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

WILD VIRGINIA, *et al.*, Plaintiffs, v. COUNCIL ON ENVIRONMENTAL QUALITY and MARY NEUMAYR, in her official capacity as Chair of the Council on Environmental Quality, Defendants, and AMERICAN FARM BUREAU FEDERATION, *et al.*, Defendants-Intervenors.	)	Case No. 3:20-CV-00045-JPJ-PMS

BRIEF OF MEMBERS OF CONGRESS THOMAS R. CARPER, PETER A. DEFAZIO, AND RAÚL M. GRIJALVA AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTERESTS OF *AMICI CURIAE*[1] AND SUMMARY OF ARGUMENT

Amici Thomas R. Carper, Peter A. DeFazio, and Raúl M. Grijalva are members of Congress who have a strong interest in ensuring that regulations implementing the National Environmental Policy Act ("NEPA") are consistent with congressional intent and do not adversely affect *amici*'s constituents. *Amici* serve on key committees with jurisdiction over environmental issues, natural resources, and infrastructure: Mr. Carper is Ranking Member on the Senate Committee on Environment and Public Works, Mr. DeFazio is Chair of the House Committee on Transportation and Infrastructure, and Mr. Grijalva is Chair of the House Committee on Natural Resources. *Amici* are well versed in Congress's intent to establish "a national policy which will encourage productive and enjoyable harmony between man and his environment," in part by creating an environmental review process that ensures public involvement, requires thorough evaluation of project impacts, and "promote[s] efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321.

Congress enacted NEPA to "maintain and enhance the quality of the environment." S. Rep. No. 91-296, at 8 (July 6, 1969). To that end, it included within NEPA "certain 'action-forcing' provisions and procedures designed to assure that all Federal agencies plan and work toward meeting the challenge of a better environment." *Id.* at 9. One provision gave agencies the "responsibility to consider the consequences of their actions on the environment" through the preparation of an environmental impact statement. *Id.* at 14. Congress also directed agencies to carry out all of their new duties under NEPA "to the fullest extent possible." 42 U.S.C. § 4332.

Contrary to NEPA's text and Congressional intent, the regulations issued by the Council

[1] *Amici* certify that no person or entity, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief or authored it in whole or in part.

on Environmental Quality ("CEQ"), Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) ("2020 Rule"), will narrow the range of impacts and alternatives that agencies consider in environmental impact analyses, impede public involvement in the NEPA process, and make it harder for *amici*'s constituents to challenge flawed NEPA analyses in court. Importantly, these changes will act as a ceiling on all federal agencies' NEPA regulations, which "shall not impose additional procedures or requirements beyond" the 2020 Rule. 40 C.F.R. § 1507.3(b). Since the 2020 Rule was proposed, *amici* have observed the rule's incurable legal defects and have on multiple occasions communicated their concerns in the public record. *See, e.g.*, Letter from Thomas R. Carper, Ranking Member, U.S. Senate Comm. on Environment and Public Works, to Mary B. Neumayr, Chairman, Council on Environmental Quality (Mar. 10, 2020) (Comment ID: CEQ-2019-0003-172653), https://perma.cc/2X78-2XMP. CEQ argues the 2020 Rule aligns with and builds on Congress's goals when passing various post-NEPA laws. However, those statutes do not support the 2020 Rule's expansive changes to NEPA's core requirements. By making those unwarranted changes, the 2020 Rule will harm the environment and *amici*'s constituents.

ARGUMENT

I. THE 2020 RULE IS INCONSISTENT WITH STATUTORY TEXT AND CONGRESSIONAL INTENT

Plaintiffs have explained how the 2020 Rule is inconsistent with decades of judicial decisions, CEQ regulations and guidance, and agency practice, and how CEQ has not considered relevant factors in the rulemaking or provided a reasoned basis for its change of policy. *See* Dkt. 105-1 at 12–31. *Amici* agree with Plaintiffs' arguments but write separately to emphasize four core elements of NEPA review that have been undercut by the 2020 Rule: 1) consideration of cumulative and indirect impacts, 2) analysis of all reasonable alternatives, 3) public participation,

and 4) the requirement to consider environmental impacts *before* project commencement. The 2020 Rule removes or weakens these core elements and thereby contravenes Congress's intent, as demonstrated by both the statutory text and legislative history.

