IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA

No. 3:20-cv-00045-JPJ-PMS

WILD VIRGINIA, VIRGINIA WILDERNESS COMMITTEE, UPSTATE FOREVER, SOUTH CAROLINA WILDLIFE FEDERATION, NORTH CAROLINA WILDLIFE FEDERATION, NATIONAL TRUST FOR HISTORIC PRESERVATION, MOUNTAINTRUE, HAW RIVER ASSEMBLY, HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT, DEFENDERS OF WILDLIFE, COWPASTURE RIVER PRESERVATION ASSOCIATION, CONGAREE RIVERKEEPER, THE CLINCH COALITION, CLEAN AIR CAROLINA, CAPE FEAR RIVER WATCH, ALLIANCE FOR THE SHENANDOAH VALLEY, and ALABAMA RIVERS ALLIANCE,

Plaintiffs,

v.

COUNCIL ON ENVIRONMENTAL QUALITY and MARY NEUMAYR IN HER OFFICIAL CAPACITY AS CHAIR OF THE COUNCIL ON ENVIRONMENTAL QUALITY,

Defendants,

AMERICAN FARM BUREAU FEDERATION, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN FOREST RESOURCE COUNCIL, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, FEDERAL FOREST RESOURCE COALITION, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, and NATIONAL CATTLEMEN'S BEEF ASSOCIATION,

Defendant-Intervenors.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION OR STAY

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As this Court noted, elections have consequences. When new presidents are elected, they have new sets of ideas, values, and policies they want to implement. And this is precisely why, in 1946, Congress enacted the Administrative Procedure Act ("APA"). Worried about the growth of the administrative state, the APA was a compromise attempt to "preserve[] individual rights as against the abuse of administrative power."[1] The APA thus ensures that when new administrations reverse long-standing policies, they go through a process to consider how the changes will impact people in the real world, disclose both the good and the bad consequences of the changes, and explain their decisions in light of these effects. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("If Congress established a presumption from which judicial review should start, that presumption … is … against changes in current policy that are not justified by the rulemaking record."). The APA provides both substantive and democratic checks on agencies' reversals, requiring they be supported logically and explained clearly. "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). Where, as here, the agency has not done the work required to justify its reversal of NEPA policy, that reversal must be sent back to comply with the APA.

Before the Court can reach a ruling on the merits, however, the 1978 regulations should remain in effect. The parties have worked diligently to brief this motion prior to September 14, and the Court can preserve the status quo by temporarily staying the Rule's effective date under 5 U.S.C. § 705, allowing agencies to continue develop any procedures they wish to fit under the Rule's new ceiling, while postponing the drastic changes to project-level reviews across one

[1] Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 Fordham Envtl. L. Rev. 207, 208-09 (2016).

hundred federal agencies that the Rule itself sets in place immediately. 40 C.F.R. § 1507.3(a) (2020). The alternative is irremediable harm to the Conservation Groups and public chaos.

I) Judicial Review Now Is Both Appropriate and Necessary

A) This Case Is a Valid Facial Challenge

The Rule is clear that from its effective date of September 14, 2020, it controls all NEPA evaluations; no "inconsistent" agency procedures are allowed, starting immediately. 40 C.F.R. § 1507.3(a) (2020). Just as when NEPA rules were first reviewed, this Court does "not have to review a particular decision" by an individual agency, but rather the "recently promulgated rules which govern consideration of environmental values in all such individual decisions." *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115–16 (D.C. Cir. 1971). Indeed, review now is necessary because there will be no opportunity to challenge evaluations of future projects that the Rule excludes from NEPA.

CEQ appeals to *Reno v. Flores* and *United States v. Salerno* to suggest that the Conservation Groups cannot bring a facial challenge.[2] In both of those cases, however, the challenge depended at least in part on predictions about how the regulations would be applied. *See* 507 U.S. 292, 309 (1993) (where challenge was based on failure of regulations to set a time period within which a hearing must be held, the Court declined to "assume … that an excessive

[2] CEQ also implies that because certain laws have specialized review provisions and NEPA does not, facial challenges cannot be made to regulations promulgated under NEPA. Dkt 59, 37-38; Oral Argument Transcript at 34:2-35:3 (Sept. 4, 2020) (Exhibit 1). However, rather than creating some kind of special pre-enforcement right of review, courts recognize that special review provisions instead set the jurisdictional requirements for certain challenges to regulations promulgated under certain laws. *See, e.g., Nat'l Min. Ass'n v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 843, 869 (11th Cir. 2016) (court did not have jurisdiction where regulation was not challenged within sixty days under Mine Act § 101(d), 30 U.S.C. § 811(d)); *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1239 (10th Cir. 2020) (sixty-day deadline to challenge final agency action under the Clean Air Act, 42 U.S.C. § 7607(b)(1), is jurisdictional); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 623 (2018) (generally, EPA actions are reviewable in federal district court under the APA, but that the Clean Water Act, 33 U.S.C. § 1369(b)(1), enumerates certain specific categories of EPA action for which review lies directly in the courts of appeals). The Conservation Groups' claims arise under the APA, which permits challenges to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The Conservation Groups challenge a final agency action, and this lawsuit provides the only possibility of remedy for their imminent harms.

delay will invariably ensue"); 481 U.S. 739, 751 (1987) (statutory procedures might in some cases be insufficient but were adequate with respect to "at least" some persons). Thus, both *Reno* and *Salerno* are examples of an unexceptional principle: the mere fact that a "regulation may be invalid as applied in [some] cases … does not mean that the regulation is facially invalid because it is issued without statutory authority." *INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 188 (1991).

It is well established under *State Farm*—itself a successful facial challenge—that a regulation may be facially invalid due to procedural defects in its development. 463 U.S. at 43. Similarly, a regulation may be facially invalid because it strays outside the agency's lawful grant of discretion. *E.g.*, *Michigan v. EPA*, 576 U.S. 743 (2015) (holding regulation facially invalid under *Chevron*). There is "little point in waiting to see whether [a regulation] would be validly applied when it was not validly adopted in the first place." *Wildlaw v. U.S. Forest Serv.*, 471 F. Supp. 2d 1221, 1233 (M.D. Ala. 2007); *see also Sierra Club v. Bosworth*, 510 F.3d 1016, 1024 (9th Cir. 2007) ("procedural noncompliance" in the development of a policy "would render [it] unlawful regardless of how [it] is applied").

B) This Case is Ripe for Review

The Conservation Groups have established that this case—which is about violations of law during the development of the Rule—cannot get any riper. The claims, which are all procedural, are fit for review and will be based on an administrative record that closed on July 16, 2020. As discussed in the Conservation Groups' previous briefs and reiterated below, there would be significant harm in withholding review because the Rule will go into effect immediately across all federal agencies and will immediately start to harm the Conservation Groups. Dkt. 30-1 at 26, 72-73, 89; Dkt. 73 at 4-6, 8-9, 12, 16-18.

Contrary to CEQ's characterization, Dkt. 53 at 15; Tr. at 82:16-25, 85:1-10 (Exhibit 1), *Ohio Forestry Association v. Sierra Club* did not establish that claims cannot be ripe until site-specific harms occur. Instead, the case distinguished between procedural and substantive claims, holding unsurprisingly that a substantive challenge to "too much, and the wrong kind of, logging" could wait until there was a proposal for logging. 523 U.S. 726, 738 (1998). In contrast, claims brought under statutes that "guarantee[] a particular procedure, not a particular result," may be challenged "at the time the [procedural] failure takes place, for the claim can never get any riper." *Id.* at 737. Challenges brought under *State Farm* are of that species. *Wildlaw*, 471 F. Supp. 2d at 1238.

