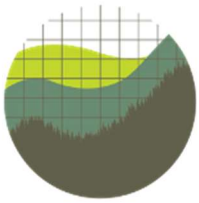

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

September 29, 2023

To: Council on Environmental Quality

Subject: National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924 (CEQ–2023–0003) (proposed July 31, 2023)

The Institute for Policy Integrity at New York University School of Law (Policy Integrity)[1] respectfully submits the following comments to the Council on Environmental Quality (CEQ) regarding the proposed National Environmental Policy Act implementing regulations (Proposed Rule).[2] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

The Proposed Rule reflects a more holistic approach to informing agency decisions with a robust and balanced analysis of environmental impacts. Notably, this approach includes impacts on climate change and environmental justice, which are both frequently and unjustifiably overlooked in federal permitting decisions. CEQ can and should improve upon its proposal in several key ways that will help ensure the robust and balanced treatment of environmental impacts in reviews conducted under the National Environmental Policy Act (NEPA). Specifically, this comment offers the following insights and recommendations:

- **The Proposed Rule's treatment of climate change, environmental justice, transboundary impacts, and alternatives is consistent with judicial and regulatory precedent** and represents a sensible approach to ensuring that agencies robustly assess key environmental impacts under NEPA.
- **CEQ should incorporate certain general principles from its recent greenhouse gas guidance[3] into the NEPA implementing regulations**—namely, the importance of quantifying and contextualizing environmental effects.
- CEQ should amend § 1502.22 of the NEPA implementing regulations to recognize that **cost-benefit analysis can be useful and appropriate even when some benefits or costs are unmonetized**.
- CEQ should amend §§ 1502.21 and 1502.23 to **more clearly specify that the standards for scientific accuracy and incomplete information apply to environmental assessments.**

[1] This document does not purport to present the views, if any, of New York University School of Law.
[2] National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49,924 (CEQ–2023–0003) (proposed July 31, 2023) (hereinafter Proposed Rule).
[3] National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023) (hereinafter Interim Guidance).

- CEQ should amend § 1505.2 to **require agencies to explain why they did not select the environmentally preferable alternative** when they did not.
- CEQ should further amend § 1502.23 to **clarify that agencies should use projections appropriate to the geographic scope of the effect being analyzed when available**, and should consider other relevant projections when an appropriately scaled projection is not available so that those effects are also afforded a hard look.
- CEQ should bolster its regulatory impact analysis (RIA) by **discussing further why it repudiates many of the findings from its 2020 RIA** and **providing more reasoning to reinforce its conclusion that benefits justify costs**.

Following a short background section, we expand upon these points below.

Background

CEQ published the Proposed Rule in July 2023, among other reasons, "to provide for an effective environmental review process that promotes better decision making . . . grounded in science, including consideration of relevant environmental, climate change, and environmental justice effects."[4] The proposed rule would comprehensively update the implementing regulations that agencies use to conduct environmental reviews under NEPA.[5]

If finalized, the Proposed Rule would mark the second comprehensive update to the NEPA implementing regulations since 2020. In July 2020, CEQ issued a regulation (2020 Rule) that sought to emphasize "efficient" and "timely" NEPA reviews[6] but also drew criticism for inappropriately curtailing consideration of key environmental effects.[7] In 2022, CEQ finalized a regulation (2022 Rule) rescinding three provisions of the 2020 Rule "that pose[d] significant near-term interpretation or implementation challenges."[8] In that rule, known as the Phase 1 rule, CEQ also expressed its intent to engage in "more comprehensive Phase 2 rulemaking" that would "advance environmental, climate change mitigation and resilience, and environmental justice objectives," among others.[9]

The Proposed Rule serves as this Phase 2 rulemaking. It includes provisions aimed at enhancing analyses of climate change mitigation, climate change resilience, and environmental justice. With respect to climate change mitigation and resilience, for instance, the Proposed Rule would amend the definition of "effects" that agencies must consider under NEPA to expressly "include climate change-related effects, including the contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the

[4] Proposed Rule, 88 Fed. Reg. at 49,924.
[5] CEQ's regulations also inform each agency's environmental-review regulations. *See* 40 C.F.R. § 1500.6 (calling upon each agency to "ensure full compliance with the purposes and provisions of the Act" and "[CEQ's] regulations."
[6] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (hereinafter 2020 Rule).
[7] *E.g.*, Inst. for Pol'y Integrity, Comments on Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (Mar. 10, 2020).
[8] National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453, 23,455 (Apr. 20, 2022).
[9] *Id.* at 23,455–56.

proposed action and its alternatives."[10] Of particular relevance for climate change, the Proposed Rule recognizes that relevant effects may occur well "beyond the immediate area of the action," including at a global scale.[11]

The Proposed Rule would also codify the current regulatory practice of considering environmental justice impacts under NEPA, requiring agencies to assess the "degree to which the action [under review] may have disproportionate and adverse effects on communities with environmental justice concerns."[12] And with respect to the consideration of alternatives, the Proposed Rule would again permit agencies to analyze "reasonable alternatives not within the jurisdiction of the lead agency"[13]—resuming an established practice that the 2020 Rule forbid—and require them to identify the environmentally preferable alternative in an environmental impact statement.[14]

The Proposed Rule also includes numerous revisions that could reduce burdens on agencies initiating projects that may not have a significant adverse environmental impact, such as certain renewable energy infrastructure. Those provisions, while significant, are not the subject of this comment letter.

I. The Proposed Rule's Treatment of Climate Change, Transboundary Impacts, Environmental Justice, and Alternatives Is Consistent with Caselaw and Regulatory Practice

Some industry groups and advocacy organizations have questioned whether NEPA permits agency consideration of climate impacts, transboundary impacts, environmental justice, and alternatives beyond the agency's jurisdiction. All of these considerations lie within NEPA's proper ambit, as CEQ has recognized with this rulemaking.

Below, we offer a short discussion of the history and caselaw supporting each consideration. As those sections indicate, agencies at a minimum may—and, in at least some cases must—account for these important considerations in environmental review.

A. Climate Change

It is well established that agencies certainly may—and in fact, in at least most cases, must—consider impacts on climate change under NEPA. Under NEPA, agencies must assess all "reasonably foreseeable environmental effects of the proposed agency action."[15] Effects on climate change undeniably qualify as "environmental effects."[16] Accordingly, so long as they are "reasonably foreseeable," impacts on climate change must be assessed under NEPA.

CEQ has repeatedly and explicitly recommended through guidance dating back to 2010 that agencies must normally consider climate change under NEPA—including both the "effects of a proposed action" on climate change and the "relationship of climate change effects to a proposed

[10] Proposed Rule, 88 Fed. Reg. at 49,986 (proposed § 1508.1(g)(4)).
[11] *Id.* at 49,935.
[12] *Id.* at 49,969 (proposed § 1501.3(d)(2)(ix)).
[13] *Id.* at 49,977 (proposed § 1502.14(a)).
[14] *Id.* (proposed § 1502.14(f)).
[15] 42 U.S.C. § 4331(C)(i).
[16] *See* Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 510 (2007) (quoting without objection that "climate change will have serious adverse effects on human health and the environment").

action or alternatives."[17] Numerous court decisions confirm the importance of considering climate change under NEPA. For instance, a number of court decisions fault agencies for failing to adequately consider a project's impact on climate change—effectively confirming that such impacts fall within NEPA's mandate.[18] Federal courts have also repeatedly recognized the appropriateness of considering the relationship of climate change effects to a proposed action under NEPA.[19]

Accordingly, climate change effects clearly qualify as "environmental effects" under NEPA and must be assessed so long as they are reasonably foreseeable. CEQ appropriately proposes numerous revisions that would enable agencies to more sensibly account for climate change in environmental review and decisionmaking. These include CEQ's proposal to revise the regulations to better account for climate change-related effects on the project and environment, namely changes to provisions concerning reasonable alternatives (§ 1500.2), significance of short- and long-term effects (§ 1501.3), environmental consequences (§ 1502.16), methodology and scientific accuracy (§ 1502.23), monitoring and compliance plan requirements for mitigation components of proposed actions (§ 1505.3), and the definition of effects (§ 1508.1).

