September 29, 2023

Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Docket No. CEQ-2023-0003 – National Environmental Policy Act Implementing Regulations Revisions Phase 2

To Whom it May Concern:

We, American Stewards of Liberty, a non-profit Texas corporation dedicated to the protection of the rights and interests of farmers and ranchers in Texas and across the nation, and the Texas Public Policy Foundation, a non-profit organization whose mission is to promote and defend liberty, personal responsibility, and free enterprise, jointly submit the attached comments for consideration in connection with the Council on Environmental Quality's proposed regulatory amendments to the National Environmental Policy Act ("NEPA"). We appreciate your careful consideration of the concerns and suggestions we have expressed.

NEPA has long been in need of reform to prevent unnecessary delay and litigation risks to crucial elements of the Texas economy. Congress, in passing the bipartisan Fiscal Responsibility Act recognized this need at a national level and took significant steps to ensure NEPA did not serve as a hindrance to the safety and welfare of this Nation and its people. When the federal government promulgates regulations going beyond the intended-reach of Congress, it ignores the sovereignty of the States and gives short shrift to the expertise of States and State Agencies to manage their resources effectively and efficiently. As with other regulations and policies proposed and promulgated under the Biden Administration, the changes to NEPA regulations set forth in the Proposed Rule are a significant overreach, will create new burdens for the regulated community, and will not further the goals of NEPA itself.

We appreciate your consideration and would welcome the opportunity to discuss these important issues with you.

Sincerely,

Margaret Byfield
Executive Director
American Stewards of Liberty

Robert Henneke
Executive Director and General Counsel
Texas Public Policy Foundation

RE: *National Environmental Policy Act Implementing Regulations Revisions Phase 2*, Docket No. CEQ-2023-0003

The American Stewards of Liberty and the Texas Public Policy Foundation submit these comments in response to the Council on Environmental Quality's ("CEQ") July 31, 2023 notice of a proposed rulemaking ("Proposed Rule") to revise its regulations at 40 C.F.R. § 1500 – 1508, implementing the National Environmental Policy Act ("NEPA").[1] The Proposed Rule, along with the first phase of the Biden administration's NEPA revisions,[2] seek in many ways to undo significant improvements that were made to the NEPA compliance process that were achieved in 2020 (the "2020 Regulations"),[3] and cut against bipartisan direction, found in the Fiscal Responsibility Act ("FRA")[4], to ensure that NEPA does not unnecessarily stymie the economic security of this nation. Prior to the promulgation of the 2020 Regulations, federal agencies struggled to timely complete environmental review of projects critically important to the American people. The 2020 Regulations updated the NEPA regulations established in 1978 so that federal agencies could be empowered to meet the challenges of the 21st Century. A bipartisan majority of Congress, by amending NEPA for the first time in 50 years through the passage of the FRA, recognized the importance of ensuring NEPA does not continue to be wielded as a weapon to delay or prevent the health and sustainability of our economy. While some provisions of the Proposed Rule are intended to incorporate the NEPA amendments contained in the FRA, other provisions would undo or work against aspects of the 2020 Regulations that had streamlined NEPA review. As a result, the regulated community now faces significant regulatory uncertainty and burden that the current regulations had sought to resolve.

American Stewards of Liberty is a non-profit organization dedicated to protecting private property rights, defending the use of our land, and restoring local control. We work to ensure the American people have full protection of their private property rights and retain the ability to produce our food, fiber, minerals, and energy.[5] The Texas Public Policy Foundation is a non-profit organization whose mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.[6] Guiding the Foundation in its work are the principles of free enterprise, liberty, and personal responsibility.[7]

Below, we provide comments focused on those aspects of the rule that appear to conflict with the underlying purpose of the FRA's NEPA amendments and that could lead to delay, confusion, and litigation risk rather than efficiency, clarity, and robust environmental review.