Final agency action that eliminates or narrows the application of NEPA's procedural safeguards can be challenged (and enjoined) right away. *E.g.*, *Fund for Animals v. Norton*, 281 F. Supp. 2d 209 (D.D.C. 2003) (issuing injunction where agency improperly issued a "finding of no significant impact" and did not prepare an EIS). Here, the Rule itself constitutes final agency action to unlawfully narrow or eliminate NEPA review for dozens of specifically identified projects affecting places in which the Conservation Groups and their members have a concrete stake. It also immediately cuts off information to which the Conservation Groups are statutorily entitled. That the Rule is so sweeping does not mean it is unripe. To the contrary, the Rule's audacity argues strongly in favor of immediate review and preliminary relief.

II) The Conservation Groups Will Prevail on the Merits

To prevail on a Motion for Preliminary for Injunction, plaintiffs need only show that they are likely to prevail on at least one of their claims. *See Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013). The Conservation Groups have already made strong showings in their opening brief that they will prevail on the merits, including their claim that CEQ did not consider important aspects

of the problem. Dkt. 30-1. CEQ's response admits as much, making Conservation Groups' likelihood of success all the more certain. *See, e.g.*, Dkt. 75 at 51.

The Supreme Court established in *State Farm* that an agency action is arbitrary and capricious when the agency: (1) relied on factors Congress had not intended it to consider; (2) entirely failed to consider all important aspects of the problem; (3) offered an explanation for its decision that runs counter to the evidence before the agency; or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *State Farm*, 463 U.S. at 43. Agencies may not ignore or countermand their earlier factual findings without a reasoned explanation, "*even when reversing a policy after an election*." *Org. Vill. of Kake v. U.S. Dep't. of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (emphasis added).

The Conservation Groups' first eight APA claims are all governed by *State Farm* and the line of cases that follow it, not *Chevron*, though that case is discussed at length by CEQ throughout its response. *Chevron* relates only to the Conservation Groups' ninth claim, under Section 706(2)(C), about the Rule's inconsistency with the governing NEPA statute—though as set out below, *Chevron* deference does not apply here.

Encino Motorcars LLC v. Navarro, 136 S. Ct. 2117 (2016), invoked by CEQ, demonstrates how the two standards of review interact. In *Encino Motorcars* the Supreme Court made clear that because the agency had failed to "'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made,'" *id.* at 2125 (*quoting State Farm*, 463 U.S. at 43), the Court would give no deference to its statutory interpretation: "*Chevron* deference is not warranted where the regulation is 'procedurally defective.'" *Id.* (*quoting United States v. Mead Corp*, 533 U.S. 218, 227 (2001)). *Encino Motorcars* further explains, "'it is not that further justification is demanded

by the mere fact of policy change; but that *a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.*'" *Id.* at 2126 (*quoting Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)) (emphasis added). That is precisely what CEQ failed to provide here.

A) CEQ Failed to Consider Important Aspects of the Problem.

The APA requires federal agencies to take a careful look at the bad along with the good. But CEQ's one-sided rulemaking only discussed supposed problems with the prior regulations and supposed benefits of the new Rule. Although CEQ emphasizes instances in which it believes the NEPA process took longer than it thought was justified,[3] that should not have been the end of CEQ's inquiry. CEQ was required to consider and disclose the Rule's positive *and* negative effects, the reliance interests of interested parties and "consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (quoting *State Farm*, 463 U.S. at 51); *see also Encino*, 136 S. Ct. at 2126 (agencies must account for "facts and circumstances that underlay or were engendered by the prior policy."); *Fox*, 556 U.S. at 516 (same); *United Keetoowah Band of Cherokee Indians in Okla. v. Fed. Commc'ns Comm'n*, 933 F.3d 728, 740, 744 (D.C. Cir. 2019) (agency was obligated to "adequately address the harms of deregulation or justify its portrayal of those harms as negligible").

[3] Indeed, the examples cited by CEQ and the Business Associations are well-known to have been delayed by external factors. The I-70 expansion in Colorado, for example, was not delayed due to paperwork and public meetings (*see* Coyle Decl. ¶ 8(b), Dkt. 75-1; Dkt. 74 at 39), but instead the Colorado Department of Transportation's plans to route the highway through low-to-moderate income, majority-minority neighborhoods and those communities' opposition to those plans and concerns about air pollution, the cost of stormwater drainage, and gentrification. *See* Eliza Carter, *The highway lowdown: Denver's I-70 expansion controversy, explained,* The Colorado Independent, July 13, 2016, *available at* https://www.coloradoindependent.com/2016/07/13/i-70-expansion-explained/. NEPA played a vital role in moving the project forward by informing the community and providing for public comment. Project delay was rooted in the agency's poor planning and lack of consensus, none of which are addressed by CEQ's Rule—and in fact, are made worse by the Rule, which limits the transparency and public participation requirements that ultimately led to a solution that allowed the project to move forward.

CEQ protests that it has "acknowledge[d]" that it is changing course. Dkt. 75 at 41. But the APA requires more, especially when the agency is reversing a prior policy. *Regents*, 140 S. Ct. at 1915 ("[B]ecause DHS was not writing on a blank slate, it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." (emphasis in original, internal citations omitted)); *Encino*, 136 S. Ct. at 2126 ("[A]n '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'"); *Fox*, 556 U.S. at 515 (agencies must give "good reasons" when they reverse policies).

The Conservation Groups and others carefully explained in comments to CEQ the various ways in which the Rule would have negative impacts on environmental quality, and how it would disenfranchise already at-risk communities. The Conservation Groups' comments were articulated clearly to put CEQ on notice and meticulously supported by examples and evidence. More than 350 attachments included scientific studies, past and ongoing NEPA reviews, analysis of the aggregate effect of specific NEPA procedures over time, and more, all showing how certain provisions, which are eliminated under the Rule, have long benefited the environment.[4]

CEQ makes it easy for the Court to rule on this claim, because it admits in its brief that it failed to take the hard look at the important aspects of the problem that the APA requires. Dkt. 75 at 50-51. CEQ states plainly that it did not consider the comments and detailed factual records submitted by the Conservation Groups, summarily dismissing the detailed comments with over 350 supporting documents as "unsupported and conclusory speculation." Dkt. 75 at 51. *See United Keetoowah Band*, 933 F.3d at 744 ("Characterizing a concern as 'generalized' without addressing that concern does not meet the standard of 'reasoned decisionmaking.'").

[4] *See* S. Envtl. L. Ctr., Comments on CEQ's Notice of Proposed Rulemaking to Update the Regulations for Implementing NEPA, Docket Id. CEQ-2019-0003-171879, 8-9 (Mar. 10, 2020) (hereinafter "Conservation Groups Comment Letter").