B. Transboundary Impacts

It is also well established that agencies may—and, in at least some cases, must—assess transboundary environmental impacts under NEPA.

NEPA requires agencies to "recognize the worldwide and long-range character of environmental problems, and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment."[20] Consistent with this mandate, agencies have long considered transboundary effects in environmental review. Executive Order 12,114, signed in 1979, instructs agencies to "take into consideration" effects of their actions on the "environment of the global commons outside the

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[17] *See* Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions (Feb. 18, 2010), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf. Numerous subsequent iterations of this guidance have all reaffirmed that climate change effects require analysis under NEPA—including the 2019 draft guidance issued by the Trump administration. *See* Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30,097, 30,098 (June 26, 2019) (providing guidance on "assessing potential climate effects" under NEPA). *See also* Final Guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change 2 (issued Aug. 1, 2016; withdrawn Apr. 5, 2017) ("Climate change is a fundamental environmental issue, and its effects fall squarely within NEPA's purview."); Notice of Rescission of 2019 Guidance on Consideration of Greenhouse Gas Emissions, 86 Fed. Reg. 10252 (Feb. 19, 2021) (directing that "agencies should consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions); Interim Guidance, 88 Fed. Reg. at 1197.

[18] *See, e.g.*, Diné Citizens Against Ruining Our Env't v. Haaland, 59 F.4th 1016, 1039–44 (10th Cir. 2023); 350 Mont. v. Haaland, 50 F.4th 1254, 1264–70 (9th Cir. 2022); Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1215–16 (9th Cir. 2008).

[19] Courts have frequently deferred to agencies on what constitutes an adequate analysis, and have not questioned the appropriateness of considering climate vulnerability and resilience effects under NEPA. *E.g.* Cent. Oregon Landwatch v. Connaughton, 696 Fed. App'x 816, 819–20 (9th Cir. 2017); Ctr. for Biological Diversity v. Kempthorne, 588 F.3d 701, 711–12 (9th Cir. 2009). Considering this analysis integral to satisfying NEPA, a federal court found that an agency's environmental review inadequately considered the effects of climate change on the project. AquAlliance v. U.S. Bureau of Reclamation, 2018 WL 903746, at *38–39 (E.D. Cal. 2018).

[20] 42 U.S.C. § 4332(2)(I).

jurisdiction of any nation," "the environment of a foreign nation," and "natural or ecological resources of global importance."[21] And in 1997, CEQ issued guidance recognizing that "NEPA requires agencies to include analysis of reasonably foreseeable transboundary effects."[22]

Some court decisions affirm that NEPA does not permit agencies to ignore the environmental impacts of covered actions that occur outside domestic borders. Most notably, in *Massey v. Environmental Defense Fund*, the D.C. Circuit held that NEPA required the National Science Foundation to consider environmental impacts before proceeding with plans to incinerate food waste in Antarctica, rejecting the agency's argument that such effects fall outside NEPA's purview due to the presumption against extraterritoriality.[23] The court found that "Congress, when enacting NEPA, was concerned with worldwide as well as domestic problems facing the environment."[24] Numerous other courts have followed the D.C. Circuit's lead in concluding that NEPA requires analysis of transboundary effects.[25]

To be sure, some courts have suggested that the question merits a case-by-case inquiry,[26] and case law on the issue is not entirely consistent.[27] Nonetheless, in light of the precedents above, it is widely established that, at a minimum, NEPA permits (if not requires) agencies to consider reasonably foreseeable transboundary effects.

C. Environmental Justice

There is also extensive precedent dating back nearly thirty years for considering environmental justice impacts under NEPA. Once again, it is clearly established that agencies may consider environmental justice under NEPA—and a strong argument that, in at least many circumstances, they must do so.

Executive Order 12,898, issued in 1994, calls on "each federal agency" to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[28] A concurrent presidential memorandum specifically called upon each agency to analyze impacts on environmental justice under NEPA "whenever feasible."[29] Since 1997, CEQ guidance has "further assist[ed] Federal agencies with their NEPA procedures so that environmental justice concerns are effectively identified and addressed."[30]

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[21] Exec. Order No 12,114 § 2-3, 44 Fed. Reg. 1957, 1957–58 (Jan. 9, 1979).
[22] Council on Env't Quality, Guidance on NEPA Analyses for Transboundary Impacts (July 1, 1997).
[23] Env't Def. Fund, Inc. v. Massey, 986 F.2d 528, 533 (D.C. Cir. 1993).
[24] *Id.* at 536.
[25] *E.g.*, Gov't of Man. v. Salazar, 691 F. Supp. 2d 37, 51 (D.D.C. 2010); Backcountry Against Dumps v. U. S. Dep't of Energy, No. 3:12-cv-03062-L-JLB, 2017 WL 3712487, at *3 (S.D. Cal. Aug. 29, 2017).
[26] *E.g.*, Greenpeace USA v. Stone, 748 F. Supp. 749, 759 (D. Haw. 1990) ("Congress intended to encourage federal agencies to consider the global impact of domestic actions and may have intended under certain circumstances for NEPA to apply extraterritorially.").
[27] *See* Mayaguezanos por la Salud y el Ambiente v. United States, 198 F.3d 297, 301 n.8 (1st Cir. 1999) (collecting case law going both directions); Hirt v. Richardson, 127 F. Supp. 2d 833, 844 (W.D. Mich. 1999) (same); Jeffrey E. Gonzalez-Perez & Douglas A. Klein, The International Reach of the Environmental Impact Statement Requirement of the National Environmental Policy Act, 62 GEO. WASH. L. REV. 757, 760 (1994) ("There is no consensus about whether NEPA applies extraterritorially.").
[28] Exec. Order No. 12,898 § 1-101, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994).
[29] Memorandum on Environmental Justice, 30 Weekly Comp. Pres. Doc. 279, 280 (Feb. 11, 1994).
[30] CEQ, Environmental Justice Guidance Under the National Environmental Policy Act 1 (Dec. 10, 1997).

More recently, President Biden's Executive Oder 14,096 reaffirmed the policies of Executive Order 12,898[31] and directed that agencies' NEPA reviews "analyze[] direct, indirect, and cumulative effects of Federal actions on communities with environmental justice concerns;" "consider[] best available science and information on any disparate health effects (including risks) arising from exposure to pollution and other environmental hazards;" and "provide[] opportunities for early and meaningful involvement in the environmental review process by communities with environmental justice concerns potentially affected by a proposed action."[32]

Moreover, courts have underscored the importance of agencies' considering environmental justice impacts under NEPA. In particular, at least three court decisions—including a 2021 decision from the U.S. Court of Appeals for the D.C. Circuit—rejected an agency's inadequate assessment of environmental justice under NEPA's "hard look" requirement.[33] These decisions further illustrate the importance of considering environmental justice under NEPA.

Finally, NEPA's legislative history further supports considering environmental justice as a core principle under the statute. The statute's legislative reports emphasize that NEPA was intended "to preserve environmental values in the larger public interest"[34] by addressing such problems as "the indiscriminate siting of steam fired powerplants and other units of heavy industry"[35] and the construction of "highways, airports, and other public works projects which proceed without reference to the desires and aspirations of local people."[36]

D. Alternatives Beyond the Agency's Jurisdiction

It is also established that agencies may—and, in at least some cases, must—consider alternatives beyond the agency's jurisdiction.

