No. 23-975

In The Supreme Court of the United States

Seven County Infrastructure Coalition, Et Al.,

Petitioners,

v.

Eagle County, Colorado, Et Al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FORMER SENIOR FEDERAL OFFICIALS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are a bipartisan group of former senior federal officials who interacted frequently with the National Environmental Policy Act ("NEPA") while in office. Despite divergent political views, amici agree—based on their extensive experience with NEPA—that: (I) NEPA makes federal projects better for all stakeholders and (II) it is Congress's job, not this Court's, to refine NEPA's framework.

Sally Jewell, Secretary of the Interior, 2013-2017.

Lynn Scarlett, Deputy Secretary of the Interior, 2005-2009.

Gregory Jaczko, Chairman of the U.S. Nuclear Regulatory Commission, 2009-2012.

Jonathan Jarvis, Director of the National Park Service, 2009-2017.

Dale Hall, Director of the U.S. Fish and Wildlife Service, 2005-2009.

Jamie Rappaport Clark, Director of the U.S. Fish and Wildlife Service, 1997-2001.

Thomas L. Tidwell, Chief of the U.S. Forest Service, 2009-2017.

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[1] Pursuant to Supreme Court Rule 37.6, counsel represent that they authored this brief in its entirety and no one else made a monetary contribution for it.

Dave Matsuda, Administrator, 2010-2013, and Deputy Administrator, 2009-2010, for the Department of Transportation Maritime Administration.

Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works), 2009-2017.

R. Lyle Laverty, Assistant Secretary of the Interior for Fish, Wildlife, and Parks, 2007-2009.

Jim Furnish, Deputy Chief of the U.S. Forest Service, 1999-2002.

INTRODUCTION AND SUMMARY OF ARGUMENT

NEPA was enacted in 1969 with broad bipartisan support. Signed into law by President Nixon, NEPA has been the cornerstone of U.S. environmental law and federal project management for more than a half century. It is a procedural law that seeks to ensure informed and transparent decision making by federal officials undertaking major federal actions. To this end, in the small percentage of federal projects for which NEPA requires an agency to prepare an Environmental Assessment ("EA") or, even more uncommonly, an Environmental Impact Statement ("EIS"), "[a]ccurate scientific analysis, expert agency comments, and public scrutiny" are essential to the process, 40 C.F.R. § 1500.1(b). As NEPA's implementing regulations make clear, "it is not better documents but better decisions that count." *Id.* at § 1500.1(c). After all, "NEPA's purpose is not to generate paperwork—even

excellent paperwork—but to foster excellent action." *Id.*

NEPA does not always achieve this aspiration of excellence. But it does regularly make federal actions better. One would not know that, however, from the filings of petitioners and their amici. They paint NEPA as little more than red tape that foils (or intractably delays) infrastructure efforts and economic development generally.

As the undersigned *amici* can attest, this tale of wasted time and investment lost is a distorted one. True, there are real instances of protracted, years-long EIS review processes. But such cases are exceedingly rare, corresponding to a tiny fraction of NEPA reviews. An EIS—the most rigorous NEPA analysis and the overwhelming target of petitioners' and their amici's complaints—is itself a rarity. Among the hundreds of thousands of proposed federal actions each year, an EIS is prepared for roughly 200, or less than one percent, of those projects. *See infra* p. 29. And in *amici*'s experience, the great majority of even EIS processes are vastly more efficient than petitioners and their amici suggest.

Similarly off base is petitioners' fundamental premise that environmentally informed decision making is anathema to economic development. History, *amici*'s considerable experience, and many NEPA reviews reveal that the environmentally preferable option is sometimes *also* the most economically beneficial for taxpayers, project-developers, and local economies. Even efforts

overtly focused on environmental preservation or restoration may yield enormous economic returns. *See infra* Part I.A.

But NEPA does not expect such symbiosis. And where it is not possible, NEPA's function is not to impede economically or socially advantageous projects—it is to make them better.

NEPA does so in a variety of ways. In the event of an EA or EIS, NEPA requires that lead agencies consider—and take seriously—stakeholder input, expert analysis, alternative proposals' costs and benefits, and, yes, environmental and other sensitivities. Throughout its process, moreover, NEPA requires that agencies keep front of mind the project's objectives. The result is superior federal action. Time and again, *amici* saw NEPA make projects better for *everyone* by improving design, promoting stakeholder interests (including the interests of those with economic claims), and deconflicting inter-agency and inter-governmental concerns. Simply put, NEPA's process often means cheaper, safer, more resilient, and even (due to its deconfliction benefits) faster federal actions. *See infra* Part I.B.

Still, *amici* acknowledge that there is room for improvement. There are cases—though far fewer than petitioners suggest—when NEPA does not achieve its purpose, at least not efficiently. Yet the job of refining or "right-siz[ing] NEPA" is not for this Court, as petitioners and their amici would have it. *See, e.g.*, Brief for the American Exploration & Mining Association et al. 3. Among other issues, the

appropriate scope and duration of NEPA review and optimal level of interagency consultation are quintessential policy considerations "properly addressed to Congress, not this Court." *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 369 (2018). The undersigned *amici*, based on their extensive NEPA experience, disagree with many of the policy positions urged on the other side. But *amici* recognize that it is *Congress's* prerogative to weigh and resolve such arguments. *See Egbert v. Boule*, 596 U.S. 482, 491 (2022).

Besides, Congress is actively doing exactly that, having substantially amended NEPA just last year. The revised framework supersedes the version of NEPA that governed the events and decision below in this case. Additionally, at least 13 bills to further revise NEPA are pending at different stages of the legislative process. If enacted, they would implement many of the policy changes petitioners and their amici request. This Court should decline petitioners' invitation to intrude in this complex and contentious policy debate, and leave to Congress the work of shaping NEPA's future. *See infra* Part II.

ARGUMENT

I. NEPA Saves Money, Time, and Lives—Not Just the Environment.

Petitioners and their amici paint a dismal picture of NEPA. In their telling, NEPA is a burdensome waste of money and time that stymies projects like the proposed railroad tracks at issue here, the operation of mines, and the building of new

roads. Considering a project's environmental impacts, they say—whether through "[e]xpanded, wasteful NEPA analyses" or otherwise—serves only to "hurt developers, the thousands of employees and contractors they employ, and the economies they and their projects support and energize." Br. of Anschutz Exploration Corp. 26 ("Anschutz Br."); *see also* Petrs. Br. 50 (describing the decision below as a "threat not just to the promising project here, but to infrastructure development in general"). In short, petitioners and their amici maintain, NEPA's requirements benefit only the environment and its patrons—at the expense of critical infrastructure needs, industrial development, and local economies.

That argument does not accord with reality. History, and the experience of the undersigned *amici*, are chockful of examples of NEPA improving federal projects across nearly every metric—enhancing project design, saving taxpayer and project-developer dollars, promoting public safety, protecting property rights, and preserving the natural environment.

NEPA enables agencies to identify superior proposals and bring them to fruition. In doing so, it serves not as a barrier to financial gain and economic development. In fact, NEPA sometimes reveals that the environmentally preferable option is also the most profitable. And when that is not the case, or when such option is incompatible with the project's aims, NEPA improves projects by requiring consideration of stakeholder interests and "reasonable alternatives," 40 C.F.R. § 1502.14(a). In *amici*'s experience, that process frequently yields cheaper, safer, and overall superior federal actions.

A. Projects That Preserve or Restore the Natural Environment May Also Generate Enormous Economic Value.

To begin, contrary to the petitioners' basic thesis, it is simply not the case that a project can result in economic gain *or* environmental benefit, but not both. For more than a century, conservation, restoration, and sustainable infrastructure efforts have led to enormous positive economic externalities. Such projects have generated broad bipartisan support and tremendous economic, social, and environmental benefits.