A. Congress Intended for Agencies to Analyze Cumulative and Indirect Impacts

The 2020 Rule removes the requirement that federal agencies analyze the cumulative and indirect impacts of proposed projects—a change that is contrary to congressional intent in enacting NEPA. Under the previous regulations, agencies needed to include in an environmental impact statement ("EIS") an evaluation of the direct, indirect, and cumulative impacts of a proposed action. 40 C.F.R. § 1508.25(c) (1978).[2] "Indirect" impacts were those "caused by the action and . . . later in time or farther removed in distance, but [which] are still reasonably foreseeable." *Id.* § 1508.8(b) (1978). "Cumulative" impacts were those impacts "on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." *Id.* § 1508.7 (1978).

In the 2020 Rule, CEQ removed the definition of cumulative effects and deleted the explicit mention of indirect effects in the definition of "effects." 40 C.F.R. § 1508.1(g)(3) ("Cumulative impact, defined in 40 C.F.R. 1508.7 (1978), is repealed"); *id.* § 1508.1(g). Instead, the 2020 Rule defines "effects" to mean "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives." *Id.* § 1508.1(g). It specifies that effects "should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain." *Id.* § 1508.1(g)(2).

[2] "Direct" impacts were defined as those that "are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a) (1978).

These changes are inconsistent with Congress's intent that agencies carry out a holistic analysis of their actions' impacts on the environment. A driving force behind NEPA's enactment was Congress's recognition of "the profound impact of man's activity on the *interrelationship* of *all* components of the natural environment." 42 U.S.C. § 4331(a) (emphasis added). Congress intended for NEPA to counteract a trend in which environmentally harmful agency decisions "continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." S. Rep. No. 91-296, at 5. Similarly, Congress sought to end the pattern of letting environmental issues "accumulate in slow attrition" by requiring that agencies pay attention to "quiet, creeping, environmental decline." Senate Comm. on Interior & Insular Affairs, 90th Cong., 2d Session, A National Policy for the Environment: A Special Report 7–8 (Comm. Print 1968).

Congress, through NEPA, therefore required agencies to analyze "*any* adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(ii) (emphasis added). In addition, agencies must "recognize the worldwide and *long-range* character of environmental problems." *Id.* § 4332(2)(F) (emphasis added). Accordingly, NEPA directs "all agencies of the Federal Government" to "identify and develop methods and procedures . . . which will insure that *presently unquantified environmental amenities and values* may be given appropriate consideration in decisionmaking." *Id.* § 4332(2)(B) (emphasis added). Moreover, agencies must carry out all of these duties "to the fullest extent possible." *Id.* § 4332.

Eliminating consideration of indirect and cumulative impacts defies these statutory directives and Congress's intent behind them. If agencies omit indirect and cumulative effects from NEPA analyses, they will overlook the "small but steady" and "quiet, creeping" effects and

the "interrelationship of all components of the natural environment" that Congress intended to be key considerations in EISs. By writing "*any* adverse environmental effects" into the law, Congress plainly expressed its intent for analyses to cover a broad swath of impacts.

B. Congress Intended for Agencies to Analyze a Broad Range of Alternatives

The 2020 Rule curtails the scope of alternatives to proposed projects that agencies must evaluate. The prior regulations required that agencies "[r]igorously explore and objectively evaluate *all* reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a) (1978) (emphasis added). Moreover, the prior regulations required agencies to evaluate "reasonable alternatives not within the jurisdiction of the lead agency." *Id.* § 1502.14(c) (1978). The 2020 Rule removes both of these obligations.

These changes are inconsistent with NEPA's statutory text and Congressional intent. NEPA mandates that agencies "to the fullest extent possible" consider "alternatives to the proposed action" and "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(C)(iii), (2)(E). Congress intended that "[a]lternatives must be actively generated and widely discussed," and for "[i]rreversible or difficultly reversible changes" to "be accepted *only after the most thorough study*." Senate Comm. on Interior & Insular Affairs, 90th Cong., 2d Session, Congressional White Paper on A National Policy for the Environment, 16 (Comm. Print 1968) [hereinafter "Congressional White Paper"] (emphasis added).

