a presumption that the agency has considered the submitted alternatives, information, and analyses, including the summary thereof, in the final [EIS]." *Id.*

The NEPA Rule relatedly clarifies when judicial review of agency actions under NEPA should take place. The 1978 regulations declared "[CEQ]'s intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final [EIS], or has made a final [FONSI]." 40 C.F.R. § 1500.3 (2018). The NEPA Rule clarifies that the proper test for when judicial review is available is the "final agency action" test of the APA (85 Fed. Reg. at 43,318); under that test, judicial review should not occur until "an agency has issued the [ROD] or taken other final agency action." *Id.* at 43,358 (new 40 C.F.R. § 1500.3(c)).

Improving coordination between agencies involved in preparing the same EIS or EA. In cases where more than one agency is involved in a federal action, CEQ's 1978 regulations provide that one agency is to be designated the "lead agency" for the project and supervise the preparation of an EIS. *See* 40 C.F.R. § 1501.5 (2018). The NEPA Rule seeks to improve interagency coordination with respect to actions involving multiple agencies by clarifying, among other things, that (1) a lead agency should be designated both for EISs and for complex EAs; (2) to the extent practicable, the lead and cooperating agencies should compile a single EIS or EA and then issue a joint ROD or FONSI, as applicable; and (3) the lead agency is responsible for determining the alternatives that should be considered, in consultation with the cooperating agencies. 85 Fed. Reg. at 43,361 (new 40 C.F.R. § 1501.7).

Setting length and scheduling guidelines for reviews. Finally, the NEPA Rule sets default page and time limits for EISs and EAs, in order to encourage agencies to prepare and finalize these documents expeditiously and to present them in a format that will be most helpful to agency decisionmakers. CEQ's 1978 regulations state that EISs should "normally" be no longer than 150 pages, or 300 pages in the case of proposals of unusual scope or complexity (40 C.F.R. § 1502.7 (2018)); the NEPA Rule makes this aspirational page limit a default requirement that can be exceeded only with a senior agency official's approval (85 Fed. Reg. at 43,364 (new 40 C.F.R. § 1502.7)). The rule also sets a default page limit of 75 pages for EAs. *Id.* at 43,360 (new 40 C.F.R. § 1501.5(f)).

And with respect to the timing of EISs and EAs, the rule directs agencies to complete EAs within one year and EISs within two years—again allowing these time limits to be exceeded with a senior agency official's approval. *Id.* at 43,362-63 (new 40 C.F.R. § 1501.10).

D. Procedural History

Plaintiffs, a group of seventeen environmental organizations, filed this action on July 29, 2020, alleging that the NEPA Rule violates the APA because it is inconsistent with NEPA, is arbitrary and capricious, and exceeds CEQ's statutory authority. Dkt. 1 ¶¶ 560-656. On August 18, 2020—nearly three weeks after filing suit and five weeks after the Rule was published—Plaintiffs moved for a preliminary injunction against enforcement of the Rule. *See* Dkt. 30.

STANDARD OF DECISION

Preliminary injunctive relief is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)). The purpose of a preliminary injunction is narrow: to "prevent irreparable harm during the pendency of a lawsuit." *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (affirming denial of preliminary injunction). In order to demonstrate entitlement to a preliminary injunction, therefore, a party must clearly "establish" that "[it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

ARGUMENT

NEPA was originally intended to ensure that federal agencies gather information and conduct analyses necessary to understand the environmental impacts of their decisions and the practical alternatives to those decisions. Today, NEPA is more often used as a tool by opponents of development and land-use to obstruct and delay federal decisionmaking, rather than to inform it. Agencies

are prompted to gather and consider boundless amounts of data and evidence in service of analyses that are very often irrelevant to their decisionmaking processes because they are either factually impractical or fall outside the agency's legal authority. Along the way, regulated entities are required to produce voluminous, redundant documents to multiple agencies participating in a largely uncoordinated process. This vast over-inclusion and repetition is encouraged by fear of litigation, which is rampant and unproductive.

This sclerotic review process—which is followed by drawn-out lawsuits almost as a matter of course—not only wastes agencies' time and resources but also harms American communities. NEPA has become a major obstacle to the execution of economically beneficial projects of all sorts, from new transportation infrastructure to family farming and ranching. Ironically, many of the projects hindered by these sprawling NEPA reviews would help to *improve* the environment—projects like high-efficiency light rail lines, wind farms, and forest restoration.

The NEPA Rule is a long overdue remedy. It will reduce the costs and delays that have become endemic to the NEPA process, bringing much-needed clarity after decades of conflict and confusion. The Rule clarifies the meaning of important terms in the regulations and aligns them with the best reading of NEPA's text. And it applies the lessons that CEQ and other agencies have learned over the last four decades to streamline NEPA reviews, making them more efficient. The Rule makes these critical improvements while continuing to ensure that potential environmental impacts from proposed projects are properly identified and thoroughly examined.

Plaintiffs have no likelihood of succeeding on their challenges to these common-sense revisions to CEQ's regulations—many of which have been prompted by judicial precedent. And even if they did, they could not show that the NEPA Rule's changes to NEPA procedures will cause them any cognizable harm, as they must for preliminary injunctive relief. The Court should therefore deny plaintiffs' motion.

I. PLAINTIFFS HAVE NOT MADE A CLEAR SHOWING THAT THEY WILL SUFFER IRREPARABLE HARM

The bulk of plaintiffs' 108-page brief is dedicated to their assertion that they are likely to succeed on the merits of their claims. They defend no fewer than ten causes of action, based on a seemingly countless array of supposed defects with the NEPA Rule. But the Court does not need to consider any of that, because plaintiffs have failed to show that they will suffer irreparable harm absent a preliminary injunction—and that is enough, by itself, to deny the motion.

A. "As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943-1944 (2018). "Rather, a court must also consider whether the movant has shown 'that he is likely to suffer irreparable harm in the absence of preliminary relief.'" *Id*. at 1944 (quoting *Winter*, 555 U.S. at 20). Accordingly, a court may appropriately deny preliminary injunctive relief without reaching the merits if the moving party has failed to show irreparable harm will result. *Id*. (affirming denial of preliminary injunction "[e]ven if we assume . . . that plaintiffs were likely to succeed on the merits of their claims"); *see also, e.g.*, *Henderson v. Bluefield Hosp. Co.*, 902 F.3d 432, 439 (4th Cir. 2018) (affirming district court's denial of preliminary injunctive relief based solely on absence of irreparable harm).

Crucially, "a plaintiff must demonstrate more than just a 'possibility' of irreparable harm" to establish entitlement to preliminary relief. *Di Biase*, 872 F.3d at 230. "Issuing a preliminary injunction based only on a *possibility* of irreparable harm [would be] inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to relief." *Id*. (emphasis added) (quoting *Winter*, 555 U.S. at 22). In addition, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of [a preliminary injunction] are not enough." *Id*. (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). And "[t]he possibility that adequate . . . corrective

relief will be available at a later date . . . weighs heavily against a claim of irreparable harm." *Id.* (quoting same).

B. Plaintiffs have not made the "clear showing" required to win a preliminary injunction. As we and CEQ both explain in greater detail in our respective motion-to-dismiss briefs (*see* Dkts. 53, 57), Plaintiffs have not suffered an Article III injury sufficient even to confer standing. Just as these observations necessitate a dismissal of the complaint for lack of jurisdiction, they equally necessitate a denial of preliminary injunctive relief for failure to establish irreparable harm.