1. Take what is now known as Grand Canyon National Park. When, in 1903, President Theodore Roosevelt sought to preserve "this great wonder of nature," President Theodore Roosevelt, Remarks at Grand Canyon, Arizona (May 6, 1903),[2] some had other ideas. Those with mining interests fought for decades to thwart attempts to protect the canyon from industrial development. *See generally* Douglas H. Strong, *Ralph H. Cameron and the Grand Canyon (Part II)*, Arizona and the West, Vol. 20, No. 2 (Summer 1978). Happily, President Roosevelt's vision prevailed when Congress established Grand Canyon National Park. Pub. Law No. 277, 65 Stat. 1175 (1919). Not only was the Grand Canyon later shown to possess "no mineral value," Strong, *supra* p. 7, at

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[2] Available at: https://www.presidency.ucsb.edu/documents/remarks-grand-canyon-arizona.

156, it is now widely accepted as one of our country's great treasures.

The Park has also proven to be an outstanding economic investment. According to a peer-reviewed study, in 2023 alone, more than 4.7 million visitors to the Grand Canyon brought more than $768 million dollars in spending to the surrounding economy. *2023 National Park Visitor Spending Effects: Economic Contributions to Local Communities, States, and the Nation*, National Park Service ("NPS"), at 27 (Aug. 2024).[3] That spending, in turn, generated 10,060 jobs, producing more than $350 million in labor income. *Id.* That result is an annual economic output—defined as the "total estimated value of the production of goods and services supported by NPS visitor spending"—of more than $1 *billion*. *Id.*

2. Restoration of the Florida Everglades is a similar story. In 2000, Congress committed more than $10.5 billion over a 35-year timeline to "restore, preserve, and protect the south Florida ecosystem"—an area more than twice the size of New Jersey—through the Comprehensive Everglades Restoration Plan ("CERP"). Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2681 (2000). The plan was an ambitious one, with each phase shaped by and implemented pursuant to a NEPA analysis. *See* 33 C.F.R. § 385.14 (directing the Army Corps of Engineers to "comply with the requirements of NEPA

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[3] Available at: https://www.nps.gov/subjects/socialscience/vse.htm?utm_medium=email&utm_source=govdelivery.

and applicable implementing regulations" when implementing CERP). The restoration work quickly paid environmental dividends. S*ee generally* The National Academies of Sciences, Engineering, and Medicine, *Progress Toward Restoring the Everglades: The Ninth Biennial Review* (2022). But just as important are CERP's economic benefits, owing to the Everglades' critical role in desalinating South Florida's drinking water and protecting against damage from hurricane storm surges. According to a 2010 study, every dollar spent on CERP generates an economic benefit worth four times that amount. Mather Economics, *Measuring the Economic Benefits of America's Everglades Restoration*, at iii (2010).[4] That means that the $10.5 billion allocated pursuant to CERP "will generate an increase in economic benefits of approximately $46.5 billion in net present value," with benefits potentially as high as "$123.9 billion." *Id.*

Given these extraordinary returns, it is unsurprising that continued investment in CERP has broad bipartisan support. Earlier this year, Governor DeSantis committed $1.5 billion for the 2024-25 Fiscal Year for Everglades restoration, with $614 million allocated for CERP alone. Press Release, Governor DeSantis Announces $1.5 Billion for Everglades Restoration and Water Quality Improvements in

[4] Available at: https://downloads.regulations.gov/FWS-R8-NWRS-2016-0063-0811/attachment_9.pdf.

Fiscal Year 2024-25 (April 22, 2024).[5] As Governor DeSantis put it: "I am proud to continue making these investments in Everglades restoration and water quality that will benefit our state for decades to come." *Id.*

3. The Everglades is hardly the only example of a natural resource that serves as a protective, and economically efficient, system. The U.S. Army Corps of Engineers ("USACE")—the federal entity tasked with implementing CERP in accordance with NEPA—has an entire program devoted to identifying and implementing nature-based solutions to infrastructure projects. Known as "Engineering with Nature," the program is rooted in modern advances in engineering and ecology that demonstrate that environmentally sustainable infrastructure can also be the most cost-effective and socially beneficial. Through this program, the USACE has, among many other projects:

- Restored wetlands in San Pablo Bay, California, which provide a habitat for endangered species and improve the quality of water entering the Bay while also maintaining a buffer for flooding. *Engineering with Nature: An Atlas*, U.S. Army Corps of Engineers 68-70 (2018);[6]

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[5] Available at: https://www.flgov.com/2024/04/22/governor-ron-desantis-announces-1-5-billion-for-everglades-restoration-and-water-quality-improvements-in-fiscal-year-2024-25/.

[6] Available at https://ewn.erdc.dren.mil/atlas-series/volume/engineering-with-nature-an-atlas-volume-1/.

- Rehabilitated a river in Washington that provides a migratory and rearing habitat for salmon species—important both for ecosystem health and for the region's commercial and recreational fishing industries, *id.* at 210-12; and
- Reused dredged sediment from the Buffalo River to restore wetland vegetation decimated by decades of industrial development. The project rehabilitated a coastal wetland habitat that is home to threatened wildlife, provided a native seed bed, and generated "significant cost savings" by reducing the need for a sediment disposal facility. *Engineering with Nature: An Atlas*, *Vol. 2*, U.S. Army Corps of Engineers 106 (2021).[7]

In each instance, the USACE not only "reduce[d] demands on limited natural resources, and minimize[d] environmental impacts," but also "generat[ed] a diverse array of economic … and social benefits." Jeffrey King et. al, *Achieving Sustainable Outcomes Using Engineering with Nature Principles and Practices*, Integrated Environmental Assessment and Management (Aug. 2020).[8]

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[7] Available at: https://ewn.erdc.dren.mil/atlas-series/volume/engineering-with-nature-an-atlas-volume-2/.

[8] Available at: https://setac.onlinelibrary.wiley.com/doi/10.1002/ieam.4306.

B. NEPA Makes Economically Advantageous Projects Even Better.

Of course, environmental conservation and restoration do not always go hand-in-hand with economic gain. And as *amici* well recognize, there are times when an infrastructure project or industrial development effort will benefit the public good, even if it will harm the environment.

NEPA's purpose is not to impede such projects. Rather, its function is to identify the best approach; i.e., the one that causes the least environmental harm while *also* achieving the project's goals and advancing stakeholders' interests—whether they be "social, economic," or otherwise. 42 U.S.C. § 4331(a) (NEPA Congressional Declaration of National Environmental Policy). Beyond seeking to maintain the environment, after all, NEPA's mandate is to help "fulfill the social, economic, and other requirements of present and future generations of Americans." *Id.*

NEPA accomplishes that goal by requiring agencies to engage in a reasoned and transparent decision-making process that accounts for the interests of *all* stakeholders. It does so in multiple ways. By mandating that agencies "[r]igorously explore and objectively evaluate reasonable alternatives to the proposed action" when preparing an EIS, 40 C.F.R. § 1502.14(a), NEPA stands to "reveal cheaper, more effective, or less damaging alternatives," A. Masinter, *The National Environmental Policy Act and the Value of Information*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 465, 469 (2020). Likewise, NEPA invites input from

parties with vastly divergent perspectives, which "help[s] to satisfy diverse stakeholders and aid[s] in avoiding litigation." K. Emerson & E. Baldwin, *Effectiveness in NEPA Decision Making: In Search of Evidence and Theory*, J. ENV. POL'Y & PLAN. 427, 430 (2019). And, NEPA demands "inter-agency exchange of information," as well as "inter-agency cooperation," in a setting "where competition and exclusiveness were once standard practice." L. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 207 (1998).

As *amici* saw time and again while in office, the result is better overall projects for everyone—including project developers, taxpayers, property owners, local communities, and the many individuals whose safety would have otherwise been jeopardized by a federal project. The following are just a few examples of how NEPA has benefitted those groups.

Project Developers and Other Economic Stakeholders. Some of petitioners' amici cast NEPA as a tool used exclusively by "special-interest groups that oppose oil-and-gas and other mineral development on public lands." *See, e.g.*, Anschutz Br. at 1. Hardly. Project developers, too, have a voice in the NEPA process.