One of NEPA's key purposes was to reorient mission-focused agencies away from a single-minded pursuit of narrow goals. As Senator Henry "Scoop" Jackson, one of NEPA's chief architects, put it, agencies would "no longer have an excuse for ignoring environmental values in

the pursuit of narrower, more immediate, mission-oriented goals." 115 Cong. Rec. 29,056 (Oct. 8, 1969). This purpose can be achieved only if agencies consider a full range of alternative approaches to the problems before them. Indeed, Congress "expected" the alternatives requirement to produce "thorough consideration of *all* appropriate methods of accomplishing the aim of the proposed action." *Sierra Club v. Morton*, 510 F.2d 813, 825 (5th Cir. 1975) (emphasis added).[3]

The 2020 Rule's weakening of alternatives analysis undermines this core element of NEPA. The only conceivable purpose behind CEQ's removing "all" from 40 C.F.R. § 1502.14(a) is to reduce the number of alternatives that agencies will analyze, which is inconsistent with Congress's direction that agencies consider "alternatives to the proposed action" "to the fullest extent possible." 42 U.S.C. § 4332(2)(C)(iii), 4332. In addition, deletion of the requirement that agencies evaluate "reasonable alternatives not within the jurisdiction of the lead agency" heralds a return to blinkered, agency-specific siloes rather than the holistic approach Congress intended.

C. Congress Intended for Agencies to Prioritize Public Involvement

The 2020 Rule includes a variety of changes that limit the opportunities for public involvement in NEPA processes. The prior regulations acknowledged that "public scrutiny [is] essential to implementing NEPA" and that "federal agencies shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. §§ 1500.1(b) , 1500.2(d) (1978). The 2020 Rule deletes these vital provisions and introduces several other changes that make it harder for the public to participate in the NEPA process or challenge NEPA decisions in court. The Rule illogically

[3] In past guidance, CEQ recognized Congress's intent, stating: "[t]he 'alternatives' section is the heart of the EIS." Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,028 (Mar. 23, 1981).

provides that draft EISs need only satisfy NEPA's requirements to the fullest extent "*practicable*," rather than the fullest extent "*possible*." 40 C.F.R. § 1502.9(b). It also imposes a greater burden on potential commenters by requiring specific content in public comments, such as addressing "economic and employment impacts" and describing "the data sources and methodologies supporting the proposed changes." *Id.* § 1503.3(a).

Additionally, the 2020 Rule imposes exhaustion requirements which are burdensome and contradict existing legal requirements, especially considering that CEQ lacks the authority to change the Administrative Procedure Act's judicial review framework. The Rule provides that "[c]omments or objections of any kind not submitted, including those based on submitted alternatives, information, and analyses, shall be forfeited as unexhausted." *Id.* § 1500.3(b)(3). In the preamble to the final rule, "CEQ expresses its intention that commenters rely *on their own comments* and not those submitted by other commenters in any subsequent litigation, except where otherwise provided by law." 85 Fed. Reg. at 43,318 (emphasis added).[4] Agencies may also now require plaintiffs to post a "bond or other security requirement" before challenging NEPA decisions in court. 40 C.F.R. § 1500.3(c).

By undercutting core elements of public participation, these regulatory changes are inconsistent with NEPA's statutory text. Specifically, NEPA establishes that "[i]t is the continuing policy of the Federal Government" to cooperate with "concerned public and private organizations" to maintain environmental quality. 42 U.S.C. § 4331(a). As noted above, all

[4] Courts have allowed litigants to address issues identified by others during the commenting process, *CTIA-Wireless Ass'n v. F.C.C.*, 466 F.3d 105, 117 (D.C. Cir. 2006), and have recognized exceptions to the issue exhaustion requirement. *See, e.g.*, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004) (holding that "an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action").

federal agencies must, to "the fullest extent possible," "identify and develop methods and procedures [to] insure that *presently unquantified environmental amenities and values* may be given appropriate consideration in decisionmaking." *Id.* § 4332(2)(B). The public provides an important source of information for "unquantified environmental amenities and values."

Congress intended for public involvement to be an integral part of the NEPA review, as "every effort to preserve environmental quality must depend upon the *strong support and participation of the public*." S. Rep. No. 91-296, at 19 (emphasis added). Moreover, Congress envisioned that public involvement would hold agencies accountable: "[t]he basic principle of the policy is that we must strive in all that we do to achieve a standard of excellence in man's relationships to his physical surroundings. If there are to be departures from this standard . . . they will have to be *justified in the light of public scrutiny*." 115 Cong. Rec. 29,056 (Oct. 8, 1969) (statement of Sen. Henry Jackson). Contrary to these stated purposes, the 2020 Rule's burdensome exhaustion requirements, requirements for public comments, and other changes threaten to significantly curtail public involvement.