The Conservation Groups are likely to succeed because CEQ flatly denies any responsibility to consider the information submitted in the record.

i) CEQ Did Not Consider Impacts to the Environment

Every major rulemaking has some downside, but CEQ boldly proclaims the Rule will have no adverse environmental effects whatsoever. CEQ bases this assertion on "a baseline of the statutory requirements of NEPA and Supreme Court case law," conspicuously omitting the benefits implemented by the 1978 regulations. CEQ, *Regulatory Impact Analysis for the Final Rule*, RIN: 0331-AA03, 10 (June 30, 2020), Dkt. 75-1 (hereinafter "RIA"). CEQ does not deny the Rule's environmental impact is an "important aspect of the problem," Dkt. 75 at 45-46, 55, n.30, and now tries to argue that it did consider the prior regulations in its baseline, Dkt. 75 at 42, but CEQ's contemporaneous explanation of the Rule speaks for itself.[5] The fundamental problem, however, remains that the benefits of the 1978 regulations were not considered at all. *See S.C. Coastal Conserv. League v. Pruitt*, 318 F. Supp. 3d 959, 965–67, 965 n.2 (D.S.C. 2018) (vacating rulemaking reversing prior policy because agencies failed to consider substance of earlier regime, and holding such arbitrary rulemaking would transform government into "'a matter of the whim and caprice of the bureaucracy'" (quoting *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring))).

CEQ's denial of environmental effect is all the more remarkable in comparison to its predictions that the Rule will speed up highways, drilling, pipelines, and more. Dkt. 75 at 60, 63. For example, CEQ maintains that narrowing the scope of "effects" considered under NEPA may "reduce administrative burden," but will not "influenc[e] environmental outcomes." RIA at 30-

[5] Furthermore, CEQ's later explanation shows that the omission of the 1978 regulations from the description of the baseline was not a mistake. For example, CEQ states that new procedures identifying actions as "not subject to NEPA … does not change the applicability of NEPA." RIA at 28-29 (discussing Sec. 1507.3). In other words, CEQ argues that excluding projects from NEPA review will have no adverse environmental impact because NEPA review was not required for those projects (by the statute) in the first place. That is a baseline problem.

31. Again and again, CEQ states that its changes will reduce burdens and speed project delivery, but then concludes—without any detail or support—that it "does not anticipate the changes to result in environmental impacts," or some variant of the phrase. RIA at 12-32. In its Response to Comments, CEQ explains the Rule will have no environmental impact for the reasons "summarized" in the appendix to the Regulatory Impact Analysis. CEQ, *Final Rule Response to Comments*, RIN 0331-AA03, 8 (June 30, 2020), Dkt. 75-1 (hereinafter "RTC"). Yet, the "reasons" in the appendix to the Regulatory Impact Analysis are nothing more than the repeated bare statement that CEQ "does not anticipate the changes to result in environmental impacts." RIA at 12-32. CEQ's conclusory findings that the Rule will speed up projects but will not cause any environmental harm are simply not supported by any reasoned explanation.

CEQ also attempts to confuse the issue of whether this case is ripe for review (discussed above) with its independent obligation to examine all "important aspects of the problem." CEQ suggests that it should not have to think about how the Rule change will affect the environment until it happens. Dkt. 75 at 45, 51. In its contemporaneous explanation of the Rule, however, CEQ does not state that it cannot analyze environmental impacts *yet*; it categorically states that there *will be none*. Dkt. 75 at 43, 50, 55; RIA at 10, 12-32; RTC at 8, 34.

The Conservation Groups and others provided exhaustive documentation of how the 1978 regulations create environmental benefits in individual projects and in the aggregate, so the information was available. Yet CEQ failed to grapple with this information. For example, CEQ ignored the thousands of comments urging that elimination of a mandatory cumulative effects analysis would lead to detrimental environmental outcomes. Indeed, CEQ ignored comments even from its own *amicus*, the Southern Ute Tribe, which raised concerns that the new definition

of "effects" "would likely lead to poorer, less thoughtful, analyses." Dkt. 75-1 at 964.[6] The Conservation Groups and others made similar points with reference to examples including of environmental review where cumulative effects was especially important, such as the cumulative effect of a proposed titanium mine on water quality, the cumulative effects of multiple highways in Atlanta, and the cumulative effect of multiple shoreline hardening projects on coastal ecology.[7] In addition, the Conservation Groups provided a wide range of scientific literature pointing to the importance of cumulative impacts for environmental analysis.[8]

CEQ does not deny that it did not analyze any of this information. Rather, it attempts to skirt the issue by suggesting that just because a cumulative impacts analysis is no longer *required* does not mean that federal agencies will no longer perform one. Dkt 75 at 49. This explanation is nonsensical for several reasons. First, it ignores entirely express language in the Rule that generally prohibits consideration of environmental impacts that are "remote in time, geographically remote, or the product of a lengthy causal chain." 40 C.F.R. § 1508.1(g)(2) (2020). Second, it ignores the reality that agencies will comply with the new minimum requirements of the Rule, and CEQ instructions not to go beyond them. As the D.C. Circuit noted in *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 708 (D.C. Cir. 1988), it "[i]t strains credulity . . . to suggest that [an agency], in abandoning minimum standards, sought to encourage . . . concerns to exceed the previous regulatory floors." *See also Johnson v. Allsteel, Inc.*, 259

[6] In particular, the Tribe noted that elimination of "the requirement to consider cumulative impacts could be especially problematic in the energy industry" because "individual projects never have a 'significant impact' but, cumulatively, energy development can have a significant impact." Dkt. 75-1 at 964. The Tribe explains that "Indian tribes share many resources with their neighbors, such as water, air, and wildlife. Tribes are always upstream or downstream of proposed federal actions. The interconnectedness of the resources makes an evaluation of cumulative impacts especially important." *Id*. at 965.

[7] Conservation Groups Comment Letter at 76-83.

[8] Conservation Groups Comment Letter at 83, Attachment 344, Docket Id. CEQ-2019-0003-172519, CEQ-2019-0003-172512.

F.3d 885, 888 (7th Cir. 2001) ("the increased risk [of replacing assurance with discretion] is itself an injury"). Indeed, Christy Goldfuss, former CEQ Managing Director notes that in her experience "agencies are not likely to do any aspects of review that are not required by law or regulation, given limited budgets and capacity." Dkt. 30-54 at ¶ 32.[9] And, third, explanation is at odds with CEQ's claim the Rule will provide great clarity, reduce litigation risk, and speed up project delivery. If it is CEQ's position that the agencies should still do the exact same analysis as they would have done previously—but just with less direction—then there will be no increase in clarity, and certainly no increase in project speed. If, on the other hand, CEQ's position is that there will be less analysis, then it must consider the implications of the change.

CEQ's explanations of its failure to study the environmental impact of other changes, such as the changes to the alternatives analysis and public involvement, are equally nonsensical and self-contradictory. Dkt. 75 at 46-48.

ii) CEQ Did Not Consider the Rule's Impact on Environmental Justice

NEPA requires consideration of environmental justice by demanding that "each person should enjoy a healthful environment," 42 U.S.C. § 4331(C). CEQ ignores this statutory language,[10] and states that environmental justice is not "important or relevant" and need not be considered. Dkt. 75 at 53.

Perhaps it should come as no surprise that an Administration that attempted to eliminate

[9] Ms. Goldfuss also notes that in her experience agencies have not previously been hamstrung by the 1978 regulations that split these different effects into different categories. *See* Dkt. 30-54 at ¶ 31. This further undercuts CEQ's stated rationale for the Rule.

[10] CEQ states that the Conservation Groups identified "no other basis in substantive law [other than Executive Order 12898] for requiring CEQ to consider impacts on environmental justice." Dkt. 75 at 53. But the Conservation Group identified NEPA itself. Dkt. 30-1 at 54-55.