This principle was established as early as 1972, just two years after Congress passed NEPA, in the D.C. Circuit case *Natural Resources Defense Council v. Morton*. There, the D.C. Circuit recognized that NEPA mandates consideration of "reasonably available" alternatives and specifically rejected the government's claim that "this requires a limitation to measures the agency or official can adopt."[37] In particular, the court explained that consideration of alternatives beyond the agency's jurisdiction is needed "[w]hen the proposed action is an integral part of a coordinated plan to deal with a broad problem," as doing so would allow interested stakeholders to better assess a broad range of solutions.[38]

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[31] Exec. Order No. 14,096 § 3(a), 88 Fed. Reg. 25,251, 25,253 (Apr. 26, 2023).
[32] *Id.* § 3(a)(ix).
[33] California v. Bernhardt, 472 F. Supp. 3d 573, 621–22 (N.D. Cal. 2020) (finding NEPA's "hard look" requirement was not met when BLM concluded there would be no significant impact on minority or low-income populations while ignoring contrary evidence in the record); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101, 140 (D.D.C. 2017) (holding agency's "bare-bones" environmental justice analysis concluding that Tribe would not be disproportionately harmed violated NEPA's hard look requirement); Vecinos para el Bienestar de la Comunidad Costera v. Fed. Energy Reg. Comm'n, 6 F.4th 1321, 1330–31 (D.C. Cir. 2021) (finding FERC's decision to limit its environmental justice analysis under NEPA to communities within two miles of certain fossil fuel-related infrastructure to be arbitrary and capricious because FERC also determined that environmental impacts would extend beyond this two-mile radius).
[34] S. Rep. 91-296 at 5 (1969).
[35] *Id.* at 8.
[36] *Id.*
[37] Nat. Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972).
[38] *Id*. at 835.

Consistent with this caselaw, CEQ's original regulations promulgated in 1978 required agencies to "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency."[39] This provision remained in effect for over 40 years until its rescission in the 2020 Rule.[40] Accordingly, the Proposed Rule's reminder that agencies should consider alternatives outside the agency's jurisdiction finds extensive support in longstanding practice and precedent.

II. CEQ Should Codify the Greenhouse Gas Guidance's Focus on Quantification and Contextualization in the NEPA Implementing Regulations

In the Proposed Rule, CEQ "invites comment on whether it should codify any or all of its 2023 [greenhouse gas] guidance, and, if so, which provisions of part 1502 or other provisions of the regulations CEQ should amend."[41] Accordingly, this section specifies several key recommendations from its greenhouse gas guidance (Interim Guidance) that CEQ should codify as key components of agencies' analytical frameworks. Specifically, CEQ should codify the importance of quantification and contextualization as part of NEPA's required assessment of environmental impacts.

In particular, Section IV of the Interim Guidance identifies three steps for assessing the climate change effects of proposed actions: 1) quantifying total greenhouse gas emissions from each alternative; 2) contextualizing those emissions through monetization and other relevant metrics; and 3) mitigating those emissions by selecting less-emitting alternatives or other mitigation measures.[42] The third step (mitigation) is sufficiently captured in the Proposed Rule.[43] Yet the first two are barely mentioned, despite quantification and contextualization being critical analytical predicates for assessing any environmental impact.

CEQ should expressly incorporate quantification and contextualization into Section 1502.16 of the implementing regulations, as these reflect best practices for all environmental impacts, not just climate effects. In particular, CEQ should add a second paragraph to § 1502.16(a)(1), which discusses the need for agencies to describe environmental consequences in an environmental impact statement. We offer the following language for consideration (note: throughout this letter, proposed insertions are in red and proposed deletions are in blue):

> **Add to § 1502.16(a)(1):** Analysis of the reasonably foreseeable environmental effects of the proposed action and reasonable alternatives, and their significance, should include, to the extent practicable, quantification of those effects and contextualization of those effects in terms of their real-world impacts on the human environment. When available, high-quality monetized values of environmental effects, including climate effects, should be provided as part of this contextualization. If the agency determines quantification or contextualization to be impracticable or infeasible, it should explain that determination.

This language reflects best practices for all environmental impacts, not just greenhouse gas emissions. Like greenhouse gas emissions, analyzing any environmental impacts typically begins

[39] National Environmental Policy Act—Regulations, 43 Fed. Reg. 55,984, 55,998 (Nov. 29, 1978) (promulgating § 1502.14(c)) (hereinafter 1978 Implementing Regulations).
[40] 2020 Rule, 85 Fed. Reg. at 43,330.
[41] Proposed Rule, 88 Fed. Reg. at 49,945.
[42] Interim Guidance, 88 Fed. Reg. at 1200–01.
[43] *E.g.*, Proposed Rule, 88 Fed. Reg. at 49,977 (proposed § 1502.14(e) and § 1502.16(a)(11)).

with quantifying that impact.[44] Likewise, with any environmental impact, proper contextualization "help[s] decision makers and the public understand proposed actions' potential" effects.[45] Indeed, NEPA requires agencies to "reveal the meaning of [environmental] impacts in terms of human health or other environmental values" and not merely provide estimates of quantified emissions.[46] And for all environmental impacts, monetization can "give[] decision makers and the public useful information and context" about environmental effects that can otherwise be "difficult to understand and assess . . . in the abstract."[47] Beyond climate impacts, agencies frequently value other environmental impacts in regulatory cost-benefit analysis such as the health impacts from local pollution[48] and effects on ecosystem services.[49]

Such a provision would recognize the Interim Guidance's focus on quantification and contextualization as best analytical practices across impact areas without being unduly onerous. In particular, by incorporating the language of "to the extent practicable" and "high-quality" science from other provisions of the guidance, the proposed insertion would ensure that agencies follow best practices when feasible but not conduct time-consuming and potentially unhelpful analysis when reliable information is unavailable.

Additionally, CEQ may wish to incorporate similar principles into other parts of the implementing regulations, including the significance determination (§ 1501.3(d)) and definition of "effects" (§ 1508.1(g)).

III. CEQ Should Amend Section 1502.22 to Reflect Best Practices in Cost-Benefit Analysis and to Clarify that Monetization Can Provide Useful Context

CEQ proposes to retain language from its 1978 and 2020 regulations urging that agencies "should not" "display the weighing of the merits and drawbacks of the various alternatives in a monetary cost-benefit analysis . . . when there are important qualitative considerations."[50] This statement suggests that the presence of important unmonetized effects render a cost-benefit analysis unhelpful and counter-productive. CEQ should pare that back.

It is widely accepted that a comparison of monetized costs to monetized benefits could be misleading when major costs or benefits have not been monetized, which is perhaps what this regulatory language intended to reflect. In such cases, unmonetized effects should still be given due weight in the decisionmaking process, which means that the agency should not consider and compare *only* monetized values. That is consistent with leading federal guidance on cost-benefit analysis.[51]

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[44] *See* Interim Guidance, 88 Fed. Reg. at 1201–02 (discussing the importance of quantification).
[45] *Id.* at 1202.
[46] Nat. Res. Def. Council v. Nuclear Regul. Comm'n, 685 F.2d 459, 486–87 (D.C. Cir. 1982), *rev'd on other grounds*, Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 106–07 (1983).
[47] *See* Interim Guidance, 88 Fed. Reg. at 1202 (discussing application of social cost of greenhouse gases).
[48] *See, e.g.*, OFF. OF INFO. & REGUL. AFF'S, CIRCULAR A-4: REGULATORY ANALYSIS 29–31 [hereinafter CIRCULAR A-4] (discussing valuation of mortality risks in cost-benefit analysis).
[49] *See, e.g.*, OFF. OF INFO. & REGUL. AFF'S, GUIDANCE FOR ASSESSING CHANGES IN ENVIRONMENTAL AND ECOSYSTEM SERVICES IN BENEFIT-COST ANALYSIS: DRAFT FOR PUBLIC REVIEW (Aug. 2023).
[50] Proposed Rule, 88 Fed. Reg. at 49,978. CEQ invites comment on whether to amend this provision but does not propose any substantive amendments. *Id.* at 49,944–45.
[51] *See* CIRCULAR A-4, *supra* note 48, at 27 (2003) ("You should carry out a careful evaluation of non-quantified benefits and costs."); OFF. OF INFO. & REG. AFFS., CIRCULAR A-4: DRAFT FOR PUBLIC REVIEW 43 (2023)