1. The carve-outs found in the Forest Service's "Roadless Rule" are illustrative. In 1999, consistent with NEPA's requirements, the Forest Service initiated rulemaking regarding roadless area conservation. Notice of Intent to Prepare an EIS, 64 Fed. Reg. 56306 (Oct. 19, 1999). The purpose was to

conserve the road-free portions of the National Forest System by limiting road construction, reconstruction, and timber harvest within those zones. *See* Statement of James R. Furnish Before the United States Senate, Committee on Energy and Natural Resources, Subcommittee on Forests and Public Lands Management (July 26, 2000).[9]

As initially proposed, the rule lacked exceptions for holders of existing mineral leases. *See* Notice of Proposed Rulemaking: Roadless Area Conservation, 65 Fed. Reg. 30275 (May 10, 2000).[10] During the NEPA process, however, it became clear that existing and future holders of such leases required the ability to construct roads, remove trees, and make other environmentally impactful changes to extract the minerals in accordance with their leases. Forest Service Area Conservation: Final EIS Vol. 1, U.S.D.A., Forest Service at 3-259 (Nov. 2000).[11] Recognizing the importance of those interests, the Forest Service established exceptions for both existing and prospective mineral leasing activities. *See* Final Rule and Accord of Decision, 66 Fed. Reg. 3244, 3256 (Jan. 12, 2001) (allowing "road construction needed in

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[9] Available at: https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5137345.pdf.

[10] Available at: https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5137342.pdf.

[11] Available at: https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5057895.pdf.

conjunction with the continuation, extension, or renewal of a mineral lease").

2. Similarly, as part of the Desert Renewable Energy Conservation Plan ("DRECP"), lead agencies delivered significant benefits to project developers utilizing NEPA's review process. The DRECP is a collaborative effort among the U.S. Bureau of Land Management ("BLM"), the U.S. Fish and Wildlife Service, and two California state agencies to "streamline[] permitting of renewable energy projects" across 22.5 million acres in the Mojave Desert. DRECP, Executive Summary for the Record of Decision, BLM, at ES-1 (Sept. 2016).[12] In consultation with federal, state, and local agencies, tribal governments, and the public, the DRECP agencies zoned the Mojave Desert to identify conservation areas, tribal lands, and "development focus areas"—zones appropriate for utility-scale renewable energy resource development. *Id.* at ES-5-8.

Leveraging the NEPA process, the DRECP agencies successfully deconflicted the interests of the many government entities involved, received input from additional stakeholders, collected all necessary data, and performed environmental analyses of the development focus areas—all in advance of receiving project proposals. *See* DRECP Proposed Land Use Plan Amendment and Final EIS, Volume II at II.3-119

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[12] Available at: https://eplanning.blm.gov/public_projects/lup/66459/133459/163123/DRECP_BLM_ROD_Executive_Summary.pdf.

(October 2015)[13] (highlighting "interagency coordination [undertaken] to expedite service and provide priority processing to [developers]"). This enabled the DRECP to offer an accelerated approval process for proposed construction projects within the focus areas, having already addressed the concerns of interested parties through NEPA's framework. Executive Summary, *supra* p. 15, at ES-5-6.

BLM has already approved three Mojave Desert solar projects capable of generating enough electricity to power nearly 300,000 homes. Lisa Friedman, *Biden Administration Approves Two Big Solar Projects*, N.Y. Times (Dec. 21, 2021);[14] Press Release, Dep't of the Interior, BLM Approves Oberon Solar Project (Jan. 13, 2022).[15] While beneficial from an environmental standpoint too, these rapid approvals were a win for the project developers.

Taxpayers. Taxpayers also gain from NEPA's mandate that agencies consider reasonable alternatives before commencing a project.

1. The Department of Energy's ("DOE") shift in approach to producing tritium—a radioactive gas that is a key component in nuclear weapons—provides a dramatic illustration. Because tritium has a decay

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[13] EISs issued from 2012 onward are available at the following database: https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search.

[14] Available at: https://www.nytimes.com/2021/12/21/climate/solar-power-federal-land-california.htm.

[15] Available at: https://www.blm.gov/press-release/blm-approves-oberon-solar-project.

rate of 5.5% per year, it must be continually produced to maintain nuclear arms. During the Cold War, far more was needed, so DOE devoted significant resources to producing and recycling sufficient tritium to compete in the ever-intensifying arms race. *NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government*, The Environmental Law Institute, at 33 (Aug. 2010)[16]. But when the Cold War ended abruptly, so did DOE's need for massive amounts of tritium.

The NEPA process gave DOE the runway it needed to adapt to the new global order. As then-Secretary of Energy Admiral James Watkins told Congress in 1992: "Thank God for NEPA because there were so many pressures to make a selection for a technology that might have been forced upon us and that would have been wrong for the country." *Id.* Instead, NEPA ensured that DOE would carefully evaluate multiple proposals, including those rejected during the Cold War years because of their inability to provide then-adequate quantities of tritium. *Id.*

Taxpayers emerged as the winner. After DOE cancelled plans to restart an existing production reactor and prepared EISs on favored alternatives, it announced that it could meet the nation's requirements for tritium production at an existing nuclear reactor operated by the Tennessee Valley Authority, combined with processing at the Savannah River site in South Carolina. *Id.* That result saved

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[16] Available at: https://ceq.doe.gov/docs/get-involved/NEPA_Success_Stories.pdf.

billions of dollars in construction costs and tens of millions of dollars per year in operation costs, all while fulfilling the country's national security needs. *Id.*

2. Taxpayers are also front of mind for the U.S. Army Corps of Engineers in carrying out its coastal initiatives. Many Texas counties have experienced multiple major coastal storm surge events in recent years, including from Hurricane Rita in 2005 and Hurricane Ike in 2008. In response, the USACE initiated the Sabine Pass to Galveston Bay Coastal Storm Risk Management Program to reduce significant human and economic risks from storm surges. *See* Sabine Pass to Galveston Bay, Texas Coastal Storm Risk Management and Ecosystem Restoration, Final EIS at ES-2, 9-10 (2017). The Program called for the construction of a new levee system in Orange County, Texas as well as improvement projects for existing hurricane flood protection systems. *Id.*

Through a NEPA-mandated evaluation of alternatives, the agency discovered that the installation of a floodgate—a central component of the proposed projects—would cost approximately $865 million more than the levee alternative, and would also include significant operation, maintenance, and repair costs. *Id.* ES-5. That cost disparity led USACE to drop the floodgate from further consideration, once again saving taxpayers hundreds of millions of dollars. *Id.* at ES-27.

Local Communities and Landowners. NEPA's implementing regulations require agencies "to inform the public of an agency's proposed action,

allow for meaningful engagement during the NEPA process, and ensure decision makers are informed by the views of the process." 40 C.F.R. § 1501.9(a). That public engagement frequently results in project design changes that address legitimate concerns from surrounding communities, without jeopardizing the project's economic success.

1. NEPA-mandated community engagement and interagency cooperation played a significant role in the development of the Kitty Hawk wind farm off the coast of the Cape Hatteras National Seashore in North Carolina. In 2012, the Bureau of Ocean Energy Management ("BOEM") called for commercial wind lease proposals that would permit the construction of wind energy projects on multiple sites along North Carolina's coast. *See* Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore North Carolina – Call for Information and Nominations, Docket No. BOEM-2012-0088 (Dec. 13, 2012).

Not everyone was thrilled—particularly because BOEM's initial proposal allowed for leases as close as six miles from the shore. The town of Kitty Hawk, for instance, expressed concern over that proximity. Michelle Wagner, *Kitty Hawk Wants Offshore Turbines Out of Sight*, Outer Banks Voice (Feb. 13, 2013). So did NPS, because turbines within 20 miles of shore would obstruct the views from the Cape Hatteras National Seashore, including its famed Bodie Island Lighthouse. Rob Morris, *Energy Agency Moves Wind Farm Lease Areas Farther Off OBX*, The Outer Banks Voice (Aug. 14, 2004).