EPA's Office of Environmental Justice[11] would consider the issue unimportant. But the fact is that the statutory language, a longstanding Executive Order,[12] and comments from hundreds of thousands of groups and individuals make it an "important aspect of the problem" that CEQ should have considered. The Conservation Groups submitted extensive comments—again with reference to specific examples and evidence—about how communities of color will be impacted via the Rule's elimination of guidance documents, limitation on the types of environmental effects that can be considered, imposition of barriers to public participation, and more.[13]

Having stated the issue is unimportant, CEQ then asserts it did, in fact, address the concerns. Ultimately CEQ argues that because the Rule supposedly will not result in any environmental impacts, it also will not result in any disproportionate environmental impacts. Dkt. 75 at 55. This argument fails for at least two reasons. First, as noted above, the assertion that the Rule will not have adverse environmental impacts is a conclusory finding based on no actual analysis of the issue. Second, even if the Rule did not result in *net* losses to the environment, it does not mean that it will not disproportionately impact certain communities. For example, even it were true that a highway would be built regardless of the Rule, it does not follow that the highway would be built in the same place. The lack of procedure encompassed in the Rule is precisely the type of driver which ensures that communities with less voice bear the brunt of environmental harms.

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[11] *See FY 2018 EPA Budget in Brief* (2018), *available at* https://www.epa.gov/sites/production/files/2017-05/documents/fy-2018-budget-in-brief.pdf.

[12] While the Executive Order 12,898 does not itself create a cause of action, it does make clear that environmental justice is an "important aspect of the problem" that CEQ should consider. Moreover, CEQ's bold rejection of particular Circuit Court cases that have reviewed the discussion of environmental justice in NEPA documents under the APA's arbitrary and capricious standard (Dkt. 75 at 54 n.28) as incorrect sits strangely at odds with their insistence elsewhere that NEPA regulations must be revised to stay in line with Circuit Court precedent. *See generally* 85 Fed. Reg. 43,315-43,354 (citing Circuit Court precedent 60 times as support for changes to the Rule).

[13] Conservation Groups Comment Letter at 91-108.

In addition, CEQ is wrong to focus on on-the-ground outcomes of the NEPA process as the only area relevant to environmental justice. As the Conservation Groups and others set out in their comments, changes to the Rule also stand to significantly disenfranchise communities of color because of the ways it cuts back on public input and opportunities for judicial review.[14] The requirement to submit comments in a highly specific and technical way, for example, will make it more difficult for communities to participate in the NEPA process where they are not able to afford expert assistance. And the new possibility that a bond will be required for litigation poses a barrier to judicial review for those less able to afford it. None of these areas were explored by CEQ and the Rule is therefore arbitrary and capricious.

B) CEQ Did Not Provide a Reasoned Explanation for Its Rulemaking

CEQ's brief also serves to underscore the fact that CEQ's decision does not match its "explanation given." *Dep't of Commerce*, 139 S. Ct. at 2575. According to CEQ, the Rule is intended to "increase efficiency, reduce delays, decrease paperwork, reduce litigation, advance the policy of integrating NEPA with other environmental reviews, and foster excellent decisionmaking," by "clarifying" the process. *See*, *e.g.*, 85 Fed. Reg. 43,306; RIA at 6–8.

In comments and in their opening brief, the Conservation Groups explained that, in fact, the changes in the Rule are more likely to engender confusion and project delays than clarity and speed. Dkt. 30-1 at 64-71. CEQ's brief solidifies this reality. For example, where CEQ suggests that changes to which environmental effects should be considered in the future "will reduce confusion and promote consistent implementation across federal agencies," Dkt. 75 at 49, their brief makes clear that they are doing the reverse. In response to concern that the plain text of the rule would prohibit consideration of climate change, CEQ disagrees, noting that some

[14] Conservation Groups Comment Letter at 91-96, 99-102.

projects with "an immense scope" would require consideration of climate change "as an environmental effect." Dkt. 75 at 22. This only illustrates that CEQ is interjecting new uncertainty into the process: "Immense" is not defined in either the 1978 regulations or the Rule.

And indeed, the text of the Rule is equally unclear. The Rule states that the definition of environmental effects "may" include effects that are later in time or farther removed in distance from the proposed action or alternatives," 40 C.F.R. § 1508.1(g) (2020), but then later *in the same definition* states "[e]ffects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain." *Id.* Thus geographically and temporally remote effects "may" be considered but "should generally not be considered." This "clarification" only signals to agencies that they should not evaluate such effects, while providing a fig leaf that allows CEQ to deny it has cut them out entirely; the result can only be more agency confusion. For this reason and others already stated, CEQ has failed to provide a reasoned explanation for the Rule and it is arbitrary and capricious.

C) CEQ Failed to Consider Reliance Interests

When changing policies, agencies must consider reliance interests and weigh them against possible benefits. *Regents*, 140 S. Ct. at 1913-15. The Conservation Groups identified parties who have long relied on the 1978 regulations and whose reliance interests were not considered by CEQ. Dkt. 30-1 at 58-63. CEQ does not even pretend to take into account the Conservation Groups' reliance interests, or the reliance interests of States, cities and other municipalities whose laws are written to complement the 1978 regulations. Nor does CEQ offer a word of explanation as to how they considered the reliance interests of private applicants, like solar companies, who have relied on the stable application of NEPA to guide business decisions.

Instead, CEQ states that the Conservation Groups have "no legitimate reliance interests whatsoever" and that all the Conservation Groups point to is "familiarity" with the regulatory framework. Dkt. 75 at 57. Not so. The Conservation Groups have explained in detail how their organizations depend on NEPA. They rely on its requirements to learn about a host of environmental issues. *See, e.g.,* Stangler Decl. at ¶ 5, attached as Exhibit 2. They depend upon it as a venue to let their voices be heard, free of charge, with no need for specialized expertise. *See, e.g.,* Aydlett Decl. ¶¶ 10, 14, Dkt. 30-52. They count on getting notice of major federal actions that affect them. And while CEQ states that the loss of transparency and public participation under the Rule cannot be considered "losing access to public benefits," Dkt. 75 at 56, NEPA is indeed a public benefit—a benefit that provides the public information about important issues free of charge and a seat at the table. And CEQ is wrong when it states the Conservation Groups will not face new liability as a result of their previous reliance. Dkt. 75 at 59. The Conservation Groups have structured their participation in the process based on the previous regulations, which can now be ignored for ongoing projects. New requirements, like the requirement that all issues be raised with specificity during a public comment period or considered unexhausted and thereby waived, will now be imposed on the Conservation Groups to their detriment. 40 C.F.R. § 1503.3, 1500.3 (2020).

D) CEQ Failed to Consider Alternatives

Agencies must also consider alternatives "'within the ambit" of the policy. *Regents*, 140 S. Ct. at 1913; *see also United Keetoowah Band*, 933 F.3d at 744. The Conservation Groups and other members of the public provided a number of alternatives that should have been considered. Dkt. 30-1 at 71-72. CEQ snipes at some of them, arguing first that the idea of issuing additional guidance "is not likely to be effective" because it is not legally binding. Dkt. 75 at 67. But the

Rule itself removes or narrows mandatory legal requirements at every turn. CEQ's rejection of the guidance alternative is therefore incoherent.

CEQ's explanation as to why it could not update regulations to consider climate change is equally confusing – stating that "a new stand-alone requirement to consider possible climate change impacts would only increase the already onerous NEPA burden and would not address the myriad other concerns animating the rulemaking." Dkt. 75 at 68. The primary "concern[] animating the rulemaking" with respect to climate change was the stated purpose of "clarifying" the definition of effects. Dkt. 75 at 68. Yet CEQ's argument—that perhaps "immense" (an undefined word) projects would be analyzed for climate impacts, Dkt. 75 at 22—shows just how muddy the Rule is on its face. CEQ has not offered any reason that explicitly addressing climate change would not better clarify the definition of effects. Bizarrely, CEQ also notes that an analysis of climate impacts would "add to the 'duplication of paperwork'" it was trying to eliminate. Dkt. 75 at 68. But CEQ does not explain where else climate change is considered that is duplicative, and its citation to the Response to Comments does not illuminate an answer.