But Section 1502.22 goes further than urging care in interpreting the results of a monetary cost-benefit analysis. In its current iteration, it indicates that such an analysis is *not worth doing at all* when important unmonetized effects exist. That is not consistent with leading guidance, which urges carefully thinking though unmonetized effects *within* a cost-benefit analysis.[52] Because cost-benefit analysis, when done properly, can and should capture unmonetized effects and give them due weight, CEQ should not suggest avoiding cost-benefit analysis when important unmonetized effects exist. It should limit its guidance to avoiding relying solely on monetized values in such cases, mirroring federal guidance on cost-benefit analysis.[53]

Moreover, as outlined above in Section II, monetized values can provide important context regarding the magnitude of a harm, such as the harm stemming from marginal greenhouse gas emissions.[54] There is a risk that agencies could read Section 1502.22's permission not to do cost-benefit analysis—and, if retained, its urging not to do it when important unquantified effects exist—as downplaying the usefulness of any monetized values. CEQ should add a sentence that avoids that sort of implication, consistent with its Interim Guidance.[55]

Finally, CEQ should refer to considerations without an assigned monetary value as "unmonetized" rather than "qualitative." This change would reflect that some unmonetized effects are not inherently qualitative or (by implication) categorically unmonetizable but rather could potentially be monetized given further data or analytical methods.

For consideration, we offer the following proposed amendments to Section 1502.22:

> **Revise § 1502.22:** . . . For purposes of complying with the Act, agencies need not display the weighing of the merits and drawbacks of the various alternatives in a monetary cost-

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[hereinafter DRAFT CIRCULAR A-4 UPDATE] ("When it is not possible to quantify or monetize all of the important benefits and costs of a regulation, the most advantageous policy will not necessarily be the one with the largest quantified and monetized net-benefit estimate. In such cases, you should exercise professional judgment in determining how important the non-quantified benefits or costs may be in the context of the overall analysis."); OFF. OF MGMT. & BUDGET, CIRCULAR A-94: GUIDELINES AND DISCOUNT RATES FOR BENEFIT-COST ANALYSIS OF FEDERAL PROGRAMS 4 (1994) [hereinafter CIRCULAR A-94] ("A comprehensive enumeration of the different types of benefits and costs, monetized or not, can be helpful in identifying the full range of program effects."); OFF. OF MGMT. & BUDGET, CIRCULAR A-94: DRAFT FOR PUBLIC REVIEW 4 (2023) [hereinafter DRAFT CIRCULAR A-94 UPDATE] ("When there are important costs or benefits that cannot be monetized, discounted net benefits are not fully computable. In these cases, discounted net benefits will not fully reflect the effect of a program on social welfare, and a comprehensive enumeration of the different types of benefits and costs, monetized or not, can be helpful in identifying the full range of program effects (for example, distributional effects, where relevant and appropriate).").

[52] *See* CIRCULAR A-4, *supra* note 48, at 27 (suggesting ways to account for unmonetized and unquantified effects); DRAFT CIRCULAR A-4 UPDATE, *supra* note 51, at 45–47 (same, and discussing break-even, threshold, screening, and order-of-magnitude analyses in particular); CIRCULAR A-94, *supra* note 51, at 4–5 (same); DRAFT CIRCULAR A-94 UPDATE, *supra* note 51, at 4–5 (same, and suggesting threshold and break-even analyses in particular).

[53] *See supra* note 51.

[54] *See also* The White House, Fact Sheet: Biden-Harris Administration Announces New Actions to Reduce Greenhouse Gas Emissions and Combat the Climate Crisis (Sept. 21, 2023) (explaining that monetizing climate damages better "facilitates the comparison of alternative policies with different emissions profiles" and recommending monetization in a wide variety of contexts, including NEPA analysis).

[55] Interim Guidance, 88 Fed. Reg. at 1211 ("Agencies can use the [social cost of greenhouse gases] to provide information on climate impacts even if other costs and benefits cannot be quantified or monetized."); *id.* at 1202 ("The [social cost of greenhouse gases] provides an appropriate and valuable metric that gives decision makers and the public useful information and context about a proposed action's climate effects even if no other costs or benefits are monetized, because metric tons of GHGs can be difficult to understand and assess the significance of in the abstract.").

benefit analysis and should avoid referring only to monetized values ~~not do so~~ when there are important unmonetized ~~qualitative~~ considerations. However, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, that are likely to be relevant and important to a decision. Nothing in this section should be interpreted to limit the use of high-quality monetized values of environmental effects, including climate effects.

IV. CEQ Should Amend Section 1505.2 to Require Explanation When an Agency Chooses Not to Adopt the Environmentally Preferable Alternative

The Proposed Rule takes the important step of requiring agencies to identify the environmentally preferable alternative as part of the environmental impact statement (which is subject to public comment) and not merely in the record of decision (which is not).[56] The Proposed Rule also clarifies that the no-action alternative can serve as the environmentally preferable alternative,[57] an idea that some agencies struggle with.[58]

CEQ should go further by requiring agencies, in the record of decision, to discuss whether it adopted the environmentally preferable alternative and provide an explanation when it did not. This would help reinforce the primary purpose of identifying the environmentally preferable alternative in the first place—and the purpose of NEPA more generally—which seeks to ensure that the agency "consider[s] whether the decision accords with the Congressionally declared policies of [NEPA]"[59] and "focus[es] attention on" promoting "better environmental decisionmaking."[60]

For consideration, we offer the following proposed language for insertion at the end of Section 1505.2(b):

> **Add to § 1505.2(b):** The agency should state whether it has adopted the environmentally preferable alternative, and if has not adopted that alternative, explain why it did not.

This requirement would be consistent with Section 1505.2's structure. First, that section already requires agencies to "discuss preferences among alternatives based on relevant factors including environmental, economic, and technical considerations and agency statutory missions."[61] Second, the section also requires particular attention to and explanation of environmental factors, requiring analysis in the record of decision of "whether the agency has adopted all practicable

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[56] Proposed Rule, 88 Fed. Reg. at 49948–49 (proposing to require analysis of environmentally preferable alternative in summary section and alternatives c).
[57] *Id.* at 49949 ("[T]he environmentally preferable alternative may be the proposed action, no action alternative, or a reasonable alternative.").
[58] *See, e.g.* Bureau of Land Mgmt., Willow Master Development Plan Record of Decision 8–9 (2023) (identifying Alternative E Option 3, which has "the fewest total greenhouse gas emissions of all the action alternatives" but emits over 200 million tons of carbon dioxide equivalent more than the no-action alternative, as the environmentally preferable alternative); Dep't of Energy, Final Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations, DOE Order No. 3643-A at 52 (2020) (omitting the no-action alternative from consideration in identifying proposed export as "the environmentally preferred alternative to meet the Project's objectives").
[59] Council on Env't Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations 6, 46 Fed. Reg. 18026 (Mar. 23, 1981), as amended (1986).
[60] 1978 Implementing Regulations, 43 Fed. Reg. at 55984.
[61] Proposed Rule, 88 Fed. Reg. at 49981 (proposed § 1505.2(b)). The Proposed Rule would slightly modify this sentence by adding the word "environmental."

means to mitigate environmental harm from the alternative selected, and if not, why the agency did not."[62] It would also provide additional transparency and further aid the public in understanding what informs the agency's thinking.