1. Plaintiffs' theory of "environmental harm" (PI Mem. 73-88 (Dkt. 30)) presents at most the "possibility" of injury, insufficient for preliminary relief. *Di Biase*, 872 F.3d at 230. Plaintiffs' own briefing concedes this point: They express nothing more than a vague "concern[]" that "private applicants or federal agencies *may* take steps that affect important environmental resources" or "*might* move [development] along without careful thought," to the detriment of the environment. PI Mem. 86 (emphasis added). The extraordinary step of enjoining a duly promulgated federal regulation requires more than mere "maybes" and "mights." *See Di Biase*, 872 F.3d at 230; *Winter*, 555 U.S. at 22. It requires, instead, that Plaintiffs (1) identify at least one particular federal action, pending or imminent, that will be reviewed (or exempted from review) under the NEPA Rule's revised procedures and standards, and (2) show that application of the NEPA Rule to that action will harm them irreparably. *Id.*; *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009) (dismissing for lack of an Article III injury where "[r]espondents have identified no other application of the invalidated regulations that threatens imminent and concrete harm to the interests of their members").

They cannot possibly make that showing in this context, for three reasons. *First*, as we explained our motion-to-dismiss brief (at 5), "NEPA imposes only procedural requirements" and does not require "particular results." *Public Citizen*, 541 U.S. at 756-757; *accord Robertson* 490 U.S. at 350 ("NEPA itself does not mandate particular results, but simply prescribes the necessary

process."). The Rule's effect on the substantive outcomes of federal actions implicating NEPA reviews is therefore both uncertain and likely years away. Put another way, any harm to the environment from the NEPA Rule (if there is to be any) "lies at the end of a 'highly attenuated chain of possibilities.'" *South Carolina v. United States*, 912 F.3d 720, 727 (4th Cir. 2019) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). That is not enough for Article III standing (*id.*), much less a preliminary injunction.

Second, the NEPA Rule does not regulate primary conduct; it is, instead, a regulation of other agencies' regulations. Before it can be applied to actual federal actions, therefore, many federal agencies involved in NEPA reviews will have to implement the Rule with their own notice-and-comment rulemakings, making any purported harm anything but imminent.

Third, the NEPA Rule's standards can only make a practical difference in the context of an environmental review of a separate federal action, such as a permitting decision. To the extent that Plaintiffs' environmental interests might conceivably be harmed by some future application of the NEPA Rule to a federal action, they would suffer no irreparable harm here and now from waiting to bring their challenge (and their request for an injunction) until the Rule is actually applied in such a context, and the alleged harms can meaningfully be evaluated.

That was the Supreme Court's holding in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), where it held that the challengers in that case "cannot show that they will suffer irreparable injury" from a proposed agency action implicating NEPA review because "if and when" the agency actually "runs afoul of NEPA, [the party] may file a new suit challenging such action and seeking appropriate preliminary relief" at that time. *Id.* at 162. In such circumstances, an "injunction is not now needed to guard against any present or imminent risk of likely irreparable harm." *Id.* Or, as the Fourth Circuit has more generally stated, "[t]he possibility that adequate . . . corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm." *Di Biase*, 872 F.3d at 230 (quoting *Sampson*, 415 U.S. at 90). That is this case.

It is thus simply wrong to say that plaintiffs' generalized environmental concerns implicate injuries so imminent that a preliminary injunction is needed during the pendency of this lawsuit.

2. Plaintiffs' theories of informational and procedural harm (PI Mem. 88-96) are likewise inadequate to establish irreparable harm. To begin with, those theories are just as speculative as plaintiffs' asserted environmental harms. *See* MTD Mem. 7-9 (Dkt. 57). Plaintiffs cannot show that they actually have been (or imminently will be) denied access to particular information required to be disclosed by NEPA. Nor can they show how any such deprivation, being described only in the abstract, would cause them irreversible injury. That is to say, they cannot show *what* information is being withheld (or imminently will be withheld), *why* it is arguably relevant under NEPA and must be disclosed, *what* they would do with the information if it were disclosed, or *why* their inability to use the information represents such an immediate and irreparable injury that it would warrant the drastic step of a preliminary injunction.

On top of that, plaintiffs' true theory of informational and procedural injury appears to be that they will eventually have to "divert . . . resources" to "gather information previously provided through NEPA documents" in connection with some unidentified future federal action. PI Mem. 91. Setting aside the speculative and non-immediate nature of that assertion, the Fourth Circuit recently confirmed that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of [a preliminary injunction] are not enough" to justify a preliminary injunction. *Di Biase*, 872 F.3d at 230 (quoting *Sampson*, 415 U.S. at 90).

For these reasons, and for the reasons given in our and CEQ's briefs in support of our motions to dismiss (Dkts. 53, 57), the Court should deny the motion for a preliminary injunction on the ground that plaintiffs have failed to make a "clear showing" that they will suffer irreparable harm in the absence of preliminary relief. *Di Biase*, 872 F.3d at 230; *Winter*, 555 U.S. at 22.

II. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

Plaintiffs' inability to show that they will be irreparably harmed absent an injunction is reason enough for the Court to deny their motion—indeed, it is grounds to dismiss the suit altogether for lack of standing. But plaintiffs' motion for a preliminary injunction should be denied for the additional reason that plaintiffs cannot demonstrate a likelihood of success on the merits. Each challenge to the validity of the NEPA Rule rests on misreadings of NEPA and misunderstandings about what the APA requires. Plaintiffs accordingly have not met their high burden of "mak[ing] a clear showing that [they are] likely to succeed at trial." *Di Biase*, 872 F.3d at 230.

A. The NEPA Rule is consistent with the statutory text.

Plaintiffs begin their merits argument with a series of claims concerning the statutory text. *See* PI Mem. 28-41. As they see it, because the NEPA Rule breaks from past practice and from a handful of judicial decisions interpreting NEPA through the lens of the old regulations, the Rule must violate the "NEPA's statutory mandate." PI Mem. 28. Plaintiffs' arguments have one glaring omission: any meaningful discussion of the statutory text itself. Nearly the only statutory language that plaintiffs rely upon is Congress's generic direction that, "to the fullest extent possible[,] . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth" in NEPA. 42 U.S.C. § 4332. From this boilerplate, plaintiffs reason that their own policy preferences should override the most natural (and often only permissible) interpretations of other statutory text. In practical effect, they suggest that CEQ's 1978 regulations are etched in stone, and they can never be altered except (one supposes) to make them even more demanding than they already are.

That is not how statutory interpretation or agency rulemaking works. Agencies are free to change prior policy, either by rescinding or amending prior regulations. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-516 (2009). Neither special permission nor enhanced justification is needed. *Id.* As for this Court, its "function," in reviewing CEQ's revisions to the regulations, is "to

give the statute the effect its language suggests, however modest that may be," and "not to extend it to [the] admirable purposes" that plaintiffs would prefer the regulations "to achieve." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 270 (2010).

As we demonstrate below, CEQ's interpretations in the NEPA Rule are not only permissible, but often required by the statute's plain meaning and binding Supreme Court precedents. Neither the age of the prior regulations nor NEPA's generic opening policy statement can change these basic facts.

1. The proximate cause standard is the only permissible interpretation of the NEPA's "effects" language

a. Without citing statutory text, plaintiffs assert that "a complete NEPA evaluation must consider not only the immediate footprint of a project, but its indirect and cumulative effects as well." PI Mem. 29. The only real authorities that plaintiffs cite for this proposition are the old version of the regulations (40 C.F.R. § 1508.8(b) (2018)) and a Fourth Circuit case premised expressly on the old regulations (*N. Carolina Wildlife Fed'n v. N. Carolina Dep't of Transp.*, 677 F.3d 596, 602 (4th Cir. 2012) (interpreting old 40 C.F.R. § 1502.16)). Neither of those sources addresses whether CEQ's *present* interpretation of the statute is a reasonable one.

It is. Plaintiffs disagree; they rely on 42 U.S.C. § 4332(2)(C), which directs agencies to evaluate "any adverse environmental effects" and "any environmental impact" of the proposed action. Coupling those snippets with that section's preamble ("to the fullest extent possible"), plaintiffs imply that CEQ cannot rationally interpret 42 U.S.C. § 4332(2)(C) to exclude consideration of indirect and cumulative effects.

That is obviously wrong. In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Supreme Court held that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." *Id.* at 767. Any interpretation of NEPA must "draw a manageable line between those causal changes that may make an actor responsible for an effect

and those that do not." *Id*. (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 n.7 (1983)). Because "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause," the Supreme Court "analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'" *Id*. (quoting same).