In accordance with NEPA's public engagement requirement, however, both the town of Kitty Hawk and NPS—then led by one of the undersigned amici—were entitled to express their concerns, and BOEM was required to listen. Through that engagement, BOEM agreed to move the proposed lease sites beyond 24 nautical miles off the Kitty Hawk coastline and 33.7 nautical miles off nearby Bodie Island. *Id.*; *see also* Press Release, Dep't of the Interior, Secretary Jewell Announces Milestone for Commercial Wind Energy Development Offshore North Carolina (Aug. 11, 2014) (BOEM "worked with [NPS] to address concerns regarding potential visual impacts"). That compromise paved the way for several exceptionally lucrative, competitively auctioned lease agreements—with the money again accruing to taxpayers' benefit. *See, e.g.*, Press Release, Dep't of the Interior, Biden-Harris Administration Announces Winners of Carolina Long Bay Offshore Wind Energy Auction (May 11, 2022) ("Sale results in $315 million total in winning bids for two lease areas and a $42 million investment in domestic supply chain and workforce training.").

2. The route occupied by State Highway 26 in south-central Wisconsin is also illustrative. In 2000, the Wisconsin Department of Transportation ("WDOT") proposed constructing a bypass to address high rates of traffic congestion along this significant trucking route. Absent NEPA, the agency would have done little more than "'ask[] what the shortest distance was and buil[d] the road through there.'" Statement of H. Greczmiel, Former Associate Director

for NEPA Oversight at CEQ, Oversight Hearing before the Committee on Natural Resources, U.S. House of Representatives, at 31 (Apr. 25, 2018) (quoting WDOT project manager).[17] Instead, consistent with NEPA's public engagement mandate, the agency partnered with members of potentially affected communities to evaluate a host of "through-town" and other alternative proposals. *See* STH 26 Final EIS at 11-5 (signed June 15, 2005) (detailing public engagement process).[18]

That process produced a compromise route that minimized disruption to local communities. The final route successfully navigated around private lands and dairy farms, and assuaged communities' concerns by avoiding routes through urban centers. Still, the final route resolved the traffic efficiency concerns that had sparked the project in the first place. *See id.* at 11-71 – 11-77 (detailing selected preferred alternative). According to local residents, such consensus was possible only because of NEPA. As one town supervisor put it: "'We talked out problems and came up with solutions that were agreeable to most participants. The NEPA process has saved us a lot of money and mitigated many of the externalized consequences of a freeway expansion project.'" Greczmiel Statement, *supra* pp. 20-21, at 31 (quoting town supervisor).

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[17] Available at: https://www.congress.gov/115/chrg/CHRG-115hhrg29883/CHRG-115hhrg29883.pdf.

[18] Available at: https://books.google.com/books?id=JA1g7uoPiIkC&pg=RA1-PA1&source=gbs_toc_r&cad=2#v=onepage&q&f=false.

Public Safety. When enacting NEPA, Congress declared that a key purpose of the new law was to enhance "the health and welfare of man." 42 U.S.C. § 4321. NEPA achieves that objective in part by making federal actions safer.

1. NEPA's process proved critical to the safe demolition of the former nuclear reactor known as Chicago Pile 5 at Argonne National Laboratory in Argonne, Illinois. After the reactor ceased operations, it was decontaminated and decommissioned following an EA prepared pursuant to NEPA. *See* EA for the Proposed Demolition of Building 330 at Argonne National Laboratory, DOE/EA-1659 (Aug. 2009) at 2; *see also id.* at 1 n.1 (noting initial EA).[19] In 2009, the Department of Energy proposed taking the final step: demolishing the dormant structure. *Id.* at 1. That effort, however, was complicated by the possibility that demolition would release toxic radionuclides into the air.

NEPA's consultation and expert-analysis requirements ensured that this risk was adequately addressed to protect the safety of the local community and on-site workers. Among other mechanisms, the EA set out steps to ensure compliance with federal limits on public exposure to radionuclides. *Id.* at 10. Those steps included mandating air monitoring at the building location and site boundaries; the implementation of airborne contamination controls such as filters, dust suppression techniques, and the

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[19] Available at: https://www.energy.gov/nepa/articles/ea-1659-final-environmental-assessment.

like; requiring workers to wear personal protective equipment such as respirators; and providing for post-demolition radiation surveys. *Id.*

2. NEPA similarly succeeded in protecting the public in a project at the Timpanogos Cave National Monument in Utah. In 1991, the Monument's Visitor Center burned down, requiring NPS to operate out of a "temporary" facility for the next two decades. In 2010, NPS approved a new Visitor Center to be built on essentially the same site as the existing temporary facility. *See Timpanogos Cave National Monument Long Range Interpretive Plan*, NPS, at 6 (Dec. 2010).[20]

Through the NEPA process, however, NPS learned that the chosen site posed a much greater risk of rock falls than NPS initially believed. NPS announced in 2012 that it had "reevaluated alternatives for the Environmental Assessment regarding the construction of a new visitor facility" in order to "improve visitor and employee safety from … the rockfall hazard." Press Release, NPS, Timpanogos Cave National Monument Revisits Alternatives for Environmental Assessment (Feb. 1, 2012).[21] In the end, NPS decided to build the new Visitor Center in a new location, thus "put[ting] visitors out of the path [of] rocks and boulders."

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[20] Available at: https://npshistory.com/publications/tica/lrip-2010.pdf.

[21] Available at: https://www.nps.gov/tica/learn/news/2012-ea-revisit.htm.

Timpanogos to Close After Labor Day for Construction Project, Associated Press (Aug. 20, 2018).[22]

II. To The Extent NEPA Should Be (Further) Revised, Such Work Is Congress's Domain—And That Work Is Currently Underway.

None of the above is to say that NEPA is a perfect law. It is not. And as the briefing in this case makes clear, reasonable minds disagree on several of NEPA's key elements. As this Court has long recognized, however, such policy considerations are "properly addressed to Congress, not this Court." *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 369 (2018); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 193 (2015) ("Congress gets to make policy, not the courts."). For one thing, Congress is "far more competent than the Judiciary to weigh such policy considerations." *Egbert v. Boule*, 596 U.S. 482, 491 (2022). For another, this Court's "authority" to engage in policy making "at all is, at best, uncertain." *Id.*

Bedrock separation-of-powers principles limit this Court's role to reviewing whether the D.C. Circuit's decision below comports with NEPA's then-applicable requirements. Those principles are particularly pressing here, where a policy debate regarding NEPA's future is currently underway in Congress. Just last year, Congress enacted significant revisions to NEPA that supersede the NEPA framework in effect during the events at issue

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[22] Available at: https://apnews.com/travel-general-news-0fd2c794586d4767a08151e5a3757c7e.

here. Moreover, at least 13 bills to further amend NEPA are winding their way through the legislative process. If enacted, they would implement many of the policy changes petitioners and their amici advocate.

In short, were there ever a case for this Court to tread lightly, this is it. "Congress gets to make policy, not the courts," *Omnicare, Inc.*, 575 U.S. at 193, and here Congress is actively doing just that. This Court should decline petitioners' invitation to intrude in this process.

A. Congress Recently Amended Key Aspects of NEPA About Which Petitioners Complain.

Since the preparation of the EIS underlying this dispute, Congress overhauled NEPA as part of the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, Div. C, Title III, § 321, 137 Stat. 38. That overhaul involved several of the issues underlying petitioners' challenge here. Specifically, the 2023 amendments: (1) imposed a standard requiring agencies to evaluate all "reasonably foreseeable" effects of a proposed agency action, (2) circumscribed the duration of environmental reviews and the length of environmental documents prepared under NEPA, and (3) reaffirmed the importance of interagency coordination.

1. Scope of Effects Assessment. Petitioners' principal objection to the decision below is that NEPA requires agencies to consider only those environmental effects that the proposed action would proximately cause—yet, petitioners contend, the D.C. Circuit required much more. *See* Petrs.' Br. 19-30.