In addition to furthering the purposes of NEPA, this requirement would also help agencies satisfy the Administrative Procedure Act's requirement that agencies "articulate a satisfactory explanation" for their actions that includes "consideration of the relevant factors."[63]

V. CEQ Should Further Clarify that the Regulatory Standards for Scientific Accuracy and Incomplete Information Apply to Environmental Assessments

The Proposed Rule helpfully provides that "[a]gencies generally should apply the provisions of §§ 1502.21 [regarding incomplete or unavailable information] and 1502.23 [regarding methodology and scientific accuracy] to environmental assessments."[64] This proposed change is both smart policy—as careful scientific analysis is often required to assess whether an effect is significant in the first place[65]—and consistent with longstanding NEPA jurisprudence.[66]

To ensure that this change is properly implemented, CEQ should make several clarifying edits. First, CEQ should remove the word "generally" from this sentence of the Proposed Rule, as the meaning of this word is unclear and it may raise ambiguity about the degree to which compliance with those two provisions is required.

> **Revise § 1501.5(h)(i):** Agencies ~~generally~~ should apply the provisions of §§ 1502.21 and 1502.23 to environmental assessments.

Second, CEQ should cross-reference this requirement in both §§ 1502.21 and 1502.23 themselves (which on their face concern only environmental impact statements) to eliminate any possibility that agencies or practitioners could overlook this requirement. CEQ should also remove references in §§ 1502.21 and 1502.23 to "significant" environmental effects, which are specific to an environmental impact statement and do not include impacts in an environmental assessment (which by definition are not significant) or non-significant impacts in an environmental impact statement.

> **Revise § 1502.21:** (a) When an agency is evaluating reasonably foreseeable ~~significant~~ adverse effects on the human environment in an environmental impact statement or environmental assessment, and there is incomplete or unavailable information, the agency shall make clear that such information is lacking. (b) If the incomplete information

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[62] Proposed Rule, 88 Fed. Reg. at 49,981 (proposed § 1505.2(c)). The Proposed Rule would slightly modify this provision by inserting "mitigate" in place of "avoid or minimize."
[63] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
[64] Proposed Rule, 88 Fed. Reg. at 49,970 (proposing § 1501.5(h)(i)).
[65] *See* Dena Adler & Max Sarinsky, Inst. for Pol'y Integrity, Ensuring Robust Consideration of Climate Change Under NEPA: Six Priorities for CEQ's Phase 2 Rulemaking 7 (2022) ("The current limited application of 40 C.F.R. § 1502.21 to impacts that the agency has deemed significant is also illogical, since those requirements can be instrumental to the determination of whether an impact is significant in the first place.").
[66] In one key case prior to the 1978 regulations, for instance, the D.C. Circuit applauded the U.S. Atomic Energy Commission for using sophisticated research methods to determine the risk of a severe reactor accident to be "extremely low." Carolina Env't Study Grp. v. United States, 510 F.2d 796, 799–800 (D.C. Cir. 1975). As this case demonstrates, it is appropriate for agencies to deploy rigorous research methods not only to assess the severity of impacts that the agency has already determined to be significant, but also to assess whether an impact is significant in the first place.

relevant to reasonably foreseeable ~~significant~~ adverse effects is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable, the agency shall include the information in the environmental impact statement or environmental assessment. (c) If the information relevant to reasonably foreseeable ~~significant~~ adverse effects cannot be obtained because the overall costs of obtaining it are unreasonable or the means to obtain it are not known, the agency shall include within the environmental impact statement or environmental assessment: (1) A statement that such information is incomplete or unavailable; (2) A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable ~~significant~~ adverse effects on the human environment; (3) A summary of existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable ~~significant~~ adverse effects on the human environment; and (4) The agency's evaluation of such effects based upon theoretical approaches or research methods generally accepted in the scientific community. (d) For the purposes of this section, "reasonably foreseeable" includes effects that have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the effects is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

Add as § 1502.23(d): This provision applies to both environmental impact statements and environmental assessments.

VI. CEQ Should Further Amend Section 1502.23 to Clarify the Need to Consider the Affected Environment and Environmental Consequences Based on Analysis at the Appropriate Geographic Scope and Spatial Scale

As discussed above, NEPA's requirement to consider "environmental effects" includes climate change-related effects.[67] However, agency practice has historically fallen short when considering climate-change-related effects on the project and affected environment (e.g., increased flooding risk to a project from sea-level rise and more extreme precipitation events, or increased stress on wildlife from drought in combination with water extraction from a project.).[68] Agencies have repeatedly cited a lack of information on these climate-change-related effects to explain their incomplete review.[69] Given the increasing significance of climate-change-related effects on the environment, communities, and infrastructure, this failure to consider those effects threatens the

[67] *See, e.g.,* Adler & Sarinsky, *supra* note 65, at 2 n.11 (providing examples of federal courts considering the adequacy of agency NEPA review of climate change-related effects on the affected environment and environmental consequences); Romany M. Webb et al., Sabin Ctr. for Climate Change Law, Evaluating Climate Risk in NEPA Reviews: Current Practices and Recommendations for Reform 22–25 (2022) (discussing how review of climate change-related effects on the project and affected environment is consistent with the statutory purpose of NEPA, case law, regulatory requirements, and previous CEQ guidance); CEQ 2016 Climate Guidance at 4, 20–25; Interim Guidance, 88 Fed. Reg. at 1197, 1207–10.

[68] Webb et al., *supra* note 67, at 35–50; *see also* Jessica Wentz et al., Sabin Ctr. for Climate Change Law & Env't Def. Fund, Survey of Climate Change Considerations in Federal Environmental Impact Statements, 2012–2014 (2016); Saloni Jain et al., Sabin Ctr. for Climate Change Law, How Did Federal Environmental Impact Statements Address Climate Change in 2016? (2017); Jessica Wentz, Assessing the Impacts of Climate Change on the Built Environment Under NEPA and State EIA Laws: A Survey of Current Practices and Recommendations for Model Protocols, 35 ENV'T L. REP. 11,105 (2015); Patrick Woolsey, Sabin Ctr. for Climate Change Law, Consideration of Climate Change in Federal EISs, 2009-2011 (2012); Aimee Delach et al., Defenders of Wildlife, Reasonably Foreseeable Futures: Climate Change, Adaptation and NEPA (2013).

[69] *See* Adler & Sarinsky, *supra* note 65, at 9 nn.43–45.

fundamental reasonableness of an environmental review and the broader goals of NEPA to support environmental stewardship.[70]

This failure is also not supported by science. Extensive new scientific developments support agencies' ability to use their expertise in these analyses, acknowledge relevant uncertainties and limitations in the methodology, and make an informed estimate of the effects of climate change on the proposed project (rather than assume no such effects). Reflecting these developments and others, the Proposed Rule would appropriately amend Section 1502.23 to clarify the need to "use projections when evaluating the reasonably foreseeable effects, including climate-change-related effects," including projections that "employ mathematical or other models that project a range of possible future outcomes."[71] These changes are important because they clarify the need to consider future climate-change-related effects (rather than purely historical data that incompletely projects future conditions) using appropriate mathematical models.[72] This proposed revision also lends appropriate support to the use of mathematical models that analyze the impacts of a project's greenhouse gas emissions on the global climate, like the social cost of greenhouse gases.