For that reason, the NEPA Rule's elimination of indirect effects is required by precedent. "The term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011) (emphasis omitted). One critical limitation inherent in proximate cause is *directness*. The 1978 regulations (40 C.F.R. § 1508.8(b) (2018)) required consideration of any "indirect effects" so long as they were "reasonably foreseeable." But it is well settled that "foreseeability alone does not ensure the close connection that proximate cause requires." *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017). "Rather, proximate cause" calls for "some direct relation between" the cause and the effect. *Id*. (quoting *Holmes v. Sec. Inv'r Prot. Corp*., 503 U.S. 258, 268 (1992)). "A link that is too remote, purely contingent, or indirect is insufficient," no matter how foreseeable it may be. *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010) (plurality opinion) (cleaned up) (quoting *Holmes*, 503 U.S. at 271, 274).

The prior version of Section 1508.8(b), which directed unbending consideration of wholly indirect effects, was therefore at odds with the concept of proximate cause and the Supreme Court's holding in *Public Citizen*. The NEPA Rule—which requires "a reasonably close causal relationship to the proposed action or alternatives" (40 C.F.R. § 1508.1(g))—is, in contrast, appropriately tailored to the concept of proximate cause.

b. Much the same goes for the NEPA Rule's elimination of mandatory consideration of cumulative effects. Under the 1978 regulations, agencies were required to consider cumulative effects (40 C.F.R. § 1508.8(b) (2018)), defined as effects that "result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless

of [who] undertakes such other actions" (40 C.F.R. § 1508.7 (2018)). But because cumulative effects are not invariably required as part of the proximate cause analysis, the 1978 regulations' requirement that they inflexibly *always* be evaluated was inconsistent with *Public Citizen*.

Again, the NEPA Rule better aligns CEQ's regulations with the relevant Supreme Court precedent on this issue. Cumulative effects sometimes do inform the proximate cause inquiry. That is in part because proximate cause calls for consideration of all "substantial factor[s]." *Miller v. Asensio & Co.*, 364 F.3d 223, 232 n.6 (4th Cir. 2004) (Section 10(b) securities case) (quoting *Cox v. United States Steel & Carnegie Pension Fund*, 17 F.3d 1386, 1399 (11th Cir. 1994), in turn quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23-24 (2d Cir. 1990)) (emphasis omitted). For example, the effect that a given "discharge of pollutants" may have on "waters of the United States" under the Clean Water Act (33 U.S.C. § 1362(7), (12)) will sometimes depend on whether the water feature has a low natural background or a high natural background. The distinction is a difference in the "cumulative" effect of the discharge with the background: A discharge that is cumulative with a high natural background is not likely to be a "substantial factor" in causing an environmental effect; with a low natural background, the opposite is true.

In addition, the Supreme Court has held that, when "several proposals . . . that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency," it is reasonable for "their environmental consequences [to] be considered together." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). That is consistent with the *Restatement*, which provides that proximate cause may arise where "none of the alternative causes is sufficient by itself, but together they are sufficient." *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 27 cmt. g. (2010); *see also id.* § 36 cmt. a (similar).

In each of these contexts, the principle of proximate cause would call for consideration of cumulative effects—and the NEPA Rule permits just that.

In other scenarios, however, where cumulative effects are not implicated by the proximate cause analysis, they need not be considered. For example, proximate cause ordinarily will not extend responsibility for later, independent conduct not directly connected with the conduct at issue. Thus, for example, when the proposed federal action is the approval of a permit under Section 404 of the Clean Water Act to discharge fill material incidental to construction, proximate cause does not require evaluation of the environmental effects of the wholly separate activities that approving the permit might eventually make possible. That was the Eleventh Circuit's conclusion in *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288 (11th Cir. 2019), which held that, under the "proximate cause" standard set by the Supreme Court in *Public Citizen*, "NEPA and its regulations require agencies to consider only those effects caused by the agency's action" and not the "attenuated" effects caused by separate and subsequent activities. *Id*. at 1294. In that case, "the Corps' action [was] the issuance of a Section 404 permit authorizing the discharge of dredged and fill material into United States waters." *Id*. "Only the effects caused by that change in the environment—here, the discharge into U.S. waters—is relevant under NEPA." *Id*.

c. In addition, by eliminating the inflexible requirement to consider indirect and cumulative effects in all cases, the NEPA Rule eliminates the need for agencies mechanically to categorize effects as either cumulative or not.

Under the prior NEPA regime, agencies often invested considerable effort in categorizing effects as direct, indirect, or cumulative, which "divert[ed] agencies from focusing their time and resources on the most significant effects." 85 Fed. Reg. at 43,344. In addition, "[c]umulative effects analysis has been interpreted so expansively as to undermine informed decision making, and [to lead] agencies to conduct analyses to include effects that are not reasonably foreseeable or do not have a reasonably close causal relationship to the proposed action or alternatives." *Id*. The new Rule corrects this problem.

In this way, CEQ's alignment of its regulations with proximate cause is compelled not only by *Public Citizen*, but also by common sense. The Supreme Court time and again has said that the statutory concept of causation should not "be interpreted to its broadest reach." *Maracich v. Spears*, 570 U.S. 48, 59 (2013). All statutory phrases connoting cause-and-effect are "essentially indeterminate" because chains of causation, taken literally, "stop nowhere." *Id.* (cleaned up). Reading open-ended cause-and-effect provisions in an unlimited way—as did CEQ's prior regulations—is therefore "a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *Id.* (quoting *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) (ERISA preemption)).

2. The NEPA Rule's interpretation of "reasonable alternatives" is lawful

Plaintiffs' next argument concerns the statute's requirement that agencies consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). Under the prior regulations, agencies were required to "[r]igorously explore and objectively evaluate all reasonable alternatives" and "[d]evote substantial treatment to each alternative considered in detail." 40 C.F.R. § 1502.14 (2018). At the same time, CEQ guidance has provided all along that "[w]hen there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS." 46 Fed. Reg. at 18,027.

The NEPA Rule harmonizes the regulations and guidance, requiring that agencies "[e]valuate reasonable alternatives to the proposed action," including "[d]iscuss[ing] each alternative considered in detail." 40 C.F.R. § 1502.14 (2020). It further defines "[r]easonable alternatives" as "a reasonable range of alternatives that are technically and economically feasible." 40 C.F.R. § 1508.1(z).

Plaintiffs complain that, under the NEPA Rule, CEQ's regulations no longer require consideration of "all" reasonable alternatives and thus ensure that "some reasonable alternatives [will go] unexamined." PI Mem. 32. They note also that the regulations no longer mandate consider-

ation of alternatives "not within the jurisdiction of the lead agency." PI Mem. 33 (citing 40 C.F.R. § 1502.14(c)). These changes, plaintiffs contend, "weaken the required examination of alternatives" and thus violate the preamble's "fullest extent possible" language. PI Mem. 34.

Section 4332's generic language cannot transform plaintiffs' policy arguments into textual ones. In fact, NEPA calls for consideration only of "alternatives to the proposed action" (42 U.S.C. § 4332(2)(C)(iii)), later specifying that the alternatives must be "appropriate alternatives" (42 U.S.C. § 4332(2)(E)). The statute conspicuously omits a definite article in front of "alternatives"—it does not say "*the* alternatives" or "*all* alternatives." It says only "alternatives," implying that some reasonable range of alternatives suffices.

In this way, the statute gives CEQ leeway to interpret what ought to be included within the range of "reasonable alternatives" that must be considered. *See All. for Cmty. Media v. F.C.C.*, 529 F.3d 763, 778 (6th Cir. 2008) ("the term 'reasonable' generally . . . engender[s] ambiguity," creating a statutory gap for the agency to fill); *Wilmot Psychiatric/Medicenter Tucson v. Shalala*, 11 F.3d 1505, 1507 (9th Cir. 1993) ("defer[ing] to a permissible interpretation" of the word "reasonable," as "espoused by the agency entrusted with [the statute's] implementation") (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993)).