CEQ's justification for its failure to consider other suggested alternatives are equally lacking, pointing only to conclusory statements in the Regulatory Impacts Analysis and Response to Comments. Dkt. 75 at 69. As a result, the rulemaking is arbitrary and capricious and not in compliance with law.

E) The Rule Is Inconsistent with the NEPA Statute and Does Not Merit Deference

CEQ frames its entire statutory argument around *Chevron/Brand X* deference,[15] but, as

[15] CEQ breezes past the novel question of whether *Chevron* deference applies at all, which depends on whether Congress intended CEQ's views to have the force of law. *See United States v. Mead Corp*, 533 U.S. 218, 227 (2001). CEQ states it has the authority to issue regulations to bind other agencies, *see* Dkt. 53 at 12 (*citing Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004)); Tr. at 31, but neglects to mention that such authority comes from an Executive Order, not from the words of Congress. *Andrus v. Sierra Club*, 442 U.S. 347, 357 (1979). The question is academic, however, because *Chevron* deference is not available to an agency that can't get past *State Farm*.

noted above, where "agency procedures . . . are defective, a court should not accord *Chevron* deference to the agency interpretation." *Encino*, 136 S. Ct. at 2125. Because CEQ's rulemaking violated the APA in numerous ways, it cannot receive deference.[16] This dispenses with most of CEQ's twenty-eight pages of argument on the requirements of NEPA. Dkt. 75 at 11-39.

In addition, the statute is clear: NEPA requires "*to the fullest extent possible* . . . a detailed statement by the responsible official on . . . (i) the environmental impact of the proposed action, (ii) any adverse environment effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action . . . ." 42 U.S.C. § 4332(2)(C) (emphasis added). But the Rule removes the previous regulation's requirements that all reasonable alternatives, as well as indirect and cumulative effects, must be evaluated. This violates NEPA's unambiguous mandate: "the procedural duties of Section 102 [42 U.S.C. § 4332] *must be fulfilled to the 'fullest extent possible.'*" *Calvert Cliffs'*, 449 F.2d at 1114–15 (emphasis added). After examining the legislative history, the D.C. Circuit concluded that this statutory requirement, far from being ambiguous, was instead "absolutely clear," *id.* at 1128, and rejected the Atomic Energy Commission's claim of broad discretion to adopt a more circumscribed evaluation. *See id.* at 1114 n.10. The Commission cited a "national power crisis" to justify its weaker approach, *id.*at 1127–28, just as today CEQ invokes "competitor nations like China blaz[ing] ahead." Dkt. 34 at 4. But no agency has the discretion to undermine Congress's clear requirement to carry out NEPA's procedural duties to the fullest extent possible.[17]

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[16] Indeed, this rule is implicit in *Chevron* itself. *Chevron*'s grant of deference was premised on the agency's actual *use* of its special expertise to "consider[] the matter in a detailed and reasoned fashion." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 865 (1984). Where, as here, the agency failed under *State Farm* to show that it "assess[ed] the wisdom of … policy choices" and "resolv[ed] the struggle between competing views of the public interest," no such deference is warranted. *Id.* at 866.

[17] Indeed, in CEQ's own cited case (Dkt. 75 at 14), the Ninth Circuit confirmed that "NEPA requires a federal agency 'to the fullest extent possible,' to prepare 'a detailed statement on ... the environmental impact.'" *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (quoting 42 U.S.C. § 4332(2)(c)(i)). And CEQ's own citation actually quoted an earlier case discussing the legislative history,

Impacts. "NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted . . . ." *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975) (citing S. Rep. No. 91-296, 91 Cong., 1st Sess. 5 (1969)). But CEQ deleted the requirements to evaluate cumulative and indirect effects, excluding from the required analysis well-recognized environmental impacts that occur later in time, such as suburban sprawl caused by a new highway or the cumulative effects of multiple projects in a sensitive habitat. The Rule tells agencies not to evaluate these effects, 40 C.F.R. § 1508.1(g)(2), (3) (2020), but agencies must fully evaluate not only "(i) the environmental impact *of the proposed action*" itself, but also "(ii) *any* adverse environment effects *which cannot be avoided should the proposal be implemented*." 42 U.S.C. § 4332(2)(C) (emphases added). This second requirement plainly captures the indirect and cumulative effects that have been required for decades; if the direct effects of a project were the only requirement, this second statutory provision would have no meaning. CEQ relies on *Public Citizen*, but nothing in that case, including its discussion of proximate cause, supports the Rule's across-the-board deletion of cumulative and indirect effects from the required analysis and instruction to the agencies not to consider them. On the contrary, the Supreme Court held in *Kleppe* that "cumulative or synergistic" effects must be evaluated; CEQ tries to portray the Rule as compatible with the facts in *Kleppe*, but the Supreme Court's reasoning was not so limited: NEPA requires "comprehensive consideration of pending

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in which the Senate and House conferees explained, "this section [of the statute] requires 'full compliance with … the directives'" for a NEPA evaluation. *Forelaws on Board v. Johnson*, 743 F.2d 677, 683 (9th Cir. 1985) (quoting Conf. Rpt., 115 Cong. Rec. (Part 29) 39702-703 (1969)). And *Forelaws* held that "the failure to prepare an EIS demonstrating that the agency has considered all significant alternatives violates both NEPA and the APA." *Id.* at 685.

proposals." *Kleppe v. Sierra Club*, 427 U.S. 390, 409–10 (1976); *see also id.* n.20 & n.26 (proper NEPA evaluation includes effects of earlier actions).

Alternatives. NEPA "seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project." *Calvert Cliffs*, 449 F.2d at 1114. CEQ's Rule focuses on the endpoints of the "range" of alternatives rather than the reasonableness of the alternatives that may fall between those endpoints, as required by statute. Dkt. 75 at 24-25. CEQ's attempt to portray the change as consistent with agency practice highlights just how ill-considered this change is. For example, CEQ cites the "Forty Most Asked Questions" guidance as supporting its claim that the Rule's change "is not dramatic" (Dkt. 75 at 25), but in fact, this document expressly states repeatedly that agencies must evaluate "all reasonable alternatives," including those outside the agency's jurisdiction—the very requirements CEQ deleted.[18]

Likewise, the Fourth Circuit and D.C. Circuit have confirmed that NEPA mandates that alternatives are not limited to the jurisdiction of the lead agency; the court located this requirement in Congress's intent "to provide a basis for consideration and choice by the decisionmakers in the legislative as well as the executive branch," and in the statute's "duty of compliance 'to the fullest extent possible,'" *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972); *accord Coal. for Responsible Reg'l Dev. v. Brinegar*, 518 F.2d 522, 526–27, n.4 (4th Cir. 1975). Here again, CEQ's appeal to *Public Citizen* is inapposite. Dkt. 75 at 28. That case expressly did not address alternatives, 541 U.S. 752, 764–65 (2004), and CEQ's

[18] CEQ's cited cases do not support its statements. Dkt. 75 at 25 and n.13. For example, *National Audubon Society* did not concern the scope of NEPA's alternatives analysis. 422 F.3d 174 (4th Cir. 2005). And the Ninth Circuit explained that "an agency need not undertake a 'separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered,'" while reconfirming that "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Wetlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 871-72 (9th Cir. 2004).

attempt to extend its holding fails.[19] There can be no question that removing the requirement to include all reasonable alternatives, and expressly instructing agencies that "it is not efficient or reasonable" to consider alternatives outside an agency's jurisdiction, 85 Fed. Reg. 43,330, contravenes the statute's requirement of a full evaluation.