But CEQ should go further. In particular, CEQ should further revise Section 1502.23 to direct agencies to assess climate-change-related effects based on analysis at the appropriate geographic scope and spatial scale. This direction should include support for using mathematical models at the appropriate geographic scope when available—and applying other relevant high-quality projections when a model is not available at the proper geographic scope.

When analyzing the climate-change-related effects, agencies and reviewing courts have cited perceived uncertainty around what data and tools to use—particularly with regard to local effects—as a barrier to meaningfully considering how climate change will impact the project and environment.[73] Sufficient information is now often available for agencies to consider the local effects of climate change on the project and affected environment, or to at least estimate local effects from regional or national information.[74] For instance, when information is available that a

[70] 42 U.S.C. § 4321 ("The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment…"); *id*. § 4331.
[71] Proposed Rule, 88 Fed. Reg. at 49,951, 49,979.
[72] *Id*. at 49,951, 49,979.
[73] For example, the U.S. District Court for the District of Nevada upheld a cursory summary of global and regional trends that made no effort to integrate local impacts into decisionmaking regarding the project. Ctr. for Biological Diversity v. U. S. Bureau of Land Mgmt., 2017 WL 3667700 (D. Nev. Aug. 23, 2017). Other examples abound. *See, e.g.*, Idaho Rivers United, 2016 WL 498911, at *17 (deferring to federal agency's conclusions about "general uncertainty surrounding local impacts from climate change") (internal quotation marks omitted); BUREAU OF LAND MANAGEMENT, RICHFIELD FIELD OFFICE PLANNING AREA PROPOSED RESOURCE MANAGEMENT AND FINAL ENVIRONMENTAL IMPACT STATEMENT 4-4 (2008) ("The lack of scientific tools designed to predict climate change on regional or local scales limits the ability to quantify potential future impacts."); S. Utah Wilderness All. v. Burke, 981 F. Supp. 2d 1099, 1111 (D. Utah 2013), *vacated sub nom.* S. Utah Wilderness All. v. U.S. Dep't of the Interior, 2017 WL 11516766 (D. Utah May 17, 2017) ("BLM is limited in its ability to predict specific climate change on a regional and local scale because of a lack of scientific tools designed for such purposes."). *See also* Adler & Sarinsky, *supra* note 65, at 9 nn.43–45.
[74] *See, e.g.*, Inst. for Pol'y Integrity, Comments on National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change 13–15 (Apr. 10, 2023) (CEQ-2022-0005-0023) (discussing advances in estimating local and regional climate change-related effects). *See also*, Jenny Schuetz et al., *Local Climate Risk Data Could Enable Better Decisionmaking by Households and Policymakers*, BROOKINGS (Feb. 8, 2023)

region will experience one foot of sea-level rise by a certain date, but no more specific data is available on sea-level rise in a more narrowly drawn project-impact radius, an estimate of one foot of sea-level rise is far more rational than assuming no sea-level rise. Further direction on using appropriately scaled models and analysis would enable agencies to rationally inform their choices and avoid functionally ignoring climate-change-related effects on the project.[75]

Whereas climate-change-related effects on the project are best understood by analyzing or modeling effects at the local and regional levels, the project's impact on climate change is global in scope.[76] As CEQ recognizes in both the Proposed Rule[77] and in the Interim Guidance,[78] the global scope of climate change compels a global analysis of the effects of a project's greenhouse gas emissions. Amending Section 1502.23 to direct agencies to consider climate-change-related effects at the appropriate spatial scale would further support such global consideration, which some have unreasonably questioned.[79]

Such an amendment would also help ensure a more accurate review of environmental effects, including climate-change-related effects, consistent with CEQ's reasoning for the proposed revisions to Section 1502.23.[80] It is also consistent with the proposed amendment to Section 1501.3 directing agencies to "consider the characteristics of the relevant geographic area, such as proximity to unique or sensitive resources or vulnerable communities."[81]

Thus, CEQ should further amend Section 1502.23 as follows:

> **Revise § 1502.23(c):** . . .Where appropriate, agencies shall use projections when evaluating the reasonably foreseeable effects, including climate change-related effects. Such projections may employ mathematical or other models that project a range of possible future outcomes, so long as agencies disclose the relevant assumptions or limitations. Agencies should consider projections at the geographic scope of the environmental effect being analyzed, including climate change-related effects, when such projections are available. When such projections are not available, agencies should consider relevant, high-quality projections at other scales, and disclose the relevant

(discussing available resources on local climate data and their importance to decisionmaking); NOAA, GLOBAL AND REGIONAL SEA LEVEL RISE SCENARIOS FOR THE UNITED STATES: UPDATED MEAN PROJECTIONS AND EXTREME WATER LEVEL PROBABILITIES ALONG U.S. COASTLINES (2022).

[75] Inst. for Pol'y Integrity, *supra* note 74, at 13–15; Jenny Schuetz et al., *supra* note 74.

[76] Proposed Rule, 88 Fed. Reg. at 49,935 (recognizing that fossil-fuel projects "have reasonably foreseeable global indirect and cumulative effects related to [greenhouse gas] emissions").

[77] *Id.*

[78] Interim Guidance, 88 Fed. Reg. at 1203 (recognizing that "it is most appropriate for agencies to focus on [social cost of greenhouse gases] estimates that capture global climate damages").

[79] *E.g.*, Complaint ¶ 109, Louisiana v. Biden, 2:21-cv-01074 (filed Apr. 22, 2021) (arguing that NEPA does not permit a global analysis of climate change impacts). Although the Fifth Circuit dismissed this lawsuit for lack of standing, 64 F.4th 674 (2023), parties have questioned the validity of considering global climate impacts in numerous other proceedings.

[80] Proposed Rule, 88 Fed. Reg. at 49,951 ("Where available and appropriate, agencies also can use or rely on projections that are scaled to a more targeted and localized geographic scope, such as land use projections, air emissions, and modeling, or to evaluate climate effects experienced locally in relation to the proposed action.").

[81] *Id*. at 49,969 (proposing amendment to § 1501.3(d)(1)).

assumptions and limitations of these projections, following Section 1502.21's requirements for incomplete information. Agencies should not consider a localized environmental effect to be absent if the localized effect can be reasonably inferred using larger-scale projections or other high-quality scientific information.

Additionally, CEQ may wish to consider corresponding revisions to Section 1502.21 on incomplete information. Moreover, CEQ should issue further guidance with more specific advice on identifying high-quality information on local and regional climate change-related effects, applying this information when available, and estimating climate change-related effects when such information is not available.[82] Together, these revisions to the regulations and guidance would better ensure that agencies consistently and meaningfully account for climate change-related effects on the proposed project and environment. Such guidance can also help agencies identify the best available science from federal bodies such as the National Oceanic and Atmospheric Administration[83] and more detailed state-level information.

VII. CEQ Should Bolster Its RIA by Further Explaining the Flaws in Its 2020 RIA and Providing More Reasons that the Proposed Rule's Benefits Justify Its Costs

The Proposed Rule's RIA corrects the flawed analysis in the RIA accompanying the 2020 Rule (2020 RIA). To bolster this decision, CEQ should explain more fully why its 2020 RIA was flawed. Additionally, the Proposed Rule would benefit from providing additional analysis specifically detailing how the rule's benefits justify its costs.