Petitioners' chief request is thus for this Court to clarify that NEPA embodies a proximate causation standard, "not mere but-for causation." Petrs. Br. 16.

Since the EIS at issue was drafted, however, Congress has already amended NEPA to make clear that agencies need not assess all potential effects under a but-for causation standard. The previous iteration of NEPA—which governs this case—required an agency to consider a proposed action's "environmental impact," as well as "any adverse environmental effects which cannot be avoided." 42 U.S.C. § 4332(2)(C) (2022). The new statutory language, consistent with longstanding CEQ regulations, *see* Br. for the United States 3 ("Gov't Br."), requires agencies to consider "the reasonably foreseeable environmental effects" and "any reasonably foreseeable adverse environmental effects" of a proposed action. 42 U.S.C. § 4332(2)(C) (2023) (emphasis added).[23]

Petitioners urge this Court to announce that NEPA embodies a "more demanding form of proximate causation," under which agencies need not consider effects that are distant in geography or time. Petrs. Br. 16, 17, 34. But neither NEPA's pre- nor post-amendment text supports such a "demanding" approach. And as *amici*'s experience confirms, effects observed many miles from a project's base or many

[23] Although this reasonable foreseeability standard sounds in proximate causation, NEPA does not employ the same proximate cause standards as tort law, for the reasons the government explains. *See* Gov't Br. 34-38; *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 n.7 (1983).

years after a project takes place may nonetheless be "reasonably foreseeable" at the outset.

For starters, any federal action involving the approval of a mine, dam, power plant, or other facility with long-term operations will require an agency to consider and disclose reasonably foreseeable effects commensurate with those operations—meaning many years or decades into the future. *See, e.g.*, U.S. Nuclear Commission, Regulatory Guide 4.2 at ¶ 2.4 (Sept. 2018) (advising that environmental documents prepared in connection with an application to operate a nuclear power plant assess long-term effects within a 50-mile radius of the proposed site).

Yet even a discrete infrastructure project may have reasonably foreseeable impacts far down the line. For instance, "[d]evelopment induced by the construction of a new highway is a secondary effect that must be considered in the EIS for [a] proposed highway," *Sierra Club v. FHA*, 435 F. App'x 368, 375 (5th Cir. 2011), even if it is difficult to predict exactly when that development will occur. Likewise, an agency contemplating the approval of an addition to an oil refinery dock must evaluate the foreseeable impact of increased tanker traffic at the dock—and, in turn, the heightened risk of oil spills. *See Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2004). Indeed, there is good reason that NEPA's implementing regulations define "effects" to include "[i]ndirect effects" that are "caused by the action and are later in time or farther removed in distance, but are *still reasonably foreseeable*." 40 C.F.R. § 1508.1(i)(2) (emphasis added).

In any event, not only has Congress now incorporated into NEPA a reasonable foreseeability

standard, it is contemplating (by way of at least six separate bills, *see infra* Part II.B.1) the more demanding test petitioners urge this Court to embrace. As those bills reflect, the question whether NEPA should impose a narrower effects assessment than reasonable foreseeability involves policy considerations "properly addressed to Congress, not this Court," *SAS Inst.*, 584 U.S. at 369.

2. Length of NEPA Documents and Duration of NEPA Review. Petitioners and their amici complain that lower-court rulings like the decision below have led to interminable EIS documents and years-long review processes. Petrs. Br. 48-51; Anschutz Br. 20-23; Br. of American Petroleum Institute et al. 25 ("API Br."). Petitioners return to this theme time and time again, quipping that "88 miles of track should not require 3,600 pages of EIS." Petrs. Br. 19. Yet in 2023, Congress responded to this concern, enacting new limits on NEPA documents and the duration of NEPA review.

The 2023 amendments provide that unless an EIS is of "extraordinary complexity," it cannot "exceed 150 pages, not including any citations or appendices." 42 U.S.C. § 4336a(e)(1). The amendments further require that an EIS be completed "not later than the date that is 2 years after the sooner of, as applicable," the date the agency determines an EIS is required by statute, the date the agency notifies an applicant that an application to establish a right-of-way is complete, or the date on which the agency "issues a notice of intent to prepare" the EIS. *Id.* § 4336a(g)(1)(A). These deadlines may be extended only "in consultation with the applicant" and only for "so much additional time as is necessary to complete" the EIS.

Id. § 4336a(g)(2). The revised statute thus addresses petitioners' concern that the NEPA process is simply too long and too burdensome.

To be clear, during *amici*'s tenure, the EIS process was far from the morass petitioners suggest. And having to prepare an EIS, the most comprehensive of NEPA's "environmental documents," 40 C.F.R. § 1508.1(k); *see* 42 U.S.C. § 4336(b), was (and *is*) a rare occurrence. The CEQ estimates that an EIS is required for less than *one* percent of all proposed major federal actions. Greczmiel Statement, *supra* pp. 20-21, at 20. EAs—"concise public document[s] … set[ting] forth the basis of [an] agency's finding of no significant impact," 42 U.S.C. § 4336(b)(2)—are more common, accounting for roughly four percent of proposed major federal actions. *See* Greczmiel Statement, *supra* pp. 20-21, at 20. Still, that leaves 95 percent of proposed projects requiring neither an EIS nor an EA. *Id.* In this overwhelming majority of cases, NEPA requires only a "categorical exclusion determination," 40 C.F.R. § 1508.1(k), meaning documentation of the agency's determination that the proposed action is "excluded [from NEPA's EA and EIS review processes] pursuant to one of the agency's categorical exclusions [or] another agency's categorical exclusions," 42 U.S.C. § 4336(a)(2). In real numbers, this means that tens or hundreds of thousands of project proposals are excepted from NEPA review each year via a categorical exclusion, while only approximately 200 require EIS consideration. K. Emerson, *supra* p. 13.

Regardless, following the 2023 amendments, even the seldom-used EIS process has been significantly streamlined. 42 U.S.C. § 4336a(e), (g).

Petitioners' amici point to one EIS that recently topped the new 150-page limit, contending that agencies apparently "view the statutory page limits as optional," Anschutz Br. 21-22 & n.9; API Br. 26. But a single lengthy EIS hardly indicates as much. Besides, the environmental review for that project began in 2021—two years before the amendments were enacted. Bald Mountain Mine Plan of Operations Amendment Juniper Project, BLM (Aug. 8, 2024) (noting Feb. 11, 2021 start date).[24] Going forward, an EIS may exceed the cap only in cases of "extraordinary complexity." 42 U.S.C. § 4336a(e)(1).

3. <u>Cooperation Between Agencies</u>. Finally, petitioners urge the Court to announce limits on inter-agency cooperation based on the so-called "rule of reason." Petrs. Br. 45-46. In petitioners' view, agencies should consult with one another only with respect to the particular effects petitioners believe "the proponent agency is supposed to study under NEPA." *Id.* But here, too, Congress has recently spoken—just not in the way petitioners and their amici would have liked.

Although NEPA has long required lead agencies to "consult with and obtain the comments of any *Federal* agency which has jurisdiction by law or special expertise with respect to any environmental impact involved," 42 U.S.C. § 4332 (emphasis added), Congress recently expanded the consultation prerogative of lead agencies to encompass non-federal entities. Following the 2023 amendments, a lead agency may "designate . . . any *Federal, State, Tribal,*

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[24] Available at: https://eplanning.blm.gov/eplanning-ui/project/2011567/510.

or local agency that has jurisdiction by law or special expertise with respect to any environmental impact . . . as a cooperating agency." 42 U.S.C. § 4336a(a)(3) (emphasis added).

For the reasons outlined *supra* pp. 13, 19-20, *amici* view inter-agency consultation in the NEPA process as invaluable. During *amici*'s time in office, such cooperation led again and again to critical project improvements and time-saving inter-agency and inter-governmental deconfliction. *Id.* Amici therefore applaud Congress's decision to empower lead agencies to leverage the expertise of a broader array of government officials—and would disagree with efforts to limit this authority. But whatever the future policy determination on this point, *amici* recognize that it is just that: a *policy choice* that rightfully belongs to Congress.