[1] 88 Fed. Reg. 49,924 (July 31, 2023).
[2] 87 Fed. Reg. 23,453 (Apr. 20, 2022).
[3] 85 Fed. Reg. 43,304 (July 16, 2020).
[4] Fiscal Responsibility Act of 2023, Pub. L. No. 118-5 (2023).
[5] American Stewards of Liberty, About, https://americanstewards.us/about/.
[6] The Texas Public Policy Foundation, Our Mission, https://www.texaspolicy.com/about/.
[7] *Id*.

I. The Proposed Rule disproportionately emphasizes climate change considerations in the NEPA process.

Over the past several decades, federal agencies have increasingly opined on the potential impacts of climate change on a wide range of resources.[8] However, scientific consensus is lacking on the degree to which changes in climate may be attributed to human activities and the long-range impacts on the human environment that may result from changes in climate.[9] Further, there is almost no reliable information on the degree to which a discrete activity (such as provision of one lease to a private rancher or oil and gas development company) would cause any measurable impact on global climate. Despite this lack of data, CEQ nevertheless has proposed to include a new provision in the NEPA regulations which requires, in the context of preparing environmental impact statements, that:

> Agencies…use high-quality information, including the best available science and data, to describe reasonably foreseeable environmental trends, including anticipated climate-related changes to the environment, and when such information is lacking, provide relevant information consistent with [40 C.F.R.] § 1502.21.[10]

In the preamble to the Proposed Rule, CEQ explains that this language is being added to "clarify that agencies should consider reasonably foreseeable future climate conditions on affected areas rather than merely describing general climate change trends at the global or national level."[11] Even more troubling is CEQ's explanation that the proposed language seeks to "connect the description of baseline environmental conditions and reasonably foreseeable trends to an agency's analysis of environmental consequences and mitigation measures."[12] In other words, should the proposed language be finalized by CEQ, federal agencies would be expected to make climate change projections on individual projects in discrete areas, and would be required to take into consideration the environmental consequences associated with these micro climate changes and how mitigation measures could ameliorate these effects. This simply is not possible given the current state of science, and raises the real potential that NEPA documents will be based on conjecture and weak data, cutting against the utility of the statute to foster informed decision-making.

This concern is highlighted in CEQ's proposed changes to 40 C.F.R. § 1502.16, a regulation describing what kinds of effects a NEPA document should include to inform "the scientific and analytic basis" of an agency's comparison of alternatives to the agency action under review. Under the current regulations, federal agencies must describe any "[p]ossible conflicts between the proposed action and the objectives of [any] Federal, regional, State, Tribal, and local land use plans, policies and controls for the area

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[8] *See* 88 Fed. Reg. 42,661-42,662 (July 3, 2023) (proposed listing of dunes sagebrush lizard partially due to threat of climate change facing the species), 88 Fed. Reg. 54,267 (proposed designation of critical habitat for Sacramento Mountains checkerspot butterfly partially due to threat posed by climate change to habitat of species), EPA, Learn About the Greenhouse Gas Reporting Program (GHGRP), https://www.epa.gov/ghgreporting/learn-about-greenhouse-gas-reporting-program-ghgrp (EPA's Greenhouse Gas Reporting Program was promulgated in part to allow localities to compare emissions in their development of climate policies).

[9] See, e.g., Unsettled: What Climate Science Tells Us, What it Doesn't, and Why it Matters. Am. J. Phys. 91, 753-75 (Sept. 1, 2023), found at: https://pubs.aip.org/aapt/ajp/article/91/9/753/2906599/Unsettled-What-Climate-Science-Tells-Us-What-It .

[10] Proposed Rule at 49,977.

[11] *Id.* at 49,949.