A. CEQ Should Further Explain the Flaws in Its 2020 RIA

CEQ's 2020 RIA concluded that the 2020 Rule would provide "significantly lower administrative costs" for agencies,[84] "cost savings for non-Federal project sponsors,"[85] and "no adverse environmental impacts."[86] Now, the Proposed Rule's RIA argues that undoing much of the 2020 regulations would similarly result in net benefits (or, equivalently, cost savings) for agencies, project sponsors, and environmental beneficiaries.[87] To bolster this analytical correction,[88] CEQ should more fully explain why it repudiates its flawed 2020 RIA.

i. Cost and Review Time

CEQ should explain that its estimate of administrative cost savings associated with the 2020 Rule was likely flawed. In its 2020 RIA, CEQ estimated that the 2020 Rule would save a total of $83 million per year in government administrative costs.[89] CEQ stated that the "efficiencies"

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[82] Inst. for Pol'y Integrity, *supra* note 74, at 13–15 (discussing objectives for guidance).
[83] *See, e.g.*, NOAA, GLOBAL AND REGIONAL SEA LEVEL RISE SCENARIOS FOR THE UNITED STATES: UPDATED MEAN PROJECTIONS AND EXTREME WATER LEVEL PROBABILITIES ALONG U.S. COASTLINES (2022).
[84] Council for Env't Quality, Regulatory Impact Analysis for the Final Rule, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act 8 (June 30, 2020) [hereinafter 2020 RIA].
[85] *Id.* at 9.
[86] *Id.* at 10.
[87] RIA at 21 (summarizing "benefits to agencies," "project sponsors," "environmental stakeholder," and "affected communities" that outweigh "slight direct costs for agencies and indirect costs for project sponsors").
[88] While the Proposed Rule retains some of the 2020 regulations, and while it does more than simply reverse the 2020 regulations, repudiating the 2020 regulations is still a major part of the Proposed Rule.
[89] 2020 RIA, *supra* note 84, at 9.

introduced by its various reforms would reduce the maximum review time to two years,[90] and then assumed, without support, that costs would scale linearly with preparation time.[91]

However, both government surveys and empirical research suggest that the extent of review, EIS preparation time, and cost are *not* linearly related—and often may not be related at all. For instance, the Government Accountability Office (GAO) found that "a project may stop and restart for any number of reasons that are unrelated to NEPA or any other environmental requirement," and thus longer timeframes are not necessarily attributable to NEPA process or correlate with higher administrative costs.[92] Additionally, a recent empirical study found that delays are often due to exogenous factors such as "staff availability, a lack of expertise, inconsistent funding, market conditions, and compliance with other statutory or regulatory obligations."[93] And another study of critical habitat designations under the Endangered Species Act found that, on average, agency review was not any longer when a full NEPA review was conducted than when it was not.[94] As this evidence indicates, CEQ's analysis of the 2020 Rule assumed a flawed direct linkage between the extent of review, review time, and cost.

Second, CEQ may have also overstated certain cost savings from the 2020 Rule by arguing that its change to the scope of effects would provide greater clarity and thereby reduce litigation costs.[95] Rather, the 2020 Rule may have potentially increased litigation costs due to confusion surrounding the impact of that rule.[96] Litigation over the 2020 Rule itself accrued further costs.

Of course, just because CEQ's assessment of the costs of robust NEPA review in the 2020 Rule was flawed does not mean that those costs are non-existent. CEQ should still assess and reasonably consider regulatory costs—quantitatively, if feasible, or qualitatively if not. CEQ should continue to consider both compliance costs and the potential cost from the forgone benefits of delayed projects. As a potential alternative for assessing government administrative costs, CEQ could use the range of administrative costs for EIS preparation identified in a 2003 Council on Environmental Quality NEPA Task Force report, adjusted for inflation: $410,000–$3.3 million.[97] CEQ could then estimate that its regulatory changes would require additional

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[90] *Id.* at 8; 2020 Rule, 85 Fed. Reg. at 43,325.
[91] 2020 RIA, *supra* note 84, at 8–9. CEQ's 2020 regulatory impact analysis acknowledged the potential lack of correlation between review timeline and cost, but assumed a direct correlation nevertheless. *Id.* at 9.
[92] U.S. GOV'T ACCOUNTABILITY OFF., NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSIS 14 (2014); *see also id.* at 13 (noting that "time frames for completing EISs . . . *can be one element* of project cost") (emphasis added); *id.* at 14 (time frame measures may not account for up-front work that occurs prior to an EIS, and "a 10-year time frame to complete a project may have been associated with funding issues, engineering requirements, or community opposition to the project, to name a few").
[93] John C. Ruple, Jamie Pleune & Erik Heiny, *Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation*, 46 COLUM. J. ENV'T L. 273, 273, 280 (2022).
[94] John C. Ruple, Michael J. Tanana & Merrill M. Williams, *Does NEPA Help or Harm ESA Critical Habitat Designations: An Assessment of over 600 Critical Habitat Rules*, 46 ECOLOGY L.Q. 829, 832 (2019). On average, in fact, the reviews that did not undergo environmental review took over three months *longer* to complete than those that did. *Id.* at 832, 842. However, these results were not statistically significant. *Id.* at 842–43.
[95] 2020 RIA, *supra* note 84, at 31.
[96] *See, e.g.*, 2022 Rule, 87 Fed. Reg. at 23,463 ("Numerous commenters . . . noted that the 2020 Rule's changes to the definition of 'effects' created uncertainty and confusion in agencies implementing NEPA.").
[97] *See* 2020 RIA, *supra* note 84, at 8 The 2020 RIA also cites data from the Department of Energy showing a median EIS cost of $1.4 million. *Id.* at 9 n.13. The original estimate, which represents an average across agencies, is $250,000–$2 million per EIS. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 92, at 12 (citing NEPA TASK FORCE, REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY: MODERNIZING NEPA IMPLEMENTATION 66 (2003). The

resources equivalent to a certain percentage of the total resources needed for EIS preparation, and multiply each endpoint by that percentage to formulate a range of potential additional costs. (CEQ may wish to repeat this same methodology using the cost of environmental assessments.[98]) However, data limitations on the cost of NEPA analyses also suggest that a qualitative assessment could be appropriate, as long as CEQ adequately explains the problems with its earlier approach and describes the flaws in any other quantitative estimates it declines to incorporate.

ii. Environmental Impact

CEQ should also include more reasons to justify abandoning its prior conclusion that the 2020 Rule would have no adverse environmental impacts. There is both anecdotal and empirical evidence that NEPA's procedural guarantees improve environmental outcomes.[99] Multiple empirical studies identify a relationship between the NEPA process and greater environmental benefits.[100] For instance, a review of EISs for oil and gas development authorized by the Bureau of Land Management concluded that "NEPA compliance . . . appear[s] to produce final decisions that are substantially less impactful on the environment when compared to initially proposed projects."[101] The study's preliminary results also indicated that "EISs that consider a broader range of alternatives are more effective at reducing environmental impacts."[102] Another empirical review found that oil and gas projects exempted from environmental review ultimately caused greater environmental damage per well than those subject to environmental review.[103]

In particular, given that the Proposed Rule is intended to improve consideration of climate and environmental justice impacts, CEQ should bolster its discussion of the benefits of improved climate and environmental justice analysis. For instance, surveys of climate change considerations in NEPA review have demonstrated a pattern of minimal and superficial

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cited NEPA Task Force report was published in September 2003. To adjust for inflation, we used the Bureau of Labor Statistics inflation calculator, inputting $250,000 and then $2 million as the initial quantities, September 2003 as the initial date, and July 2023 (the last month for which there are statistics available) as the ending date. BUREAU OF LABOR STATISTICS, *CPI Inflation Calculator*, https://data.bls.gov/cgi-bin/cpicalc.pl (last visited Sept. 8, 2023). We then rounded to two significant digits, resulting in an administrative cost range of $410,000–$3,300,000.

[98] Those costs are also provided in the 2003 NEPA Task Force report. *See* NEPA TASK FORCE, *supra* note 97, at 65. Such costs should also be adjusted for inflation.