D. Congress Intended for NEPA Reviews to Occur Before Agency Actions

The 2020 Rule allows certain steps in project development to occur before agencies complete the requisite NEPA analysis. The prior regulations, by contrast, required that agencies "shall integrate the NEPA process with other planning at the *earliest possible* time to insure that planning and decisions reflect environmental values." 40 C.F.R. § 1501.2 (1978) (emphasis added). Moreover, agencies were required to "insure that environmental information is available to public officials and citizens *before* decisions are made and *before actions are taken*." *Id.* § 1500.1(b) (1978) (emphasis added).

The 2020 Rule permits agencies to authorize "activities, including, but not limited to, acquisition of interests in land (e.g., fee simple, rights-of-way, and conservation easements),

purchase of long lead-time equipment, and purchase options made by applicants *before the completion of NEPA analysis*." 40 C.F.R. § 1506.1(b) (emphasis added). Moreover, the 2020 Rule replaces the requirement that NEPA processes are integrated in agency planning at the earliest *possible* time, with the "earliest *reasonable* time." *Id.* § 1501.2 (emphasis added).

These changes are inconsistent with the statutory text and legislative history. Agencies must analyze, among other things, "any adverse environmental effects which cannot be avoided *should the proposal be implemented*" and "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)(ii), (v) (emphasis added). This language is plain and unambiguous: agencies must evaluate proposals, not projects already underway.

NEPA's legislative history confirms that Congress intended for agencies to consider environmental impacts before projects begin, when there is still an opportunity to mitigate effects and consider alternatives. Indeed, NEPA was "designed to establish a policy and a set of planning procedures which will prevent instances of environmental abuse and degradation caused by Federal actions *before they get off the planning board*." 115 Cong. Rec. 29,055 (Oct. 8, 1969) (statement of Sen. Henry Jackson) (emphasis added). Congress envisioned that agency "activities should proceed *only after* an ecological analysis and projection of probable effects. Irreversible or difficultly reversible changes should be accepted *only after* the most thorough study." Congressional White Paper, *supra*, at 16 (emphasis added). Congress, in effect, instructed agencies to look before they leap, by conducting NEPA analyses before allowing proposals to get underway. Contrary to this clear and unambiguous intent, the 2020 Rule will allow proposed actions, potentially harmful to the environment, to proceed before federal agencies can fully assess their potential impacts.

II. THE POST-NEPA STATUTES CITED BY CEQ DO NOT SUPPORT THE RULE

Since enacting NEPA in 1970, Congress has never substantially amended it. Moreover, when passing NEPA-related laws thereafter, Congress has always preserved the core elements of NEPA discussed above. None of the laws CEQ cites as support for the 2020 Rule meaningfully alters those requirements.

CEQ argues that the 2020 Rule accords with post-NEPA laws designed to "facilitate more efficient environmental reviews" and "improv[e] the implementation of NEPA." 85 Fed. Reg. at 43,310. Yet these statutes do not support the 2020 Rule for one of three reasons: i) some of the statutes do not change the steps required in NEPA review, ii) others modify NEPA review, but not in ways that support the 2020 Rule, and iii) still others limit NEPA review only in defined, exigent circumstances or for specified project categories. The statutes in the first two categories generally incorporate NEPA's existing framework. The statutes in the third category in no way affect NEPA review for the vast majority of projects, which are not covered by those statutes. These laws, therefore, do not support the 2020 Rule's substantive revisions to NEPA's core elements that are most concerning to *amici* and their constituents.

A. Statutes that Do Not Alter NEPA Review

Some of the statutes CEQ cites do not change the analysis required in NEPA reviews at all. For example, the American Recovery and Reinvestment Act of 2009 ("ARRA") requires that "*[a]dequate resources* within [ARRA] *must be devoted to ensuring that* applicable environmental reviews under [NEPA] are completed on an expeditious basis and that the shortest existing applicable process under [NEPA] shall be utilized." Pub. L. No. 111-5, § 1609(b), 123 Stat. 115, 304 (emphasis added). Under this provision, the analysis required for NEPA review remains the same; Congress only authorized "adequate" funds so the process can happen more quickly. In fact, ARRA reinforces NEPA's importance, stating: NEPA "protects public health,

safety and environmental quality[] by ensuring transparency, accountability and public involvement in federal actions and in the use of public funds." *Id.* § 1609(a)(1), 123 Stat. at 304.