Scope. The Rule exempts many new actions from NEPA entirely, abandoning the entire five-decade history of CEQ applying NEPA based on the significance of an action's environmental effects. CEQ's defense of this change fares no better; it relies on the cases cited in the Rule's Preamble, but they do not support the rigid two-part test CEQ adopted. *See* 85 Fed. Reg. 43,345. To pick just one example, in *Scherr v. Volpe*, the Seventh Circuit upheld the Federal Highway Administration's approach to deciding when a project was a "major federal action" requiring an EIS, which was based on whether the project had "the potential of *significantly affecting the environment*." 466 F.2d 1027, 1032–33 (7th Cir. 1972) (emphasis added). This is the opposite of CEQ's approach and does not support the Rule. Also, the Rule excludes federal actions where the agency supposedly "does not exercise sufficient control and responsibility over" the project, but its approach to "sufficient control" is clearly unreasonable and contrary to NEPA: CEQ flatly excludes all Farm Service Administration loan guarantees, even though FSA can attach binding environmental conditions; courts have found this is sufficient federal control to warrant NEPA review, *see Food & Water Watch v. U.S. Dep't of Agric.*, 325 F. Supp. 3d 39 (D.D.C. 2018), and even though the statutory text of NEPA requires using "financial . . . assistance . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . and fulfill the . . . requirements of present and future

[19] *Int'l Bhd. of Teamsters v. DOT*, 724 F.3d 206, 217 (D.C. Cir. 2013), dealt very cursorily with an environmental assessment, not the more rigorous environmental impact statement, that had rejected alternatives as being "beyond the scope of the pilot program" in question.

generations of Americans." 42 U.S.C. § 4331(a).

Timing. CEQ also contravenes the statute by allowing irretrievable commitments of resources prior to a full NEPA evaluation. This violates the statutory purpose of completing a full evaluation first to inform agency decisionmaking, and it violates the statutory text, which requires agencies to fully evaluate "any irreversible and irretrievable commitments of resources which *would be* involved in the proposed action *should it be implemented*." 42 U.S.C. § 4332(2)(C)(v) (emphases added). This forward-looking requirement forecloses irretrievable commitments of resources prior to the NEPA evaluation, but that is exactly what the Rule allows, as CEQ admits. Dkt. 75 at 35. To defend this change, CEQ relies on the fact that the Department of Transportation allows the early purchase of rights-of-way, Dkt. 75 at 34, but does not acknowledge that this was a *statutory* change made by the MAP-21 legislation in 2012.[20] 23 U.S.C. § 108. CEQ's Rule has no such authorization and thus contravenes the NEPA statute. That a few acquisitions have been held not to prejudice decisionmaking in limited circumstances, *e.g.*, *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 206 (4th Cir. 2005), does not support CEQ's *blanket* authorization of premature land acquisition.

In sum, the Rule abandons decades of consistent agency practice and precedent; due to its violations of the APA and the "absolutely clear" requirement that NEPA requires an evaluation to the fullest extent possible, CEQ is not shielded by deference; and the Rule further violates the APA by failing to comply with the longstanding requirements of the governing NEPA statute.

III) The Conservation Groups Will Suffer Irreparable Harm Before This Case Can Be Heard on the Merits

As Defendant-Intervenors noted at oral argument, the relevant inquiry for the Court on a motion for preliminary injunction is whether the Conservation Groups will suffer irreparable

[20] Moreover, this statute does not allow condemnation, *see id.* at § 108(d)(3)(B)(vii), but the Rule contains no such limitation. 40 C.F.R. § 1506.1(b) (2020) ("*acquisition* of interests in land" (emphasis added)).

harm in the time period before the Court can rule on the merits of the case at summary judgment. Tr. at 51:10-14. They will. The Rule goes into effect immediately, it immediately supersedes all other regulations, and the harm to the Conservation Groups begins at once—certainly long before this Court can consider the merits based on a full record.

A) The Rule Will Go into Effect Immediately, Supersede Other Agency Regulations, and Immediately Cause Harm

The Conservation Groups have already explained that the Rule immediately goes into effect on September 14, 2020, and from that date forward the Rule acts as a ceiling limiting all agency action regardless as to how individual agencies proceed with their own rulemakings. Dkt. 30-1 at 26, 72, 88-89. As CEQ repeatedly misreads the plain language of its own Rule,[21] the Conservation Groups again set out the unambiguous statutory language: "Where existing agency NEPA procedures are inconsistent with the regulations in this subchapter, *the regulations in this subchapter shall apply*[.]" 40 C.F.R. § 1507.3(a) (emphasis added). CEQ's Federal Register notice emphasizes this: "the applicability of [the Rule] in the interim period between the effective date of the final rule and when the agencies complete updates to their agency NEPA procedures for consistency with these regulations … requires agencies to apply [the Rule] to new reviews unless there is a clear and fundamental conflict with an applicable statute." 85 Fed. Reg. 43,340. The Response to Comments is equally clear: "to the extent existing agency NEPA procedures are inconsistent with the final rule, the final rule shall apply . . . ." RTC at 421.

[21] *See, e.g.*, Dkt. 75 at 73 ("Until FSA and SBA revise their policies toward loan guarantees and begin to issue guarantees under the new policy, the status quo with regard to loan guarantees will be maintained."); Tr. at 36:18-37:2 ("Yes, the rules will become effective [on September 14], but since they are rules about rules, you know, rules on rules, and since then the rules on rules and the original rules have to be applied to particular actions before there's any impact, we don't think that there's any immediate impact to the plaintiffs."); Tr. at 37:25-38:4 ("[N]ew regulations will be put into place, and so they first have to be proposed, they have to go through the whole Federal Register and notice and comment process – that hasn't even begun yet – before anything will change.").

As discussed in prior briefs, the immediate changes bring immediate harms. Where CEQ emphasizes the positives they believe will result, there will certainly be negative impacts that will harm the Conservation Groups.

Farm Service Loans Guarantees and CAFOs. The Conservation Groups have made clear they will be irreparably harmed because starting on September 14, 2020, entire categories of projects will completely exempt from NEPA. Dkt. 30-1 at 1, 21-22, 72. One striking example of such harm is CEQ's explicit exclusion of the Farm Service Agency's ("FSA") federal loan guarantees from NEPA. Where previously FSA loan guarantees were subject to rigorous agency disclosure and public participation requirements, *see* 7 C.F.R. § 799,[22] the Rule now exempts FSA loan guarantees from NEPA entirely. *See* 40 C.F.R. 1508.1(q)(1)(vii) ("Major Federal action does not include . . . farm ownership and operating loan guarantees").

The Conservation Groups submitted multiple declarations documenting the imminent harm they will experience once the Rule exempts these financial arrangements from NEPA.[23] In response, CEQ submitted a declaration from a Farm Service Agency employee in which he appears to testify that the USDA will break the law and disregard CEQ's Rule. Where the Rule states explicitly that its provisions (which expressly exempt FSA loan guarantees) govern, and apply immediately, the USDA states the agency will ignore this clear law and "not change the

[22] *See also* Farm Service Agency, FSA Handbook Environmental Quality Programs for State and County Offices, Short Reference, 1-EQ (Revision 3) (Nov. 4, 2016), *available at* https://www.fsa.usda.gov/Internet/FSA_File/1-eq_r03_a01.pdf (handbook "contains procedures and guidelines for completing the appropriate level of environmental compliance review or environmental impact analyses").