The NEPA Rule is a permissible exercise of CEQ's interpretive discretion. The dictionary definition of "reasonable" is, among other things, "not extreme or excessive." *Webster's Third New International Dictionary of the English Language* (1971). It is common sense that a protracted and costly analysis of alternatives that cannot actually be implemented—whether because they are outside the agencies' authority or because they are factually infeasible—is "excessive" and thus *un*reasonable. CEQ's determination in the NEPA Rule that agencies should not consider excessive alternatives that they are legally or factually powerless to implement is therefore fully consistent with the statutory language; nothing in NEPA's text suggests that Congress intended for agencies or the public to spin their wheels endlessly on impossibilities.

The District of Maryland's decision in *Audubon Naturalist Society v. Department of Transportation*, 524 F. Supp. 2d 642 (D. Md. 2007), is not to the contrary. In fact, the court there confirmed that an agency undertaking a NEPA review "need *not* consider all of the possible alternative actions" and held that the defendants in that case had "considered a sufficient number of reasonable alternatives" to satisfy the statute, even though not all of them. *Id*. at 667 (emphasis added). An EIS, the court reasoned, "need not consider an infinite range of alternatives, only reasonable *and feasible* ones." *Id*. at 669 (emphasis added) (quoting *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997)). That holding supports CEQ, not plaintiffs.

The same goes for the D.C. Circuit's nearly 50-year-old decision in *NRDC v. Morton*, 458 F.2d 827 (1972). There, contrary to plaintiffs' reading, the court confirmed that "[t]he statute must be construed in the light of reason" and does not require evaluation of alternatives that are "not meaningfully possible," particularly given that agencies' and private parties' "resources of energy and research—and time . . . are not infinite." *Id*. at 837. That is exactly the premise underlying the NEPA Rule's change to the 1978 regulations.

3. The NEPA Rule's assignment of independent meaning to the word "major" is the only permissible reading of the statutory language

NEPA calls for the preparation of environmental impact statements for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Beginning with the 1978 regulations, CEQ had historically declined to give independent meaning to the word "major," reasoning that any federal action that significantly affects the environment is necessarily a major one. *See* 40 C.F.R. § 1508.18 (2018).

That presumption was incorrect. Because the 1978 regulations declined to give independent meaning to the word "major," NEPA has been applied to a range of plainly "*non*-major Federal actions that simply have some degree of Federal involvement." 85 Fed. Reg. at 43,345. As CEQ explained in the preamble to the Rule, the word *major* "refers to the type of action, including the role

of the Federal agency and its control over any environmental impacts," whereas the word *significant* "relates to the effects stemming from the action." *Id*. Thus, some courts have long recognized that some projects indisputably "hav[ing] a substantial environmental impact" do not qualify as "major" federal actions—including, for instance, "ministerial approval[s]" of state actions, in which federal authorities have no "discretion" to control the underlying action. *NAACP v. Medical Center, Inc.*, 584 F.2d 619, 629 (3d Cir. 1978). It is "difficult to believe that Congress intended to append environmental responsibilities to [federal agencies'] ministerial role[s]." *Id*. at 630.

b. The NEPA Rule amends the regulations to correct the 1978 regulations' manifestly atextual interpretation of the statute. *See* 85 Fed. Reg. at 43,345. CEQ's regulations now apply a two-pronged test: before an EIS will be prepared, an action must be deemed both a "major" action and, separately, an action that will significantly affect the environment. *See id.* at 43,375 (new 40 C.F.R. § 1508.1(q)) (defining "major federal action"). This interpretation is not only reasonable, it is compelled. Few canons of construction are more brightly embedded in the legal firmament than the "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-539 (1955), in turn quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). The 1978 regulations did not do so, and the NEPA Rule corrects that clear "misconstruction." 85 Fed. Reg. at 43,345.

Plaintiffs complain that, under this revised interpretation, *non*-major federal actions significantly affecting the human environment will now "evade NEPA review," which they describe as "directly contrary to the purpose of NEPA." PI Mem. 35. That is a puzzling position. "The 'plain purpose' of legislation . . . is determined in the first instance with reference to the plain language of the statute itself." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373 (1986). To invoke "the 'plain purpose' of legislation at the expense of the terms of the statute itself" get matters backwards, ultimately "prevent[ing] the effectuation of congressional intent." *Id*. at 374. Plaintiffs' contrary position is indefensible.

Notably, plaintiffs do not deny that, if text is the best indication of purpose (as surely it is), the 1978 regulations have had congressional purpose wrong all along. For example, they note that the NEPA Rule "generally exempts Small Business Administration and Farm Service [l]oans" from the NEPA review process. PI Mem. 21. In particular, approvals for federal "financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of such assistance" are, under the NEPA Rule, not "major" federal actions. 40 C.F.R. § 1508.1(q)(1)(vii). Although plaintiffs challenge this element of the Rule on procedural grounds (*see* PI Mem. 56, 60-61), they tellingly do not disagree that, if the word "major" has independent meaning (how could it not?), mere loan approvals are *not* "major" federal actions. Taking the statutory text at face value, the only permissible conclusion is that Congress never meant for NEPA reviews to apply to such actions in the first place. And plaintiffs' policy preferences cannot substitute for the statute as written.

4. The NEPA Rule's procedural updates are rational and entitled to deference

Plaintiffs lastly take issue with provisions of the NEPA Rule that "allow[] applicants to expend resources towards a specific project before completing NEPA [review]" (PI Mem. 37) and impose "limitations on public participation in the NEPA process" (PI Mem. 38). CEQ did not exceed the bounds of its discretion with respect to either of these provisions.

a. Concerning pre-decisional actions, plaintiffs invoke CEQ's "longstanding . . . prohibition" on agency actions, prior to the issuance of an ROD, that "[h]ave an adverse environmental impact" or "[l]imit the choice of reasonable alternatives." PI Mem. 37 (quoting 40 C.F.R. § 1506.1(a) (2018)). But the NEPA Rule expressly preserves that longstanding prohibition, even using the same language. *See* 85 Fed. Reg. at 43,370 (new 40 C.F.R. § 1506.1(a)). The new rule simply clarifies that the regulations "do[] not preclude development by applicants of plans or designs or performance of other activities necessary to support an application for Federal, State, Tribal, or local permits or assistance." *Id.* (new 40 C.F.R. § 1506.1(b)). And it further clarifies that "such

activities" include "acquisition of interests in land," "purchase of long lead-time equipment, and purchase options made by applicants." *Id.* (emphasis added).

On its face, therefore, the NEPA Rule does not authorize any "irreversible [or] irretrievable commitments of resources" to a project. 42 U.S.C. § 4332(2)(C)(v). Indeed, CEQ sought comment on whether there are circumstances in which "irreversible" commitments are appropriate prior to an ROD and decided not to recognize any such circumstances. 85 Fed. Reg. at 43,336. In the end, the Rule has simply clarified that applicants may take certain *reversible* preliminary steps prior to an ROD, if they wish to do so as a means of avoiding downstream delays.

Plaintiffs cannot point to anything in the statute or case law that prohibits CEQ from adopting this kind of sensible process-management guideline. The First Circuit's decision in *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989), certainly does nothing of the sort. The court there simply affirmed that it may be appropriate for courts to enjoin projects that allegedly violate NEPA in light of the difficulty of "tear[ing] down projects once they are built." *Id*. at 504. But the NEPA Rule does not allow projects to be "built" before an ROD—it permits only particularly time-consuming preliminary actions, using private resources, that can easily can be undone.