[12] *Id.*

concerned." Through the Proposed Rule, CEQ would expand this provision, requiring agencies to look not only at "land use plans" but to "plans generally."[13] According to CEQ, this change is being made to "clarify that this element includes plans and policies addressing climate change."[14] CEQ also proposes to add a new paragraph at 40 C.F.R. § 1502.16(a)(7) clarifying that the discussion of environmental consequences in an environmental impact statement ("EIS") "must include any reasonably foreseeable climate change-related effects, including effects of climate change on the proposed action and alternatives."[15] Finally, CEQ proposes to add a new paragraph at 40 C.F.R. 1502.16(a)(10) that would require agencies to address risk reduction, resiliency, or adaptation measures included in the proposed action and alternatives in order to consider such factors as: "wildfire risk, extreme heat and other extreme weather events, drought, flood risk, loss of historic and cultural resources, and food scarcity."[16]

Taken together, these changes dramatically expand the scope of NEPA "effects" and "alternatives" analyses relative to discrete projects and authorizations, and all but ensure federal agencies will rely on unsubstantiated projections regarding a project's potential to have an impact on climate change locally or globally. For the overwhelming majority of actions subject to review under NEPA, the causal chain between the impacts associated with the project and climate change will be attenuated at best due to the lack of available data and scientific methodology to support project-specific analyses of climate change contributions. Relying on speculative information to conduct a NEPA analysis combined with the process of determining project-specific contributions to climate change will further complicate what is already a long and burdensome process while creating new opportunities for litigation to the detriment of the economy at large.

II. The Proposed Rule fails to ensure that the implementation of certain proposed provisions will be legally and scientifically sound.

A. Innovative Approaches to NEPA Review

Through the Proposed Rule, CEQ would authorize federal agencies to pursue innovative approaches to NEPA compliance to address extreme environmental challenges.[17] While we are intrigued by the potential for innovative approaches to NEPA compliance insofar as such approaches could result in more efficient environmental review, we are concerned that the Proposed Rule lacks specificity as to how this provision will be implemented. We are particularly concerned that CEQ describes "environmental challenges" as those that have a "longer time horizon than is typical for an emergency action" and provides as examples sea level rise, water scarcity, degraded water or air quality, species losses, and "impaired ecosystem health."[18] And perhaps most concerning is the fact that CEQ would not require these innovative approaches to undergo notice and comment. Should CEQ finalize this provision, we encourage CEQ to adopt specific, minimum standards for agency-specific innovative approaches to NEPA review, such as ensuring that innovative approaches will not further delay the NEPA review process or go beyond what is explicitly authorized by the NEPA statute. Under no circumstance should an innovative approach require provision of mitigation or long-term and expensive monitoring or adaptive management provisions, and in all cases, the public should be given no less than 30 days to review and comment on proposed adoption of an innovative compliance approach. Finally, to the extent

[13] *Id.* at 49,950.
[14] *Id.* at 49,949-49,950.
[15] *Id*. at 49,950.
[16] *Id.*
[17] *Id.* at 49,957.
[18] *Id*.

an agency adopts an innovative approach to NEPA compliance, any landowner or entity with other property rights (such as those relating to federal land allotments) should be personally notified in writing of the potential adoption of an innovative approach to NEPA compliance.

B. Incomplete or Unavailable Information

For many years, NEPA regulations have provided that where an agency is evaluating reasonably foreseeable significant adverse effects in an EIS and information essential to a reasoned choice among alternatives is incomplete, ***but available***, then an agency must include such information in the EIS so long as the overall costs of obtaining that information are not unreasonable. Through the Proposed Rule, CEQ appears to expand agencies' obligations to obtain additional information by striking the phrase "but available," thereby implying agencies may undertake or require applicants to undertake additional studies and analyses when an agency believes information is incomplete.[19] This is likely to increase both the cost and time of a NEPA review, and risks reliance on data that is inconsistent with the Information Quality Act[20] and the potential that agencies will "shop" for data to drive a preferred outcome. Given the NEPA timelines adopted by the FRA, any data obtained or studies created during the NEPA process are unlikely to benefit from sufficient peer review, rendering an agency's reliance on such data potentially arbitrary. Without providing federal agencies guidelines on data quality, CEQ all but ensures the NEPA review process will become less reliable, defying NEPA's purpose to provide for better informed federal decision making and improved environmental outcomes.[21]