B. Congress Is Considering Legislation That Would Address Still More of Petitioners' and Their Amici's Policy Priorities.

Other policy preferences that petitioners and their amici urge this Court to adopt are the subject of pending legislation in Congress. Proposals that were not enacted as part of the 2023 amendments are expected to be reintroduced when the next Congress convenes. Indeed, just last month, the House Committee on Natural Resources held a full committee legislative hearing on three NEPA-related bills in an effort to "tak[e] major steps to reform the NEPA process." Statement of Bruce Westerman (R-Ark.), Chair of House Committee on Natural

Resources (Sept. 11, 2024).[25] According to Chairman Westerman, additional amendments to NEPA are needed to "streamlin[e] permitting for crucial infrastructure projects and eliminat[e] bureaucratic red tape that is holding back development of our domestic energy and mineral resources." *Id.*

These bills make clear that petitioners and their amici are asking this Court to wade into a policy debate—not simply to apply a since-superseded version of NEPA to the facts of this case. For their part, the undersigned *amici* believe that many of these bills are misguided and would leave NEPA unable to deliver its intended benefits. Still, *amici* recognize that it is for Congress to evaluate the proposals' costs and benefits—and that it is to Congress that the parties here and their amici must direct their policy arguments.

The Court should decline petitioners' invitation to enter this policy debate. Just as it recognized in *Metropolitan Edison* that *NEPA* is not the place for policy disputes, 460 U.S. at 777, nor is this Court. Rather, "[t]he political process … provides the appropriate forum in which to air policy disagreements." *Id.*

1. <u>Scope of effects</u>. Congress is considering further refinements to the reasonably foreseeable standard it adopted in NEPA in 2023. H.R. 1, along with five bills that contain identical text (collectively,

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[25] Available at*:* https://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=416501.

the "strict causation bills"),[26] would limit the effects an agency must consider to "reasonably foreseeable environmental effects with a reasonably close causal relationship to the proposed agency action." H.R. 1, 118th Cong., § 20202(a) (2023) (emphasis added); *see also* S. 1449, 118th Cong., § 2(b) (2023) (limiting the definition of environmental "effects" to those that "have a proximate causal relationship").[27]

In line with the policy objectives of petitioners and their amici, *see* Petrs. Br. 31-39; API Br. 21-22, the strict causation bills—one of which has passed the House of Representatives—would also limit the scope of effects deemed "reasonably foreseeable" by redefining that term. These bills would define "reasonably foreseeable" to include only those effects that are "likely to occur" (1) within "10 years after the lead agency begins preparing the environmental document" and (2) within "an area directly affected by the proposed agency action such that an individual of ordinary prudence would take such occurrence into account in reaching a decision," *e.g.*, H.R. 1, § 20202(b). In addition, the strict causation bills and S. 1449 would limit consideration of environmental effects to those that "(i) occur on Federal land or (ii)

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[26] Additional bills with text identical to H.R. 1 include The American Resources Act (H.R. 1335), the National Environmental Policy Act Amendments (H.R. 1577), the Limit Save Grow Act of 2023 (H.R. 2811), the Countering Communist China Act (H.R. 7476), and the Lower Energy Costs Act (S. 947).

[27] To be clear, these bills were pending when Congress enacted the recent amendments in 2023, so Congress plainly *declined* to incorporate the "reasonably close causal relationship" language into the *current* iteration of NEPA.

are subject to Federal control and responsibility." *E.g.*, *id.*; S. 1449, § 2(g).

2. Study of effects, risks, or factors outside an agency's control. Petitioners and their amici further object to the decision below because, they contend, it requires agencies to study alternative actions that fall outside the agency's regulatory jurisdiction. *See* Petrs. Br. 44-49; Anschutz Br. 11-19; API Br. 8-20. In this respect, too, Congress is considering amending NEPA.

Each of the strict causation bills would require an agency to review only alternatives to a proposed project that "are within the jurisdiction of the [lead] agency." *E.g.*, H.R. 1, § 20202(a). Similarly, S. 1449 would limit agencies to considering "technically feasible alternatives in the jurisdiction and authority of the [lead] Federal Agency." S. 1449, § 2(b). And in the context of NEPA review for a proposed oil or gas lease, the strict causation bills would outright preclude agencies from "consider[ing] downstream, indirect effects of oil and gas consumption." *E.g.*, H.R. 1, § 20215.

3. Further shortening the duration of review. If Congress's efforts to shorten the window for NEPA review in the 2023 amendments do not satisfy petitioners and their amici, *see* Petrs. Br. 6; Anschutz Br. 22-23, 29; API Br. 7, 24-25, pending proposals would tighten the timeframe still more. The strict causation bills would preclude an agency from extending a deadline to continue environmental review unless it first obtained the approval of the applicant. *E.g.*, H.R. 1, § 20202(b). And if an agency were to miss a deadline, these bills would require the agency to pay $100 per day to the applicant for every

day past the deadline that NEPA review continues. *E.g.*, *id.*; *see also* S. 1449, § 3(d)(1) (similar).

Proposals to better monitor EIS timelines are also pending. H.R. 6129, for instance, would require the CEQ to publish data regarding the time agencies took to complete environmental reviews during the previous decade. H.R. 6129, § 2. Such data would provide Congress additional information relevant to understanding and refining NEPA's operation.

4. Containing the costs of NEPA review. Congress is considering proposals that would curtail the costs associated with NEPA review—and thus address another of petitioners' and their amici's concerns. *See* Petrs. Br. 4-9; Anschutz Br. 26-28. To monitor the costs of NEPA review, the strict causation bills and S. 1449 would require agencies to state in every EIS the estimated total costs of preparing the document. *E.g.*, H.R. 1, § 20202(b); S. 1449, § 3(d)(1). Pending legislation would also redistribute certain costs to states, other non-federal entities, and project sponsors. *See* H.R. 495, 118th Cong., § 2 (2023) (states); H.R. 1, § 20209 (non-federal entities); S. 1449, § 3(g) (sponsors). And many other proposals pending in Congress—from those limiting the effects and risks agencies must consider to those further constraining the review period, *see supra* Parts II.B.1-3—would also decrease the costs of NEPA review.

5. Limiting judicial review. Finally, pending legislation would limit litigation over NEPA's requirements. The strict causation bills, for example, would permit a would-be plaintiff to file suit only if the plaintiff had submitted comments during the administrative proceedings that "were sufficiently detailed to put the lead agency on notice of the issue

upon which the party seeks judicial review." *E.g.*, H.R. 1, § 20202(b); *see also* S. 1449, §§ 3(d)(1), 3(h) (requiring same and calling for accelerated judicial review under limited circumstances when review is permitted); S. 3170, 118th Cong., § 4 (2023) (eliminating all "judicial right of action" under NEPA for project approvals following an EA or EIS).

The strict causation bills would also significantly limit the injunctive relief permitted under NEPA. They provide that no EA or EIS "shall be vacated or otherwise limited, delayed, or enjoined unless a court concludes allowing such proposed action will pose a risk of an imminent and substantial environmental harm and there is no other equitable remedy available as a matter of law." *E.g.*, H.R. 1, § 20202(b).

* * *

In sum, petitioners' arguments and requested relief intrude on a policy debate that is complex, fraught, and actively underway right where it belongs—in Congress. It is for this Court to assess whether the D.C. Circuit properly applied the prior version of NEPA to the facts of this case. It is for Congress to "weigh such policy considerations" as petitioners and their amici urge here, *Egbert*, 596 U.S. at 491, and to decide NEPA's future.

CONCLUSION

For the foregoing reasons, the Court should recognize NEPA's considerable value and leave to Congress the work of further refining NEPA's requirements.

Respectfully submitted.