For its part, *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323 (4th Cir. 1972), held that, before completing NEPA review, agencies developing Interstate 66 in Virginia could not take irreversible steps toward constructing the highway that would "limit their options," such as condemnation of private land. *Id*. at 1327. But as noted, the NEPA Rule continues to prohibit agencies from limiting their options prior to finishing the NEPA process. 85 Fed. Reg. at 43,370 (new 40 C.F.R. § 1506.1(a)(2)) (no action "[l]imit[ing] the choice of reasonable alternatives" may be taken before an ROD or FONSI is issued). Plaintiffs ignore this entirely.

b. Plaintiffs' challenge to the NEPA Rule's purported "limitations" on public comment is also baseless. PI Mem. 38. The rule recognizes that economic impacts are among the considerations that NEPA comments may raise, and it encourages commenters to include "data sources and

methodologies" with their comments where applicable. *See* 85 Fed. Reg. at 43,368 (new 40 C.F.R. § 1503.3(a)). Both of these changes implement NEPA's statutory directive that "economic and technical considerations" be part of the NEPA analysis. 42 U.S.C. § 4332(2)(B). Nothing in the Rule prohibits comments on "qualitative . . . concerns" (PI Mem. 38) or suggests that such comments will receive less weight than those raising quantitative concerns. Indeed, CEQ expressly states that the rule should *not* be "construed to limit public comment to those members of the public with scientific or technical expertise." 85 Fed. Reg. at 43,333. Plaintiffs' speculation that CEQ has improperly "elevate[d] the influence" of economic and technical commenters at the expense of commenters with qualitative concerns (PI Mem. 38) is groundless.

B. The NEPA Rule is not arbitrary or capricious.

Plaintiffs' second grouping of challenges to the NEPA Rule contend that the rule is arbitrary and capricious because CEQ failed to consider certain facts before deciding to amend the 1978 regulations. *See* PI Mem. 41-58. The Court should reject these challenges. "[T]he scope of [judicial] review under the arbitrary and capricious standard is narrow and highly deferential," and as long as the agency has "provided an explanation of its decision that includes a rational connection between the facts found and the choice made," a court "is not empowered to substitute its judgment for that of the agency." *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 733 (4th Cir. 2009) (quotation marks omitted). CEQ's well-reasoned decision to modernize its regulations easily satisfies the requirements of arbitrary-and-capricious review.

1. Plaintiffs' arguments concerning the regulatory impact analysis are both non-actionable and meritless

Plaintiffs first argue that, before promulgating the NEPA Rule, CEQ was required (and failed) to "weigh the consequences of eliminating key provisions of the 1978 regulations, including the evaluation of cumulative impacts, consideration of all reasonable alternatives, and many others." PI Mem. 42 (citing *Fox Television*, 556 U.S. at 514-15). In Plaintiffs' view, before finalizing the

Rule, CEQ was required to conclude that adopting the Rule would yield benefits that outweigh these "consequences." They argue that CEQ failed to reach that conclusion, on the ground that the agency's regulatory impact analysis (RIA) for the NEPA Rule evaluated the environmental impact of the rule "using a baseline of the statutory requirements of NEPA and Supreme Court case law," rather than a baseline of the current regulations. PI Mem. 42-43 (quotation marks and emphasis omitted). There are two glaring problems with this argument.

a. As an initial matter, the supposed flaws in CEQ's RIA are not actionable. RIAs are prepared pursuant to Executive Orders 12,866 and 13,563, which instruct agencies to assess the impact of certain proposed actions determined to be "significant regulatory actions." *See* Exec. Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011). Both executive orders state expressly that they "do[] not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." 58 Fed. Reg. at 51,744; *see* 76 Fed. Reg. at 3,823 (similar).

Accordingly, the alleged RIA deficiency "does [not] provide a basis for rejecting final agency action." *Nat'l Truck Equipment Ass'n v. Nat'l Highway Traffic Safety Admin.*, 711 F. 3d 662, 670 (6th Cir. 2013); *see also, e.g.*, *Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430, 439 (D.C. Cir. 2013) (noting that Executive Order 12,866 does not "create[] private rights, nor is an agency's failure to comply with the[] order[] subject to judicial review"); *Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921, 932 (E.D. N.C. 1995), *aff'd* 91 F.3d 134 (4th Cir. 1996) (per curiam) ("[P]laintiff has no right of action to challenge the Secretary's compliance with E.O. 12866."). For that reason alone, plaintiffs' arguments concerning cost-benefit analysis must be disregarded.

b. Even if plaintiffs had a cause of action based on the RIA, their claim would fail. It is well understood that, when an agency changes its regulations, it must provide a "reasoned explanation for its action," by "show[ing] that there are good reasons for the new policy." *Fox Television*, 556 U.S.

at 515. But, as the Supreme Court explained in *Fox Television*, an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Id.*; *see also, e.g.*, *Philip Morris USA, Inc. v. Vilsack*, 736 F.3d 284, 290 (4th Cir. 2013) ("It is not the court's role to evaluate whether the agency's reasons for its new position are better than its reasons for the old one.").

Thus, CEQ was not required to show that the NEPA Rule would be superior to CEQ's existing regulations, or that amending the regulations would produce benefits that outweighed the costs of the change. Rather, CEQ's only obligation was to provide some rational justification for its change. *See, e.g.*, *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1037 (D.C. Cir. 2012) (rejecting arbitrary-and-capricious challenge to amended rule because "petitioners acknowledge that, although they believe the original rule was better, the amended rule is permissible," and "[a]s *Fox [Television]* made clear, that suffices as far as the court is concerned") (quotation marks omitted). As we explain in Part II.C, CEQ easily satisfied that obligation.

c. Neither *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728 (D.C. Cir. 2019), nor *American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010), indicates that CEQ was required to justify the NEPA Rule against the "baseline" of the 1978 regulations. In both of those cases, a statute other than the APA required the agency to make a heightened showing that its regulation was warranted, and the court held that the agency had not satisfied that requirement. In *United Keetoowah Band*, the court held that the FCC had not demonstrated that exempting certain types of cellular facilities from the agency's approval authority was justified by "'public interest, convenience, and necessity,'" as required by the Communications Act. 933 F.3d at 740 (quoting 47 U.S.C. § 319(d)). Similarly, the court in *American Equity Investment* invalidated an SEC rule because the Commission had not satisfied Section 2(b) of the Securities Act of 1933, which requires that the SEC consider whether certain regulations "'will

promote efficiency, competition, and capital formation.'" 613 F.3d at 177 (quoting 15 U.S.C. § 77b(b)). Here, by contrast, the APA imposes "no such heightened standard" on CEQ's decision to revise its regulations. *Fox Television*, 556 U.S. at 514.

Plaintiffs suggest in passing that NEPA itself required CEQ to use the 1978 regulations as a baseline (PI Mem. 44 (citing 42 U.S.C. § 4342)), but that is incorrect. The statutory provision on which Plaintiffs rely has nothing to do with CEQ's issuance of regulations; rather, it deals with the composition of CEQ, stating that each member of CEQ should be "well qualified . . . to formulate and recommend national policies to promote the improvement of the quality of the environment." 42 U.S.C. § 4342. Plaintiffs' suggestion that the generic qualifications for Council membership should be read as requiring the Council to provide heightened justifications for changes to regulations is insupportable. Their complaint about CEQ's choice of "baseline" is therefore no basis for thinking that plaintiffs will succeed on the merits—not least because they lack a cause of action on this claim in any event.

2. CEQ did not ignore relevant factors

Plaintiffs also contend that the NEPA Rule is arbitrary and capricious because CEQ failed to consider the impact of the rule on environmental quality and environmental justice. PI Mem. 45-58. But Plaintiffs cannot show that CEQ failed to consider any relevant aspect of these subjects, or that its reasoned analysis was arbitrary or capricious.

a. At the outset, Plaintiffs' arguments that CEQ failed to consider the practical impact of its actions are largely misplaced in this context. To be sure, when an agency issues a rule adopting binding regulatory standards as an exercise of policy discretion—such as tolerance levels for pesticide residue in food (*Nw. Coal. for Alternatives to Pesticides (NCAP) v. U.S. E.P.A.*, 544 F.3d 1043, 1052 (9th Cir. 2008)) or energy efficiency standards for new buildings (*Gas Appliance Mfrs. Ass'n, Inc. v. Dep't of Energy*, 998 F.2d 1041, 1051 (D.C. Cir. 1993))—the arbitrary-and-capricious standard may require the agency to consider evidence of the practical impact of the rule. But the

NEPA Rule is not that kind of rule. Rather, it brings NEPA procedures in line with the best reading of the statute's text, as informed by guidance documents and court decisions over the decades. *See, e.g.*, 85 Fed. Reg. at 43,305 (noting the agency's concern that "CEQ's guidance, agency practice, more recent presidential directives and statutory developments, and the body of case law related to NEPA implementation have not been harmonized or codified in CEQ's regulations").