[23] *See* Burdette Decl. ¶¶ 16-26, Dkt. 30-47; Wolfe Decl. ¶¶ 12-21, Dkt. 30-27; Parr Decl. ¶ 32, Dkt. 30-21; Robbins Decl. ¶¶ 7-11, Dkt. 30-44; Blotnick Decl. ¶¶ 6, 22, 32, Dkt 30-33; J. Wilson Decl. ¶ 37, Dkt. 30-8, M. Wilson ¶ 39, Dkt. 30-9. For example, Cape Fear River Watch member John Wolfe is a journalist who writes about environmental issues in the Wilmington area, including factory farms, and is concerned that "under the new rule, I will not be able to timely and effectively write the same sorts of articles because it will be more difficult to obtain information. … If people are unable to access timely and accurate information about projects through the NEPA process, I will be unable to be a successful journalist because it will be significantly more difficult for me to access the information I need to effectively inform the public." Wolfe Dec. ¶¶ 20-21, Dkt. 30-27.

current level of NEPA analysis FSA currently applies to its treatment of loan guarantees involving CAFOs under 7 C.F.R. part 799." Peterson Decl. ¶ 20, Dkt. 75-2.

CEQ thus asks the Court to speculate that federal agencies will not comply with the Rule's plain language. The provisions cited by CEQ at the hearing do not give the Farm Service Agency discretion to determine its loan guarantees are "major federal actions" subject to NEPA, either by agency policy or adjudication.[24] There is no basis in law or fact to assume that agencies will not follow the rule's unambiguous requirements. Conservation Groups will be irreparably harmed when these loan guarantees are no longer subject to NEPA on September 14, for the reasons already stated and as set out in declarations.

External Scoping. The Conservation Groups noted the Rule will limit the "early and open" process of determining the scope of the evaluation—known as "scoping"—only to Environmental Impact Statements, and thus remove scoping from Environmental Assessments ("EA"s). *Compare* 40 C.F.R. 1501.7(a) (1978) (scoping applicable to "proposed actions") *with* 40 C.F.R. § 1501.9(a) (2020) (defining scoping as limited to EISs). *See also* Dkt. 30-1 at 48–49, 77–78. The Groups noted that this change would immediately impact Forest Service procedures in particular, which until now have included an external scoping process for all proposed actions. Currently the majority of Forest Service projects are improved due to public comment at the scoping stage, before sunk costs make it difficult for the agency to change course. *Id.*

CEQ misrepresents the text of its own Rule and incorrectly suggest that it does not eliminate scoping for EAs. But the provisions CEQ cites to relate not to the *external* scoping valued by the Conservation Groups, but rather an *internal* process previously characterized as

[24] At the hearing on September 4, 2020 counsel for CEQ cited Sections 1501.1(a)(4) and (b) of the Rule to argue "that as to any situation that involves the question of whether there's major federal action, the agencies can choose either to do an additional look at that by adjudication or by new NEPA procedures, by new NEPA regulations." But whereas those provisions relate to other discretionary determinations, the language of Section 1508.1(q)(1)(vii)) is express and cannot be overruled by individual agencies.

"pre-scoping" under the prior regulations. *See* 85 Fed. Reg. 43,326. Under the new Rule, the agency is permitted to conduct its own "early" work, including "pre-application" coordination with permittees, out of public view. 40 C.F.R. § 1501.9(a) (2020). External scoping (*i.e.*, mandatory notice to the public) does not occur until ***after the agency determines that an EIS will be prepared***. *Id*. § 1501.9(d). In other words, external scoping occurs only after any EA has already been prepared. *Id*. § 1501.5(c)(1). The Rule therefore unambiguously eliminates any role for external scoping to gather public input on an EA. The Forest Service's scoping procedures are therefore inconsistent with the Rule and will be immediately overwritten, harming Conservation Groups who rely on this process to improve Forest Service projects.

B) The Conservation Groups Have Established Multiple Types of Irreparable Harm.

The Conservation Groups have established that they will suffer procedural, informational, and environmental harm if the Rule goes into effect. Nothing in Defendants' briefs refutes this.

Procedural Harm. CEQ suggests that the Conservation Groups cannot claim procedural harm because the procedural changes that impact them exist "in vacuo." Dkt. 75 at 73. But the Conservation Groups' procedural harm is tied to their concrete interests in environmental resources that are well established in the record. The Conservation Groups have shown how they have relied on NEPA in the past to protect these resources, and how they would continue to rely on NEPA in the present and into the future. Nothing more is needed.

CEQ's assertion that the Conservation Groups' injuries are "abstract" is equally unpersuasive. Dkt. 75 at 76. NEPA is a procedural statute that creates rights to information and procedure. Congress intended these rights to have concrete benefits (a "healthful, safe, and aesthetically and culturally pleasing" environment). *See* 42 U.S.C. § 4331. The courts have recognized that they do have such concrete benefits. *Robertson v. Methow Valley Citizens*

Council, 490 U.S. 332, 350 (1989) (noting that NEPA's procedures are "almost certain" to influence decisions). And the Conservation Groups have shown, in comments and again in this litigation, that they have such concrete benefits. The harms caused by stripping these rights are not abstract but real and irreparable.[25]

Informational Harm. Here, the Conservation Groups have clearly established a statutory right to information, a particularized interest in that information, and that they will be denied information. NEPA "of its own force vests concerned organizations with a statutory right to information." *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 503 (D.C. Cir. 1994).

CEQ suggests that the Conservation Groups suffer no informational harm because they still have FOIA available to them. Dkt. 75 at 72, n.41. As recent experience has shown, however, FOIA is no substitute for the free and extensive public disclosure tool that has been comprised by NEPA for the past 40 years. Because of the Rule, plaintiff Congaree Riverkeeper Bill Stangler was forced to submit a FOIA for information about the Westinghouse Nuclear relicensing project he believes he will no longer have access to. In response, Mr. Stangler was greeted with a $3000 fee he cannot afford, procedural hoops, and the likelihood that he would not receive the information in a meaningful timeframe. Exhibit 2. Moreover, FOIA is no substitute for NEPA because NEPA *generates* information for public distribution, where FOIA simply requires disclosure of information that already exists.

CEQ wrongly asserts that NEPA's information role is "incidental" to the statute's goals. Dkt 53 at 36.[26] But in fact informational disclosure is central to NEPA. *Baltimore Gas & Elec.*

[25] Defendants' suggestion that the Conservation Groups do not have standing because the Rule does not regulate their primary conduct also fails. Not only are Defendants incorrect about the standard, but the Rule will impose significantly on the Conservation Groups' primary conduct as they are forced to comply with stringent new participation requirements or risk waiving claims. *See* prior discussion Dkt. 73 at 16-18, 25-26.

[26] CEQ has grafted this radical interpretation onto the Rule. Where NEPA's purpose and policy has always included public *involvement* in decisionmaking, 40 C.F.R. § 1500.2(d) (1978), CEQ now asserts that NEPA's purpose is

Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 97 (1983) (one of NEPA's "twin aims" is "inform[ing] the public" about environmental concerns in agency decisionmaking); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (describing "informational role" of impact statement and its purpose to "provid[e] a springboard for public comment").