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PENDING LEGISLATION APPENDIX

TABLE OF CONTENTS

1. The cited portions of S. 879, 118th Cong. (2023) provide:

SEC. 106. DOMESTIC ENVIRONMENTAL IMPACTS.

(a) IN GENERAL.—Section 102(2) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)) is amended—

. . .

(2) in subparagraph (F), by inserting "in any proposal or other major Federal action that involves the funding or development of projects outside the United States or the exclusive economic zone of the United States," before "recognize".

. . . .

2. The cited portions of S. 1449, 118th Cong. (2023) provide:

SEC. 2. MODERNIZING THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.

(a) EXISTING NEPA REQUIREMENTS.—Section 102(2) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)) is amended—

. . .

(7) by striking subparagraph (G) (as so redesignated) and inserting the following:

> "(G) consistent with the requirements of this Act, study, develop, and describe technically feasible alternatives in the jurisdiction and authority of the Federal agency;"

. . .

(b) DEFINITIONS.—The National Environmental Policy Act of 1969 is amended by inserting after section 2 (42 U.S.C. 4321) the following:

SEC. 3 DEFINITIONS.

In this Act:

. . .

(6) EFFECTS.—

> (A) IN GENERAL.—The term 'effects' means changes to the human environment as a result of a proposed agency action or an alternative, as applicable, to be carried out by a Federal agency that—
>
> > (i) are reasonably foreseeable, including changes that may occur not later than 10 years after the date on which the lead agency begins

preparing an environmental document in an area directly affected by the proposed agency action or alternative, as applicable, such that an individual of ordinary prudence would take such occurrence into account in reaching a decision; and

(ii) have a proximate causal relationship to the proposed agency action or an alternative, as applicable.

(B) REQUIREMENT.—For purposes of subparagraph (A)(ii), a 'but for' causal relationship is insufficient to establish a proximate causal relationship.

. . .

(d) ENVIRONMENTAL IMPACT STATEMENT REQUIREMENTS.—

(1) IN GENERAL.—Title I of the National Environmental Policy Act of 1969 (42 U.S.C. 4331 et seq.) (as amended by subsection (c)) is amended by adding at the end the following:

SEC. 107. ENVIRONMENTAL IMPACT STATEMENT REQUIREMENTS.

. . .

(b) COVER SHEET.— The cover sheet for an environmental impact statement shall include a statement of the estimated total cost of preparing the environmental impact statement, including the costs of Federal agency full-time equivalent personnel hours, contractor costs, and other direct costs.

. . .

(d) TIMELINE FOR PREPARING AN ENVIRONMENTAL IMPACT STATEMENT.—

. . .(2) FAILURE TO ACT.—

(A) IN GENERAL.— If a Federal agency fails to publish a final environmental impact statement or notice of availability of the final environmental impact statement in accordance with the timeline described in paragraph (1), and the timeline has not been extended in accordance with paragraph (3), the requirements of this title shall be deemed to have been fulfilled for the major Federal action.

(B) NO JUDICIAL REVIEW.— A major Federal action deemed to fulfill the requirements of this title under subparagraph (A) shall not be subject to judicial review under this title or subchapter II of chapter 5, and chapter 7, of title 5, United States Code (commonly known as the 'Administrative Procedure Act').

(3) EXTENSION.—The timeline established under paragraph (1) may only be extended if—

(A) the extension is requested, in writing, by the project sponsor; and

(B) the applicable Federal agency concurs, in writing, with the extension.

(e) SPECIFICITY OF COMMENTS AND INFORMATION.—

. . .

(3) UNEXHAUSTED AND FORFEITED COMMENTS.— Comments and objections not provided within a comment period described in paragraph (1)—

(A) shall be considered unexhausted and forfeited; and

(B) shall not be grounds for judicial review.

. . .

(g) EFFICIENT REVIEWS.—Title I of the National Environmental Policy Act of 1969 (42 U.S.C. 4331 et seq.) (as amended by subsection (f)) is amended by adding at the end the following:

SEC. 111. EFFICIENT REVIEWS.

. . .

(c) SCOPE OF REVIEW.—In developing an environmental document for a proposed agency action, the lead agency and any other involved Federal agencies shall only consider the effects of the proposed agency action that—

(1) occur on Federal land; or

(2) are subject to Federal control and responsibility.

(d) PROJECT SPONSOR PREPARATION.—

(1) IN GENERAL.— A lead agency shall allow a project sponsor to prepare an environmental document for a proposed agency action on request of the project sponsor.

(2) GUIDANCE.— A lead agency may provide a project sponsor that elects to prepare an environmental document under paragraph (1) with appropriate guidance and assistance in the preparation of that environmental document.

(3) INDEPENDENT VERIFICATION.—A lead agency shall—

(A) independently evaluate the environmental document prepared by a project sponsor under paragraph (1); and

(B) take responsibility for the contents of the environmental document on adoption.

(h) JUDICIAL REVIEW.—Title I of the National Environmental Policy Act of 1969 (42 U.S.C. 4331 et seq.) (as amended by subsection (g)) is amended by adding at the end the following:

SEC. 112. JUDICIAL REVIEW.

. . .

(d) DEADLINE FOR RESOLUTION.—A district court of the United States shall render a final judgment on a covered cause of action—

(1) as expeditiously as practicable; and

(2) not later than the date that is 180 days after the date on which the covered cause of action is filed.

(e) APPELLATE REVIEW.— A court of appeals of the United States shall render final judgment on a covered cause of action subject to its original jurisdiction or an interlocutory order or final judgment, decree, or order of a district court of the United States in a covered cause of action—

(1) as expeditiously as practicable; and

(2) not later than the date that is 180 days after the date on which the applicable interlocutory order or final judgment, decree, or order of the district court was issued.

(f) REMANDED ACTIONS.—

(1) IN GENERAL.—If a court of competent jurisdiction remands a record of decision, a finding of no significant impact, or an authorization under this title to a Federal agency, the court shall set a reasonable schedule and deadline for the Federal agency to act on remand, which shall not exceed 180 days from the date on which the order of the court was issued.

(2) EXPEDITED TREATMENT OF REMANDED ACTIONS.—The head of the Federal agency to which a court remands a record of decision, a finding of no significant impact, or an authorization under paragraph (1) shall take such actions as may be necessary to provide for the expeditious disposition of the action on remand in accordance with the schedule and deadline set by the court under that paragraph.

. . . .

3. The cited portions of S. 3170, 118th Cong. (2023) provide:

SEC. 4. JUDICIAL STANDING UNDER NEPA.

Title I of the National Environmental Policy Act of 1969 (42 U.S.C. 4331 et seq.) is amended by adding at the end the following:

SEC. 112. JUDICIAL STANDING.

Nothing in this title, or any environmental review (as defined in section 2 of the REPAIR Act of 2023) carried out pursuant to this title, provides a judicial right of action under this title or subchapter II of chapter 5, and chapter 7, of title 5, United States Code (commonly known as the 'Administrative Procedure Act'), relating to the approval of an authorization (as defined in that section) for a project (as defined in that section) that uses an applicable environmental review (as so defined).

. . . .

4. The cited portions of H.R. 1, 118th Cong. (2023) provide:

SEC. 20202. BUILDER ACT.

(a) PARAGRAPH (2) OF SECTION 102.—Section 102(2) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)) is amended—

. . .

(3) in subparagraph (C)—

. . .

(B) by striking clauses (i) through (v) and inserting the following:

(i) reasonably foreseeable environmental effects with a reasonably close causal relationship to the proposed agency action;

(ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) a reasonable number of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, are within the jurisdiction of the agency, meet the purpose and need of the proposal, and, where applicable, meet the goals of the applicant;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.

. . .

(b) NEW SECTIONS.—Title I of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) is amended by adding at the end the following:

. . .

SEC. 107. TIMELY AND UNIFIED FEDREAL REVIEWS.

. . .

(b) ONE DOCUMENT.—

. . .

(3) SCOPE OF REVIEW.—In developing an environmental document for a proposed agency action, the lead agency and any other involved Federal agencies shall only consider the effects of the proposed agency action that—

(A) occur on Federal land; or

(B) are subject to Federal control and responsibility.