When an agency acts to align its regulations with the best reading of the statutory text, it is not obliged to evaluate and justify the practical impact of its decision. Instead, "an agency may justify its policy choice by explaining why that policy 'is more consistent with statutory language' than alternative policies," and leave it at that. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007)); *see also, e.g., Gonzales-Veliz v. Barr*, 938 F.3d 219, 235 (5th Cir. 2019) (agency action upheld where the agency sufficiently explained that it was adopting a position "more faithful to the statutory text"); *Ad Hoc Shrimp Trade Action Comm. v. United States*, 596 F.3d 1365, 1372 (Fed. Cir. 2010) (where the agency explained why its new interpretation of a statute was the "better reading," its prior position was "no obstacle to its current interpretation"); *Our Country Home Enterprises, Inc. v. Comm'r of Internal Revenue*, 855 F.3d 773, 787 (7th Cir. 2017) (with respect to agency interpretation of statutory text, the agency is not required to show that its "interpretation is the best interpretation from a . . . policy standpoint").

That is particularly true where, as here, an agency changes its regulations to conform to unambiguous statutory text. Agencies must "give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Accordingly, an agency need not give a policy-based explanation to justify conforming its regulations to the clear meaning of a statute; the agency literally has no power to do otherwise. *See, e.g., Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1306 (10th Cir. 1999) ("[W]e need not decide whether reasoned analysis supports the agency's change where, as in this case, we determine that the statutory

language at issue is unambiguous and that it supports the new regulation."). Simply put, neither an agency's nor private stakeholders' "policy preferences can[] trump the words of the statute." *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 865 (D.C. Cir. 2006).

Many of the regulatory changes and clarifications in the NEPA Rule are explained on this ground. For example, NEPA plainly requires that a federal action be "major" in order to trigger NEPA. Similarly, in light of the Supreme Court's decision in *Public Citizen*, there is no doubt that proximate causation is the appropriate framework for determining which environmental "effects" are relevant to a NEPA analysis. CEQ was not required to examine the policy consequences of updating its regulations in line with NEPA's text or Supreme Court precedent interpreting that text.

b. The NEPA Rule makes certain procedural changes to the NEPA regulations—such as its clarifications regarding interagency coordination, and its presumptive page and time limits for EAs and EISs—that are not specifically required by NEPA's text. But as to these changes, Plaintiffs do not point to any evidence before CEQ that these amendments to agency procedures would have environmental impacts.

The "Law Professor Comment Letter" that Plaintiffs cite (PI Mem. 48) simply referenced studies finding that EISs generally reduced the environmental impact of projects that underwent review. Given that EISs will still be prepared under the NEPA Rule, those studies do nothing to impugn the procedural improvements made by the Rule.

Plaintiffs also cite a comment letter submitted in a different rulemaking—which certain plaintiffs attached to their comment letter on the NPRM here—discussing the value of a scoping process that the Forest Service uses at the EA stage. PI Mem. 48 & n.69. But nothing in the NEPA Rule precludes this kind of early scoping. Indeed, the NEPA Rule expands the availability of scoping early in the NEPA process, by clarifying that "[s]coping may begin as soon as practicable after the proposal for action is sufficiently developed for agency consideration," which could be during or even before an EA begins. 85 Fed. Reg. at 43,362 (new 40 C.F.R. § 1501.9(a)).

c. Even as to the interpretive elements of the Rule, Plaintiffs' assertion that CEQ did not consider relevant environmental impacts is wrong. CEQ considered the possibility and concluded that the Rule would not have environmental impacts because NEPA, as a procedural statute, does not dictate or control the outcomes of agencies' environmental reviews. *See, e.g.*, 85 Fed. Reg. at 43,354. Plaintiffs respond that "NEPA's 'procedures are almost certain to affect the agency's substantive decision'" (PI Mem. 49 (quoting *Robertson*, 490 U.S. at 350)), but *Robertson*'s point was simply that the general process of NEPA review is likely to inform how an agency decides to proceed with an action—not that any change to NEPA procedures will lead to a corresponding change in environmental outcomes. Indeed, *Robertson* acknowledged in nearly the same breath that NEPA "does not mandate particular results." 490 U.S. at 350. Accordingly, CEQ reasonably concluded that its procedural changes would not have adverse substantive impacts on the environment.[2]

Plaintiffs argue that CEQ "elide[d] consideration" of environmental impacts by stating that "there will be no environmental harm because other substantive environmental statutes will remain unchanged." PI Mem. 50. That is a straw man: CEQ never took the position that other environmental laws obviate the need for NEPA review. In response to some commenters' concerns that the NEPA Rule would "jeopardize the future environment," CEQ did note that laws other than NEPA help to protect the environment. *See* Response to Comments at 4, CEQ-2019-0003-720629 (July 15, 2020). But CEQ also rebutted the notion that NEPA itself was being weakened, arguing that the NEPA Rule will lead to "more efficient" and "better decision making." *Id.* at 5.

Plaintiffs lastly argue that CEQ failed to consider the possibility that the NEPA Rule will lead to adverse environmental impacts by "eliminat[ing]" analysis of indirect and cumulative effects.

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[2] CEQ's conclusion that the NEPA Rule would not have a disproportionate impact on environmental justice communities was justified, for much the same reason: As CEQ explained, "NEPA is a procedural statute that does not presuppose any particular substantive outcomes." 85 Fed. Reg. at 43,356. Moreover, CEQ explained that the rule broadens agencies' ability to obtain public input, including input on issues of importance to environmental justice communities. *Id.*

PI Mem. 54. But here again, Plaintiffs are simply ignoring the key aspects of CEQ's explanation. Their claim that the rule "explicitly forbid[s]" consideration of indirect or cumulative effects (*id.*), for example, is wrong. Although the rule states, in language that Plaintiffs misquote, that effects that are geographically, temporally, or causally remote from an action "should generally not be considered" under NEPA (85 Fed. Reg. at 43,375 (new 40 C.F.R. § 1508.1(g)(2))), CEQ explained that *all* effects will continue to be considered to the extent that they are required to be under the proximate cause framework mandated by *Public Citizen.* Response to Comments at 467. Again, CEQ had no authority to come to any other conclusion. Plaintiffs accordingly have not made any showing, let alone a "clear showing," that the NEPA Rule is arbitrary and capricious.

C. CEQ properly explained its decision to amend its regulations.

Plaintiffs' last group of challenges to the NEPA Rule assert that CEQ did not comply with the requirements that the APA imposes when an agency changes an existing regulation. Each of these challenges is meritless.

1. CEQ gave "good reasons" for its decision to change the regulations

As we explained earlier, the Supreme Court has rejected the notion that an agency's decision to change its regulations is subject to any "heightened standard" of review. *Fox Television*, 556 U.S. at 514. In general, a regulatory change is permissible as long as the agency "display[s] awareness that it *is* changing position" and "show[s] that there are good reasons for the new policy." *Id.* at 515.

Plaintiffs do not (and cannot) contend that CEQ lacked "awareness" that it was modifying the 1978 regulations. They argue, instead, that CEQ's reason for adopting the NEPA Rule—*i.e.*, to reduce the administrative burdens and delays associated with NEPA reviews—is not a "good reason[]" for the regulatory change because it is not supported by the evidence. PI Mem. 63-64.