Diversion of Resources. The fact that organizations have standing when they are forced to divert resources away from activities key to their organizational missions has been well established by the Supreme Court. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The Fourth Circuit's opinion in *CASA* must be read to keep with this precedent. *CASA de Md. v. Trump*, No. 19-2222, 2020 WL 4664820 (4th Cir. Aug. 5, 2020). As the Conservation Groups have noted, *CASA* rejected an organization's move to educate members about a new regulation as being sufficient to constitute standing. Here, in contrast, the Rule deprives the Conservation Groups of essential tools that they need to continue evaluating environmentally harmful projects and educating the public and decisionmakers about them. Not only will organizations be forced to divert resources to obtain information in other ways, but many groups will need to divert resources to pay for experts to submit comments for them in keeping with the new requirements that demand specificity and technical expertise.[27]

Environmental Harm. As the Conservation Groups have repeatedly noted, environmental harm is established under NEPA when an individual can show loss of procedural protection under NEPA will lead to increased risk that an environmental resource the individual cares about will be harmed. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 at 572 n.7 (1992).

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satisfied "if the public has been informed" after the fact.

[27] *See, e.g.*, Burdette Decl. ¶¶ 25-26, Dkt. 30-47 (testifying that if it must divert resources to hire experts to draft comments, Cape Fear River Watch will not be able to "carry out our CAFO work to the same level" and "will no longer have the capability to conduct [] water quality monitoring efforts and public outreach," which will in turn adversely affect the Cape Fear River and the people who use it).

Here the Conservation Groups have pointed to numerous instances where the loss of protections afforded to them under NEPA will mean an increased risk of harm to beloved resources. As just one example among many, after Plaintiff Alabama Rivers Alliance successfully challenged FERC's relicensing of seven hydroelectric dams along the Coosa River because the agency failed to consider their cumulative effect on a biologically diverse area of fish and freshwater mollusks, the D.C. Circuit remanded the matter to FERC to evaluate the relicensing's cumulative effects, as required under the 1978 NEPA regulations. Now, however, Alabama Rivers Alliance and its members will suffer harm because the rule allows FERC to forgo consideration of cumulative effects and specifically forbids the agency from looking at effects that are geographically or temporally remote. The loss of this procedural protection means Alabama Rivers Alliance faces the prospect of decisions that fail to account for the cumulative effects of multiple dam closures on dissolved oxygen and water temperature, and that, as a result, the aquatic biota the group and its members work to protect will be harmed.

CEQ points to *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), to argue that injunctions cannot guard against future environmental harms under NEPA. But *Monsanto* actually supports the Conservation Groups' entitlement to preliminary relief. In that case, the USDA's decision allowing a genetically-altered crop to be grown without regulation was vacated because the agency failed to complete an EIS, which created a risk of environmental harm. Although injunctive relief was appropriate, *Monsanto* held that the injunction was too broad because it would have prevented the agency from *partially* deregulating the crop with more protective conditions. Here, the Conservation Groups do not ask the Court to enjoin CEQ from promulgating a *different* rule that could pass legal muster. They ask only that the Court postpone *this* rule, which is unlawful on its face and will imminently harm their concrete interests.

IV) The Balance of the Equities Favors Preliminary Relief

The relief sought in this case would prohibit the Rule from being applied to existing and ongoing agency actions while nevertheless allowing agencies to take steps toward revising their own rules. This is eminently reasonable and would serve the public interest, as the Conservation Groups explained in their opening brief. It is difficult to square CEQ's argument that postponing the Rule would delay projects, Dkt. 75 at 80, with counsel's representation in the hearing that "we don't think that anything will happen immediately on September 14." Tr. at 36:20-21. The Southern Ute amicus brief, meanwhile, disagrees with CEQ, recognizing that the Rule *will* have immediate effect. Dkt 86-1 at 10. Regardless, the amicus interest does not tip the equities. The fact that the Rule may benefit some stakeholders does not overcome the fact that CEQ did not weigh competing interests in the first place.[28] Stakeholders have different perspectives on the Rule corresponding to whether they are primarily interested in environmental protection or development—a spread of opinion that also differs among Tribes.[29] CEQ was obligated to "harmon[ize]" those perspectives, 42 U.S.C. § 4331, but failed even to consider the majority. Moreover, the requested relief would not prohibit projects important to the amicus from going forward, but would only ensure that they proceed under the well-established current rules. And nothing in the requested relief would prevent agencies from implementing new and improved consultation with tribes, because the old regulations are not a ceiling.

[28] One of many ways that CEQ was delinquent during the rulemaking process was insufficient tribal consultation required by Executive Order 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). The National Congress of American Indians and the National Association of Tribal Historic Preservation Officers, which together represent hundreds of tribes, submitted comments highlighting the lack of consultation and opposing changes to the 1978 regulations, as did other tribal groups and individual tribes. *See, e.g.*, Selection of Tribal Comments from the Docket, Exhibit 3.

[29] As counsel for amicus acknowledges, the Southern Ute Indian Tribe speaks only for its own interests and not on behalf of tribal interests generally. Dkt 86 at 2, 4. The Southern Ute Indian Tribe—sitting in southern Colorado atop one of the most productive coal-bed methane gas fields in the country—has more oil and natural-gas wells than members. *See* Catherine Traywick, *Fight Pipeline, Drill for Oil: Either Way, Tribes Want Control of Their Lands*, Bloomberg, Oct. 12, 2016, attached as Exhibit 4. Hundreds of other tribes, including land-owning tribes such as the Standing Rock Sioux, have spoken out in opposition to the Rule. *See* Docket Id. CEQ-2019-0003-170987 (Mar. 10, 2020); *see also* note 28 *supra*.

V) Nationwide Relief is Tailored to the Conservation Groups in This Case

Because the Rule applies to projects the Conservation Groups are working on in other Circuits throughout the country, there is no more limited scope of relief that would be appropriate. Because the different sections of the Rule are inseparably related, postponing only some of them would not prevent the Conservation Groups' injuries, and under *State Farm* the procedural defects that underlie the rulemaking likewise affect the entire Rule.

A stay of the Rule's effective date would provide complete preliminary relief, as would an injunction. Recently, the Fourth Circuit rejected a nationwide injunction as "wholly unnecessary to protect the rights of the only plaintiffs to this lawsuit who have standing." *CASA*, 2020 WL 4664820, at *28. But the concerns about non-parties expressed in that case do not apply here: postponing the Rule in this case affords relief to the Conservation Groups themselves, who are affected by the Rule nationwide. *See* Dkt. 30-1 at 107-08. In other words, nationwide relief *is* tailored to the plaintiffs in this case, as their numerous declarations attest. While that relief could take the form of an injunction, the Court can also simply stay the Rule's effective date[30] under the APA, postponing the Rule from immediately overriding longstanding NEPA procedures, while allowing other agencies to continue working on revisions to their own rules pending a ruling on the merits.

CONCLUSION

For the forgoing reasons, the Court should grant the Conservation Groups' Motion for Preliminary Injunction or Stay.

Respectfully submitted, September 9th, 2020.

SOUTHERN ENVIRONMENTAL LAW CENTER

[30] *See Nken v. Holder*, 556 U.S. 418, 428–29 (2009) ("[A] stay achieves this result by temporarily suspending the source of authority to act . . . not by directing an actor's conduct").

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CERTIFICATE OF SERVICE

I hereby certify that on September 9th, 2020, I electronically filed the foregoing Reply in Support of the Conservation Groups' Motion for Preliminary Injunction or Stay with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification of such filing to all counsel of record.

/s/ Kimberley Hunter