CEQ also cites three statutes meant to "facilitate more timely environmental reviews." 85 Fed. Reg. at 43,311. Again, these statutes—33 U.S.C. § 408(b), 49 U.S.C. § 40128, and 49 U.S.C. § 47171—do not alter the analytical steps of NEPA review. Instead, they require only that agencies coordinate NEPA review with other environmental review processes.

B. Statutes that Modify NEPA but Do Not Support the 2020 Rule

CEQ also cites statutes that, in limited, defined circumstances, modify NEPA review. CEQ refers, for instance, to 23 U.S.C. § 139, part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU") (as amended in 2012 by the Moving Ahead for Progress in the 21st Century Act ("MAP–21"), Pub. L. No. 112-141, 126 Stat. 405, and in 2015 by the Fixing America's Surface Transportation ("FAST") Act, Pub. L. No. 114-94, 129 Stat. 1312), as well as Title 41 of the Fixing America's Surface Transportation Act ("FAST-41"). *See* Pls.' Mem. Supp. Mot. Summ. J. (Dkt. 105-1) at 38–39. Importantly, these laws apply only to limited sets of projects, 23 U.S.C. § 139(a)(6)(A); 42 U.S.C. § 4370m-4(f), and Congress only made temporary changes under FAST-41, which is set to sunset in 2022 absent further Congressional action, 42 U.S.C. § 4370m-12. Unlike the 2020 Rule, therefore, these statutes do not make generally applicable changes to NEPA review. Each law addresses the alternatives analysis required under NEPA. Yet Section 139 provides that the agencies doing that analysis must be able to "fulfill the responsibilities" of NEPA, 23 U.S.C. § 139(f)(4)(B)(ii)(II), and FAST-41 requires that the alternatives analysis "shall include *all* alternatives required to be considered by law," 42 U.S.C. § 4370m-4(c)(2)(B) (emphasis added). Therefore, however one views these changes as a matter of policy, under any fair reading these laws do not support the 2020 Rule's severe weakening of NEPA's core requirement to consider all reasonable

alternatives.

In addition, despite introducing these sweeping new changes to NEPA analysis, CEQ has failed to consider how effective laws like SAFETEA-LU and FAST-41 have been, or to what extent they have already been implemented. CEQ claims it cannot assess FAST-41's effectiveness because "[f]ewer than 50 projects have used the FAST-41 procedures." CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Final Rule Response to Comments 32 (June 30, 2020). At the same time, CEQ says the 2020 Rule "builds on past, bipartisan efforts to make the permitting process under NEPA more efficient." *Id.* at 5. It is irrational to not only overread a set of laws, but to do so without even attempting to evaluate their effectiveness.

C. Statutes that Apply only to Certain Projects or in Exigent Circumstances

Congress has created narrow exemptions from NEPA for use in limited or exigent circumstances. For example, CEQ cites the recent CARES Act, which exempted from NEPA review emergency appropriations carried out "in response to coronavirus." Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 15002, 134 Stat. 281, 531–32. CEQ also cites the Stafford Disaster Relief and Emergency Assistance Act, which exempts from NEPA review actions or financial assistance "which ha[ve] the effect of restoring a facility substantially to its condition prior to the disaster or emergency." 42 U.S.C. § 5159.

The rest of the statutes in this category create categorical exclusions for very specific types of projects.[5] For example, CEQ cites a statute that categorically excludes "applied silviculture assessment and research treatments." 16 U.S.C. § 6554(d)(1). CEQ also cites

[5] "Categorical exclusion means a category of actions that the agency has determined, in its agency NEPA procedures (§ 1507.3 of this chapter), normally do not have a significant effect on the human environment." 40 C.F.R. § 1508.1(d).