Plaintiffs are mistaken. As an initial matter, even assuming CEQ were wrong that the Rule will reduce administrative burden and delay, that would not provide a sufficient basis for plaintiffs' claim because that was not CEQ's only reason for modifying the 1978 regulations: CEQ also sought

to align the regulations with the best reading of the statutory text. That, by itself, is a good and sufficient reason for amending the regulations. *See, e.g.*, *Long Island Care at Home*, 551 U.S. at 175.

But beyond that, CEQ's conclusion that amending the regulations would shorten the NEPA process was supported by the evidence. CEQ found that the NEPA process took, on average, *years* longer than Congress ever could have intended; that most EISs had ballooned to an encyclopedic size that cannot usefully serve NEPA's purpose; and that disputes over the meaning of statutory and regulatory terms were frequently the cause of disruptive litigation. 85 Fed. Reg. at 43,305-06. It reasonably concluded that clarifying key terms and simplifying the overall NEPA process would help avoid obstructive delays of important federal projects.

The record was littered with examples of significant and vital projects held up in years or even decades of NEPA review and associated litigation. One notable example in the Fourth Circuit is the so-called Purple Line, a 16-mile light rail project to connect various parts of suburban Maryland outside Washington, D.C. The project will provide high-efficiency transit for an estimated 70,000 daily riders, leading to 17,000 fewer vehicles on local roads. Not only will the line help reduce emissions due to fewer cars and less congestion, it will also bring thousands of jobs to the greater Washington region. *See* Comment of Am. Road & Transp. Builders Ass'n at 3, CEQ-2019-0003-166296 (Mar. 10, 2020) ("ARTBA Comment"); Comment of Chamber of Commerce of the United States of America at 7, CEQ-2019-0003-169693 (Mar. 10, 2020) ("Chamber Comment").

The Federal Transit Administration and Maryland Transit Administration published an NOI and began preparing an EIS for the Purple Line in 2003. Remarkably, however, construction began just two years ago, and the line remains under construction today. That is principally because the NEPA process for the project took an astonishing *14 years* to conclude. The agencies involved spent five years evaluating endless "alternatives" to the project. *Friends of Capital Crescent Trail v. U.S. Army Corps of Engineers*, 2020 WL 1849704, at *3 (D. Md. Apr. 13, 2020). By 2008, the agencies had narrowed down the list of alternatives to eight; after receiving public comment, they issued a

final EIS another *five years later*, in August 2013, designating the light rail option as the preferred alternative. *Id.* The ROD was finally issued in 2014, after which opponents of the project "promptly filed suit," "challenging the sufficiency of the NEPA analysis." *Id.* After two years of litigation, a district court in the District of Columbia determined that the ROD—as thorough as could be, and fully ten years in the making—was not sufficient, and it vacated the ROD and ordered the agencies to prepare a supplemental EIS. That decision ultimately was reversed by a unanimous D.C. Circuit panel—but only after nearly another year and a half had passed. *Friends of Capital Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1066 (D.C. Cir. 2017).

The proposed expansion of Interstate 70 in Denver, Colorado, provides another striking example of the kind of delays endemic to the current NEPA process. The highway widening project—a $1.2 billion effort to alleviate severe traffic congestion in Denver by expanding 12 miles of highway—took more than 13 years to navigate the NEPA process, including over 200 public meetings and a record of almost 16,000 pages. During the NEPA process, the Colorado Department of Transportation (CDOT) spent $40 million on studies, and over $30 million on viaduct repairs that should have been spent on new construction. At the end of the NEPA process, despite CDOT's publicly making 148 different environmental mitigation commitments at an additional taxpayer cost of $50 million, the project was still the subject of five separate legal actions. *See* ARTBA Comment at 3; Chamber Comment at 6.

These projects, although outliers in the extremity of the delays, are illustrative of the problems that are universal to NEPA reviews under the calcified 1978 regulations: Fear of litigation has encouraged ever more burdensome procedures and standards that only beget additional lawsuits filed by anti-development groups and unhappy "not in my back yard" litigants. As a result, NEPA reviews for actions such as federal grazing permits or timber sales average over seven years to complete, with some reviews lasting a decade or more. Comment of Am. Farm Bureau Fed'n at 1, CEQ-2019-0003-166800 (Mar. 10, 2020). Federal-aid highway projects require an average of five-to-seven

years of NEPA review. ARTBA Comment at 3. And with respect to actions by the Forest Service, "[s]tudies have shown that that litigation has remained relatively constant, even as the number of NEPA-analyzed projects and the acres they cover has declined." Comment of Am. Forest Resource Council at 3-4, CEQ-2019-0003-170699 (Mar. 10, 2020) (citing Amanda M.A. Miner et al., *Twenty Years of Forest Service National Environmental Policy Act Litigation*, 12 Envtl. Practice 116 (2010)). The NEPA Rule was a manifestly rational response to a federal regulatory scheme that had obviously lost its way.

Plaintiffs assert that CEQ had before it evidence suggesting that other factors are responsible for project delays. PI Mem. 63-64. CEQ did not ignore those other factors, but it did conclude that "the frequency and consistency of multi-year review processes for EISs for projects across the Federal Government leaves no doubt that NEPA implementation and related litigation is a significant factor." 85 Fed. Reg. at 43,305. None of the comments or sources that Plaintiffs cite casts any doubt on that well-supported, rational conclusion:

- One Congressional Research Service study noted that "there is no consensus on the reasons for [highway] project delivery delay" and added that, although "delays are often due to non-environmental factors," "environmental review of a project can take a long time." *See* Accelerating Highway and Transit Project Delivery: Issues and Options for Congress 11-12 (Aug. 3, 2011) (Attachment 15 to Comment of S. Envtl. Law Ctr. et al., CEQ-2019-0003-171879 (Mar. 10, 2020) (SELC Comment)).

- Another CRS study acknowledged that "the potential threat of litigation may result in an effort to prepare a 'litigation-proof' NEPA document," "particularly for projects that are costly, technically complex . . . or controversial." *See* The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress 29 (Apr. 11, 2012) (Attachment 17 to SELC Comment).

- The American Sustainable Business Council stated in passing in a three-page comment letter that the "key drivers of project delay includ[e] the capacity crisis within the government for conducting NEPA," without offering any deeper analysis. Comment of Am. Sustainable Business Council 2, CEQ-2019-0003-169897 (Mar. 10, 2020).

- The American Association of State Highway and Transportation Officials was generally supportive of CEQ's effort to make the NEPA process more efficient; it simply noted that "there are other delay factors that are outside of NEPA," including agencies' need to comply with the substantive environmental laws that Plaintiffs' motion downplays as a

> source of protection for environmental values. Comment of Am. Ass'n of State Highway and Transp. Officials 5, CEQ-2019-0003-84196 (Mar. 4, 2020).

Plaintiffs also contend that there was evidence before CEQ that NEPA reviews may actually *speed* projects because "NEPA provides an opportunity to identify and address issues earlier in the permitting process." PI Mem. 65. But the question before CEQ was not whether NEPA review has benefits for agency decision-making, but whether NEPA review could be made more efficient, allowing those benefits to be achieved with less delay. CEQ's answer to that question—*yes*—was supported by the record.

Plaintiffs assert that "[i]n the relatively few instances where delays are associated with the NEPA process, they do not result from NEPA's required procedures," because "NEPA's public participation checkpoints under the 1978 regulations account for only a fraction of the time it takes to develop most projects." PI Mem. 65. But focusing only on the time spent on required procedures such as comment periods misses the point. As CEQ explained, the key cause of delay in NEPA-covered projects is not mandatory steps like public comment periods, but *litigation*—and the inordinate amount of time that agencies waste performing the pointless analyses necessary to "litigation-proof" their EISs. *See* 85 Fed. Reg. at 43,305.