. . .

(e) ESTIMATED TOTAL COST.—The cover sheet for each environmental impact statement shall include a statement of the estimated total cost of preparing such environmental impact statement, including the costs of agency full-time equivalent personnel hours, contractor costs, and other direct costs.

. . .

(h) DEADLINES.—

. . .

(2) DELAY.—A lead agency that determines it is not able to meet the deadline described in paragraph (1) may extend such deadline with the approval of the applicant. If the applicant approves such an extension, the lead agency shall establish a new deadline that provides only so much additional time as is necessary to complete such environmental impact statement or environmental assessment.

(3) EXPENDITURES FOR DELAY.— If a lead agency is unable to meet the deadline described in paragraph (1) or extended under paragraph (2), the lead agency must pay $100 per day, to the extent funding is provided in advance in an appropriations Act, out of the office of the head of the department of the lead agency to the applicant starting on the first day immediately following the deadline described in paragraph (1) or extended under paragraph (2) up until the date that an applicant approves a new deadline. This paragraph does not apply when the lead agency misses a deadline solely due to delays caused by litigation.

. . .

SEC. 108. JUDICIAL REVIEW.

(a) LIMITATIONS ON CLAIMS.— Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of compliance with this Act, of a determination made under this Act, or of Federal action resulting from a determination made under this Act, shall be barred unless—

(1) in the case of a claim pertaining to a proposed agency action for which—

(A) an environmental document was prepared and an opportunity for comment was provided;

(B) the claim is filed by a party that participated in the administrative proceedings regarding such environmental document; and

(C) the claim—

(i) is filed by a party that submitted a comment during the public comment period for such administrative proceedings and such comment was sufficiently detailed to put the lead agency on notice of the issue upon which the party seeks judicial review; and

(ii) is related to such comment;

. . .

(e) REMAND.—Notwithstanding any other provision of law, no proposed agency action for which an environmental document is required shall be vacated or otherwise limited, delayed, or enjoined unless a court concludes allowing such proposed action will pose a risk of an imminent and substantial environmental harm and there is no other equitable remedy available as a matter of law.

SEC. 109. DEFINITIONS.

In this title:

. . .

(13) REASONABLY FORESEEABLE.—The term 'reasonably foreseeable' means likely to occur—

(A) not later than 10 years after the lead agency begins preparing the environmental document; and

(B) in an area directly affected by the proposed agency action such that an individual of ordinary prudence would take such occurrence into account in reaching a decision.

. . .

SECTION 20209. FUNDING TO PROCESS PERMITS AND DEVELOP INFORMATION TECHNOLOGY.

(a) IN GENERAL.—In fiscal years 2023 through 2025, the Secretary of Agriculture (acting through the Forest Service) and the Secretary of the Interior, after public notice, may accept and expend funds contributed by non-Federal entities for dedicated staff, information resource management, and information technology system development to expedite the evaluation of permits, biological opinions, concurrence letters, environmental surveys and studies, processing of applications, consultations, and other activities for the leasing, development, or expansion of an energy facility under the jurisdiction of the respective Secretaries.

(b) EFFECT ON PERMITTING.—In carrying out this section, the Secretary of the Interior shall ensure that the use of funds accepted under subsection (a) will not impact impartial decision making with respect to permits, either substantively or procedurally.

(c) STATEMENT FOR FAILURE TO ACCEPT OR EXPEND FUNDS.— Not later than 60 days after the end of the applicable fiscal year, if the Secretary of Agriculture (acting through the Forest Service) or the Secretary of

the Interior does not accept funds contributed under subsection (a) or accepts but does not expend such funds, that Secretary shall submit to the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a statement explaining why such funds were not accepted, were not expended, or both, as the case may be.

(d) PROHIBITION.—Notwithstanding any other provision of law, the Secretary of Agriculture (acting through the Forest Service) and the Secretary of the Interior may not accept contributions, as authorized by subsection (a), from non-Federal entities owned by the Communist Party of China (or a person or entity acting on behalf of the Communist Party of China).

(e) REPORT ON NON-FEDERAL ENTITIES.—Not later than 60 days after the end of the applicable fiscal year, the Secretary of Agriculture (acting through the Forest Service) and the Secretary of the Interior shall submit to the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a report that includes, for each expenditure authorized by subsection (a)—

(1) the amount of funds accepted; and

(2) the contributing non-Federal entity.

. . .

SECTION 20215. SCOPE OF ENVIRONMENTAL REVIEWS FOR OIL AND GAS LEASES.

An environmental review for an oil and gas lease or permit prepared pursuant to the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and its implementing regulations—

(1) shall apply only to areas that are within or immediately adjacent to the lease plot or plots and that are directly affected by the proposed action; and

(2) shall not require consideration of downstream, indirect effects of oil and gas consumption.

. . . .

5. The cited portions of H.R. 495, 118th Cong. (2023) provide:

SEC. 2 ASSIGNMENT TO STATES OF FEDERAL ENVIRONMENTAL REVIEW RESPONSIBILITIES.

Title I of the National Environmental Policy Act of 1969 (42 U.S.C. 4331 et seq.) is amended by adding at the end the following new section:

SEC. 106 ASSIGNMENT TO STATES OF ENVIRONMENTAL REVIEW RESPONSIBILITIES WITH RESPECT TO CERTAIN PROJECTS IN THE STATE.

(a) Assumption Of Responsibility.—

(1) IN GENERAL.— Subject to the other provisions of this section, with the written agreement of the responsible Federal official and a State, which may be in the form of a memorandum of understanding, the responsible Federal official may assign, and the State may assume, the responsibilities of the responsible Federal official under this Act with respect to one or more covered Federal projects of the responsible Federal official within the State.

(2) ADDITIONAL RESPONSIBILITY.— If a State assumes responsibility under paragraph (1) the responsible Federal official may assign to the State, and the State may assume, all or part of the responsibilities of the responsible Federal official for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review or approval of covered projects of the responsible Federal official.

(3) PROCEDURAL AND SUBSTANTIVE REQUIREMENTS.— A State shall assume responsibility under this section subject to the same procedural and substantive requirements as would apply if that responsibility were carried out by the responsible Federal official.

(4) FEDERAL RESPONSIBILITY.— Any responsibility of the responsible Federal official not explicitly assumed by the State by written agreement under this section shall remain the responsibility of the responsible Federal official.

(5) NO EFFECT ON AUTHORITY.— Nothing in this section preempts or interferes with any power, jurisdiction, responsibility, or authority of an agency, other than the agency of the responsible Federal official for a covered Federal project, under applicable law (including regulations) with respect to the project.

. . . .

6. The cited portions of H.R. 6129, 118th Cong. (2024) provide:

SEC. 2. ANNUAL REPORT ON NEPA'S IMPACT ON PROJECTS.

Section 201 of the National Environmental Policy Act of 1969 (42 U.S.C. 4341) is amended to read as follows:

SEC. 201. ANNUAL REPORT ON NEPA'S IMPACT ON PROJECTS.

(a) REPORT REQUIRED.— Beginning July 1, 2024, the Council on Environmental Quality shall annually publish on the website of the Council on Environmental Quality, and submit to Congress, a report on—

. . .

(3) the timelines to complete environmental reviews pursuant to section 102(2)(C) during the period of 10 years that ends on June 1 of the current year, which shall include—

(A) with respect to each major Federal action commenced during such period of 10 years, the date on which (as applicable)—

(i) the notice of intent to prepare the environmental impact statement was published in the Federal Register;

(ii) the draft environmental impact statement was published in the Federal Register;

(iii) the final environmental impact statement was published in the Federal Register; and

(iv) the record of decision was published in the Federal Register;

(B) the average and median publication timelines during such period of 10 years for each document described in subparagraph (A); and

(C) a description of trends in completion times during such period of 10 years for such documents compared to prior reports published by the Council on Environmental Quality.

. . . .