categorical exclusions for projects such as "covered vegetation management activities carried out to protect, restore, or improve habitat for greater sage-grouse or mule deer," *id.* § 6591e(b)(1), and "facility inspection, and operation and maintenance plan[s]" that concern "electric transmission and distribution rights-of-way," 43 U.S.C. § 1772(a)(3). By creating categorical exclusions only in exigent circumstances or for narrow categories of projects, these statutes do not support the 2020 Rule's broad, generally applicable limitations on the frequency and scope of NEPA analyses. To the contrary, they show that Congress intentionally left NEPA in place for all the kinds of projects not covered by the exemptions.[6]

III. THE 2020 RULE WILL ADVERSELY AFFECT *AMICI*'S CONSTITUENTS

Congress intended for NEPA to "maintain and enhance the quality of the environment," S. Rep. No. 91-296, at 8, but the 2020 Rule's changes will undermine agencies' ability to achieve those ends. Moreover, when describing NEPA's purposes, Sen. Jackson emphasized that "[a]n environmental policy is a policy for people." 115 Cong. Rec. 29,056 (Oct. 8, 1969). By removing or weakening the four core NEPA elements discussed above, the 2020 Rule will harm not only the environment but also people, including *amici*'s constituents.

First, the 2020 Rule's removal of the obligation to evaluate "cumulative" and "indirect" impacts of proposed projects will lead to agencies failing to evaluate impacts such as upstream and downstream greenhouse gas emissions, changes in patterns of land use, impacts on endangered species outside of the immediate area of concern, and effects of developments encroaching on wetlands. Moreover, consideration of cumulative impacts is an essential

[6] *See Reyes-Gaona v. North Carolina Growers Ass'n,* 250 F.3d 861, 865 (4th Cir. 2001) (The *expressio unius* interpretive canon "instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded.").

component of environmental justice analyses as it ensures that agencies take into account whether minority populations and low-income communities face disproportionate environmental burdens from the siting of multiple pollution sources. Inequitable distributions of environmental burdens typically arise from the cumulative effects of siting multiple sources of pollution near one neighborhood. Under the 2020 Rule, agencies will be encouraged to put on blinders and evaluate the direct impacts of each emission source individually, omitting an analysis of the cumulative impacts on the community's health.

Second, the 2020 Rule removes the requirement for agencies to evaluate all reasonable alternatives to project proposals or alternatives outside their own jurisdiction. This change will limit the assessment of new solutions and collaboration between agencies. It will also minimize information shared with the agency during their decision-making process, including suggestions agencies might otherwise overlook. As a result, agencies might fail to consider options that have less of an environmental impact or have a lower cost for taxpayers. Moreover, agencies will now be more likely to ignore some alternatives proposed by the public.

Third, the 2020 Rule's limitations on public involvement raise new obstacles to commenting on draft NEPA documents and to challenging NEPA decisions in court. Under the fullest extent "practicable" standard, agencies will now have more freedom to provide incomplete drafts for public comment, thereby undermining the meaningfulness of the commenting opportunity. The 2020 Rule imposes a greater burden on potential commenters by requiring more specific and technical content, often information not readily accessible by the public, and by imposing exhaustion requirements which are burdensome and exceed existing legal requirements. Individuals may no longer participate as meaningfully because they may be overwhelmed by the commenting process and may only have access to incomplete drafts under

the new standard. Moreover, citizens will be impeded from collaborating with one another as citizens cannot file appeals based on issues raised by their fellow citizens. Together, these changes will significantly limit opportunities for *amici*'s constituents to convey individualized and local concerns about proposed projects.

Finally, the 2020 Rule allows proposals to proceed further in development prior to completing the requisite NEPA review. This change will allow project actions, such as irreversible uses of resources and granting property rights, which may be potentially harmful to the environment, to proceed before those potential impacts have been fully assessed. Moreover, allowing concrete steps toward project development creates momentum towards approving proposals. This is contrary to NEPA's goal of requiring a disinterested review of a proposed project in order to evaluate environmental concerns and potential alternatives without consideration of any project investment or steps already taken.

Congress intended that the NEPA review process would protect the public by requiring agencies to carefully examine the environmental impacts of their actions. The 2020 Rule, however, removes or weakens core elements of the NEPA review process, thereby undermining NEPA's protections that have made the law so valuable to *amici*'s constituents.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant Plaintiffs' Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2020, I electronically filed with the Clerk of the United States District Court for the Western District of Virginia via the CM/ECF System the foregoing Brief of *Amici Curiae*. All participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

Dated: November 30, 2020

/s/ Cale Jaffe
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