III. CEQ should reconsider its proposed Endangered Species Act habitat intensity factor.

In the Proposed Rule, CEQ indicates its intent to restore certain "intensity factors" used to determine the significance of the effects of a proposed action.[22] The "intensity factors" were first established by CEQ in 1978[23] and included "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the ESA."[24] Thus, under the original CEQ regulations, federal agencies were required to consider the degree to which their actions would adversely affect federally listed species and designated critical habitat of such species. Through the proposed rule, CEQ has indicated its intent not only to reinstate the ESA-related intensity factor, but has also indicated its intent to expand the factor to include the effects of a proposed action on *any habitat* in which the listed species occurs, not just habitats that are formally designated as critical.[25]

Analysis of the significance of a proposed action's effects under the habitat intensity factor is duplicative of consultation with U.S. Fish and Wildlife Service ("USFWS") and National Marine Fisheries Services (together, "the Services") under section 7 of the Endangered Species Act ("ESA"), which requires that actions funded, authorized, or carried out by federal agencies will not jeopardize listed species or result in the destruction or adverse modification of any designated critical habitat of such species.[26] Further,

[19] Proposed Rule at 49,950.
[20] 44 U.S.C. § 3504(d)(1).
[21] Proposed Rule at 49,930.
[22] *Id*. at 49,935.
[23] *Id*. at 49,938.
[24] 40 C.F.R. § 1508.27(9) (1978).
[25] Proposed Rule at 49,938.
[26] *Id*.

requiring federal agencies to consider habitat that is not formally designated as "critical habitat" by the Services is likely to create confusion and result in NEPA documents that are ambiguous or more susceptible to litigation. The Services—the expert agencies—have not adopted a definition of what could constitute listed species' habitat and, in fact, USFWS recently repealed its own definition of habitat, that had previously been promulgated in response to the U.S. Supreme Court's decision in *Weyerhaeuser v. USFWS.*[27] Unsurprisingly, then, the Proposed Rule does not provide clarity on the meaning of listed species "habitat," making it difficult for agencies to discern the appropriate bounds of its habitat intensity factor analysis, and leading to increased regulatory uncertainty for project proponents in the early planning processes. In sum, we urge CEQ to remove the habitat intensity factor, or at the very least, refrain from expanding the habitat intensity factor from formally designated critical habitat to *any habitat* where the endangered or threatened species occurs.

IV. The proposed requirement to identify the environmentally preferable alternative in an EIS rather than solely in the record of decision is unnecessary and may unfairly skew public opinion.

For decades, NEPA implementing regulations have required that federal agencies identify in any record of decision ("ROD") the environmentally preferable alternative. Pursuant to the Proposed Rule, CEQ would require agencies to identify the environmentally preferable alternative in draft and final EISs[28] in addition to doing so in the ROD. This proposed change is unnecessarily duplicative and adds no meaningful environmental benefit as the environmentally preferable alternative is already identified in the agency's ROD, but could run the risk of skewing public opinion about a project by placing disproportionate focus on the environmentally preferred alternative at the expense of commentary that is actually relevant. The public may believe the inclusion of the environmentally preferred alternative in the EIS means NEPA requires the agency to select the environmentally preferable alternative, which could result in litigation and further delays. Accordingly, we urge CEQ to reconsider this provision.

V. Conclusion

For first time in nearly 50 years, Congress has updated NEPA for the sole purpose of making the NEPA review process more efficient. CEQ should take care not to cut against the purpose of those amendments and adopt provisions that would make the NEPA review process more onerous, lengthier, or subject to an increase in litigation. We appreciate CEQ's consideration of these comments. Should you have any questions, please contact Margaret Byfield at margaret@americanstewards.us.

[27] *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361 (2018).
[28] Proposed Rule at 49,949.