[99] For anecdotal evidence, see DEPARTMENT OF ENERGY OFFICE OF NEPA POLICY AND COMPLIANCE, NEPA SUCCESS STORIES (2017) (collecting examples of the substantive impacts of NEPA); ENV'T L. INST. ET AL., NEPA SUCCESS STORIES: CELEBRATING 40 YEARS OF TRANSPARENCY AND OPEN GOVERNMENT 6 (2010). For empirical evidence, see nn.100–103 and accompanying text.

[100] *See, e.g.*, John Ruple & Mark Capone, *NEPA - Substantive Effectiveness Under a Procedural Mandate: Assessment of Oil and Gas EISs in the Mountain West*, 7 GEO. WASH. J. ENERGY & ENV'T L. 39 (2016); Mark K. Capone & John C. Ruple, *NEPA and the Energy Policy Act of 2005 Statutory Categorical Exclusions: What Are the Environmental Costs of Expedited Oil and Gas Development*, 18 VT. J. ENV'T L. 371 (2017); John Ruple & Mark Capone, *NEPA, FLPMA, and Impact Reduction: An Empirical Assessment of BLM Resource Management Planning and NEPA in the Mountain West*, 46 ENV'T L. 953, 953, 961 (2016) (explaining "preliminary finding" based on 16 EISs that resource management planning revisions "increased the application of more protective surface use stipulations by statistically significant amounts without causing a statistically significant change in either the number of jobs created or the pace of oil and gas development").

[101] Ruple & Capone, *Substantive Effectiveness Under a Procedural Mandate*, *supra* note 100, at 50.

[102] *Id.* at 51.

[103] Capone & Ruple, *NEPA and the Energy Policy Act of 2005*, *supra* note 100, at 386, 393. This finding suggests that environmental assessments and EISs improve environmental outcomes, particularly because more damaging projects are presumably more likely to be subject to an environmental assessment or an EIS in the first place.

consideration of climate change effects.[104] Similarly, according to a 2016 study, environmental justice concerns almost never guide agency policy; instead, agencies typically either ignore environmental justice considerations in environmental review or provide "boilerplate rhetoric" that is "devoid of detailed thought or analysis."[105] These findings indicate an opportunity to generate significant project-level benefits through more informed decisionmaking, including both climate-related benefits and environmental-justice benefits.

B. CEQ Should Bolster Its Explanation that the Proposed Rule's Benefits Justify Its Costs

CEQ provides several rationales for concluding that the Proposed Rule's benefits justify its costs and that it maximizes net benefits. CEQ can bolster this conclusion by providing additional specifics when promulgating its final rule.

First, CEQ should base its assessment of various alternatives' relative benefits and costs on more than "its extensive experience in overseeing the NEPA process" and "the assumption that a better process yields better results."[106] CEQ can cite learnings from sources like those cited above[107] that discuss the reasons its 2020 regulations would have produced fewer benefits and more costs than it concluded then. It could also allude to the large magnitude of the environmental values at stake on the benefits side, including large global issues related to climate change, biodiversity loss, and environmental injustice. Given that the RIA associated with the 2020 regulations understated the importance of environmental values that NEPA promotes and potentially overstated that regulation's costs, CEQ could rely on this to confidently support its finding that the benefits of reversing many of the 2020 Rule's provisions exceed the attendant costs.

Second, CEQ should add further explanation to the claim that the Proposed Rule would reduce litigation.[108] Even if the Proposed Rule is more legally defensible, it is unclear why interested parties would be any less motivated to bring suit (even if they would lose more often). If CEQ believes that parties would be less motivated to sue, or that lawsuits would be resolved more quickly, it should explain these conclusions. Otherwise, it should reconsider this stance.

Third, CEQ should align its explanation for the alternative of "[r]etaining the 2020 Regulations, as amended by the Phase 1 Rulemaking"[109] with guidance regarding baselines. CEQ concludes that this alternative "would likely impose higher costs and lower net benefits than [] CEQ's proposal."[110] But, as CEQ recognizes, "[u]nder this alternative, the current regulations would remain in effect."[111] That makes this alternative the baseline.[112] By definition, baselines have

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[104] Adler & Sarinsky, *supra* note 65, at 3 n.13.
[105] Elizabeth Ann Glass Geltman et al., *Beyond Baby Steps: An Empirical Study of the Impact of Environmental Justice Executive Order 12898*, 39 FAMILY & CMTY. HEALTH 143, 143, 149 (2016).
[106] RIA at 21.
[107] *See supra* Section VI(a).
[108] *E.g.* RIA at 3 (listing "potentially avoided litigation" as one of the Proposed Rule's benefits).
[109] RIA at 22.
[110] *Id.*
[111] *Id.*
[112] *See* CIRCULAR A-4, *supra* note 48, at 15 ("Th[e] baseline should be the best assessment of the way the world would look absent the proposed action."); DRAFT CIRCULAR A-4 UPDATE, *supra* note 51, at 12 ("The benefits and costs of a regulation are generally measured against a no-action baseline: an analytically reasonable forecast of the way the world would look absent the regulatory action being assessed, including any expected changes to current conditions over time.").

zero incremental benefits or costs, as effects attributable to a policy are measured *against the baseline*.[113] To bolster its analysis's defensibility, CEQ should reflect that fact.

For consideration, we offer the following proposed amendments to the RIA, in the first paragraph under the heading "Retaining the 2020 Regulations, as amended by the Phase 1 Rulemaking"[114]:

> **Revise the Discussion of Retaining the Status Quo:** Under this alternative, the current regulations would remain in effect. This alternative therefore constitutes the baseline and, by definition, carries zero incremental benefits or costs. CEQ believes this alternative would be more likely ~~impose higher costs and lower net benefits~~ than ~~to~~ CEQ's proposal to result in ~~arising from increased potential~~ litigation arguing that the 2020 rule diverts from long-standing practice and case law. Second, CEQ believes the net benefits of retaining provisions from the 2020 rule (which, as noted above, is zero) are lower than the net benefits of CEQ's proposal because the 2020 rule removed longstanding provisions that provided agencies with flexibilities to perform robust analyses.

Fourth, CEQ runs a risk of inadvertently downplaying the importance of the benefits and costs it labels as "indirect." There is wide economic consensus that the fact that an effect is "indirect," or occurs further down a causal chain, does not make it any less real or important.[115] Dividing effects into "direct" and "indirect" appears to offer little analytical or organizational advantages in CEQ's presentation, but it risks confusion. CEQ should therefore eliminate that categorization. Alternatively, though less preferably, if CEQ retains this categorization, it should state that categorizing a benefit or cost as "indirect" does not suggest that the benefit or cost is any less important or that it should factor any less into the analysis.

Sincerely,

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[113] *See* CIRCULAR A-4, *supra* note 48, at 15 ("You need to measure the benefits and costs of a rule against a baseline."); DRAFT CIRCULAR A-4 UPDATE, *supra* note 51, at 12 ("The benefits and costs of a regulation are generally measured against a no-action baseline . . . .").

[114] For simplicity, these amendments assume that CEQ retains its current position on litigation costs, though this comment explains why it should nuance or reconsider that position.

[115] *See, e.g.*, RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 55–65 (2008) (arguing that benefit-cost analyses should account for both ancillary benefits and costs); Michael A. Livermore, *Polluting the EPA's Long Tradition of Economic Analysis*, 70 CASE WESTERN RESERVE L. REV. 1063, 1072 (2020) ("There is nothing unusual about indirect costs and benefits, which are a normal and anticipated element of regulating in a complex world."); CIRCULAR A-4, *supra* note 48, at 26 ("Your analysis should look beyond the direct benefits and direct costs of your rulemaking and consider any important ancillary benefits and countervailing risks."); DRAFT CIRCULAR A-4 UPDATE, *supra* note 51, at 39 ("Your analysis should look beyond the obvious benefits and costs of your regulation and consider any important additional benefits, costs, or transfers, when feasible.").