Indeed, even where a project is not ultimately challenged in court, CEQ found that the mere threat of litigation causes agencies to "generat[e] voluminous studies analyzing impacts and alternatives well beyond the point where useful information is being produced and utilized by decision makers." 85 Fed. Reg. at 43,305. CEQ reasonably concluded that delays attributable to litigation (and the bare threat of litigation) could be curbed by clarifying key terms in CEQ's regulations, ensuring that the regulations aligned with Supreme Court precedent, and setting clear standards for how comments and objections to projects are exhausted. Plaintiffs have no response to this reasoning, which is self-evidently rational.

Plaintiffs' assertion that NEPA Rule "will actually lead to *more* project delay" because applicants and agencies will have to "sort through a morass of new uncertainties" related to implementation of the new regulations (PI Mem. 69-70) is hard to take seriously. Any regulatory change entails these kind of "start-up" costs. CEQ reasonably concluded that these short-term costs should not stand in the way of the NEPA Rule because the Rule would lower agencies' administrative costs in the long run. 85 Fed. Reg. at 43,352. If plaintiffs' contrary assertion were correct, regulations could never be changed. That is not the law. *See Fox Television*, 556 U.S. at 514-516.

For the same reason, plaintiffs' argument that the changes in the NEPA Rule will "lead to an increase in litigation" (PI Mem. 70) casts no doubt on the reasonableness of the NEPA Rule. Like any regulatory change, the NEPA Rule may initially make for new work by courts used to interpreting the old regulations. But by bringing uniformity and clarity to the meaning of key terms in the statute and regulations, the Rule will *reduce* litigation rather than increase it in the long run. *See, e.g.*, 85 Fed. Reg. at 43,343. Moreover, contrary to Plaintiffs' contentions, CEQ did not fail to consider the existence of what plaintiffs call "forty years of stable, established legal precedent" under the 1978 regulations. PI Mem. 70. CEQ acknowledged the "extensive body of case law" interpreting the prior regulations but found that this "accretion of cases ha[d] not necessarily clarified implementation of [NEPA]," in no small part because the insights of key cases such as *Public Citizen* have not been "codified in [the] regulations." 85 Fed. Reg. at 43,305. CEQ's conclusion that it should modernize its regulations, rather than leaving in place an ossified body of precedent that was inconsistent with the statutory text and invited time-consuming NEPA litigation because of that inconsistency, was not arbitrary and capricious.

2. Plaintiffs' argument concerning reliance interests is baseless

Plaintiffs say that *Fox Television* required CEQ to consider the "serious reliance interests" associated with the 1978 regulations. PI Mem. 58 (quoting *Fox Television*, 556 U.S. at 515). That

requirement is irrelevant here, because Plaintiffs have not pointed to any cognizable reliance interests affected by the NEPA Rule.

The doctrine requiring agencies to consider "reliance interests" comes into play where an agency changes regulations that apply to regulated parties' primary conduct. If an agency's change in regulations will impact the way that regulated parties have arranged their affairs—the investments they have made, the contracts they have entered, the real estate they have purchased—in reliance on former regulations, an agency must consider those sunk costs in deciding whether to adopt new regulations. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring) (a rule may be arbitrary and capricious if it "alter[s] future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule").

Thus, for example, the Supreme Court recently held that the Department of Homeland Security was required to consider the impact of the rescission of the Deferred Action on Childhood Arrivals (DACA) program on DACA recipients who had enrolled in schools, purchased homes, and taken other significant actions based on the program. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020). Similarly, in *Encino Motorcars v. Navarro*, the Court held that a new Department of Labor rule regarding auto service advisors was arbitrary and capricious because the agency had not considered the facts that "[d]ealerships and service advisors negotiated and structured their compensation plans" around the prior rule and that the new rule would require "systemic, significant changes" to those existing contractual arrangements. 136 S. Ct. at 2126.

Plaintiffs have not pointed to any reliance interests of this kind. Their own asserted reliance interests are simply their interests in their preferred policies, which they think better reflected in the 1978 regulations. They claim, for example, that they and other conservation advocates have used the 1978 regulations "to ensure government transparency, obtain a wealth of data, and make their voices heard during the consideration of major projects." PI Mem. 59. They fear that under the NEPA Rule,

their opportunities to participate in NEPA reviews will be "curtail[ed]." *Id*. at 61. But even if these fears were well-founded (they are not), these are not cognizable "reliance" interests; plaintiffs do not identify commitments of resources that will lose value, or arrangements of affairs that will be upended, or ongoing courses of conduct that they will have to abandon. CEQ was not required to give special solicitude to plaintiffs' or others' mere preference for the 1978 regulations.

Nor can plaintiffs show a cognizable reliance interest by arguing that state environmental laws are meant to complement the 1978 regulations and that the changes in the NEPA Rule will accordingly leave a regulatory "gap" because NEPA will "no longer include[] the same level of review." PI Mem. 62. Even if that were true, it would not show that states have a "reliance interest" in the 1978 regulations—it would show only that the States will have to adapt their own laws and regulations to the NEPA Rule, if need be. That is true of any change to federal regulation involving a program that touches on joint federal-state regulation, and it is no basis for invalidating the change. Plaintiffs' challenge to the NEPA Rule on this score accordingly lacks merit.

3. CEQ was not required to consider Plaintiffs' suggested alternatives

Pointing to *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance*, 463 U.S. 29 (1983), plaintiffs argue, finally, that CEQ was required to consider alternatives to its amendment to the regulations. That is a bewildering claim, because *State Farm* in fact expressly confirms the opposite: courts must *not* "broadly require an agency to consider all policy alternatives in reaching decision." 463 U.S. at 51. That case involved a decision by the NHTSA to rescind its "passive restraint" rule, which required cars manufacturers to install automatic seatbelts or airbags. *Id*. at 36. The agency determined that "detachable automatic belts" would not be effective as originally determined because "many individuals will detach the mechanism" and decline to use a seatbelt at all. *Id*. at 47. At the same time, "the agency again acknowledged the life-saving potential of the airbag." *Id*. Yet it proceeded to rescind the entire rule, without considering whether it should simply alter the rule to require airbags alone. *Id*. The Supreme Court held that requiring airbags

alone was not just any "policy alternative." *Id*. at 51. Rather, it was "a technological alternative within the ambit of the existing standard," which the NHTSA was required to consider. *Id*. In other words, if a regulation requires regulated parties to do either A or B, and the agency determines that A is not effective after all, it must consider whether requiring B alone would be effective, before rescinding the entire rule. That is the same commonsense rationale that governed in the DACA case (*Regents*, 140 S. Ct. at 1913) and in *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983).

The NEPA Rule does not violate the principles recognized in these cases, because CEQ did not rescind or roll back the procedural framework through which it has implemented NEPA. Agencies undertaking major federal actions with a significant impact on the environment must still prepare environmental impact statements, and so forth. With the NEPA Rule, CEQ has simply clarified and simplified the terms in its regulations to improve the program's efficiency, while preserving its function of ensuring robust environmental review of federal actions.

Plaintiffs insist that CEQ nevertheless was required to identify and evaluate an array of their preferred policy alternatives for solving the problems that CEQ had identified—many of which, like "advocating for additional funding and oversight of NEPA implementation" (PI Mem. 71), are not regulatory in nature and would require Congressional action. Again, that is not the law; the APA does not "broadly require an agency to consider all policy alternatives in reaching decision." *State Farm*, 463 U.S. at 51. Here, CEQ's regulatory revisions were carefully considered and rationally justified. No more is required. *Fox Television*, 556 U.S. at 514-516.

CONCLUSION

The Court should deny plaintiffs' motion for a preliminary injunction.

Dated: September 2, 2020

Respectfully submitted,

/s/ *Joshua D. Rogaczewski*

MICHAEL B. KIMBERLY*
JOSHUA D. ROGACZEWSKI
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
jrogaczewski@mwe.com
mkimberly@mwe.com

Attorneys for Defendants-Intervenors

**pro hac vice*

CERTIFICATE OF SERVICE

I certify that on September 2, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification of such filing to all counsel of record.

/s/ *Joshua D. Rogaczewski*