



September 29, 2023

Brenda Mallory, Chair  
Council on Environmental Quality  
730 Jackson Place N.W.  
Washington, D.C. 20503

Re: Comments of the National Ocean Industries Association in Response to CEQ's Proposed Rule, "National Environmental Policy Act Implementing Regulations Revisions Phase 2," CEQ-2023-0003, RIN 0331-AA07

Dear Chair Mallory:

The National Ocean Industries Association (NOIA) respectfully submits these comments in response to the Council on Environmental Quality's (CEQ) proposed rulemaking, "National Environmental Policy Act [NEPA] Implementing Regulations Revisions Phase 2" that will revise the agency's implementing regulations for the law (Proposed Rule). NOIA represents the interests of all segments of the offshore energy industry, including offshore oil and gas, offshore wind, offshore minerals, offshore carbon capture, use and sequestration (CCUS), and other emerging technologies. Our membership includes energy project leaseholders and developers and the entire supply chain of companies that make up an innovative ecosystem contributing to the safe and responsible development and production of offshore energy. In addition, our members have invested significantly in the research, development, demonstration, and deployment of all types of low and zero carbon technologies. This includes wind, CCUS, hydrogen, geothermal, and more. The companies in the offshore energy industry will be key participants in building and integrating these technologies at scale. NOIA and its members thus have a direct interest in the implementation of NEPA, specifically including the Proposed Rule.

CEQ undertook a generational update of its NEPA regulations as recently as 2020 (2020 Rule). NOIA supports those revisions and commends CEQ's retention of many of those improvements in the Proposed Rule. NOIA also supports Congress' recent improvements to NEPA in the 2023 Fiscal Responsibility Act (FRA), and likewise supports their codification into CEQ's regulations. Finally, NOIA endorses CEQ's efforts to focus and expedite NEPA reviews and permitting for much-needed energy and other projects.

However, NOIA is concerned that certain aspects of CEQ's Proposed Rule exceed the bounds of NEPA and create or "encourage" the opposite of CEQ's stated goals, including promoting informed and efficient decision making and improving efficiency in the review process. We are also concerned that removal of certain aspects of the 2020 Rule by CEQ runs counter to providing consistent and clear application of agencies' NEPA review procedures. The Proposed Rule would improperly inject substantive determinations into a purely procedural statute, add new sources of potential delays, impermissibly ascribe outsized importance to certain topics, create uncertainty as to what agencies "must" do versus "should" do versus "may" do, and embolden more project opponents to abuse NEPA as a tool to stall or stop projects or to obtain preferred policy outcomes. Accordingly, based on these concerns and similar concerns expressed



by other stakeholders, NOIA encourages CEQ to reassess and revise its Proposed Rule prior to issuing any final rule.

### **NEPA's Impact on Investment in and Completion of Offshore Energy Projects**

NEPA is a foundational environmental law designed to fulfill the important objectives of informed federal agency decision-making and public participation. The intent of NEPA is clear and has been validated by the U.S. Supreme Court. As the Court stated in *Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 756-57 (2004):

Signed into law on January 1, 1970, NEPA establishes a “national policy [to] encourage productive and enjoyable harmony between man and his environment,” and was intended to reduce or eliminate environmental damage and to promote the “understanding of the ecological systems and natural resources important to” the United States. 42 U.S.C. Section 4321. “NEPA itself does not mandate particular results” in order to accomplish these ends. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analysis of the environmental impact of their proposals and actions.” See *id.*, at 349-350.

NEPA does not mandate blind pursuit of environmental benefits, or even put forth such a policy. Indeed, Section 101 of NEPA features broad-based policies, including to “foster and promote the general welfare” and to “fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. § 4331(a). NEPA’s policies are made operative via its Section 102, and subsequent provisions amended by the FRA, specifying the process for environmental considerations and public involvement. 42 U.S.C. § 4332.

NEPA’s purposes are frustrated, however, when analysis is prepared for the sake of more analysis or employs assumptions or calculations that are poorly suited to the proposed agency action at hand and can reflect a wide margin of error. In such circumstances, protracted and voluminous NEPA reviews only serve to confuse rather than inform the agency decision-maker and the public.

The delays in federal approvals for construction of major projects because of NEPA are well known and thoroughly documented. As billions of dollars are expended by the federal government through landmark legislation for infrastructure and energy projects, NEPA and other delay concerns become even more problematic. The Inflation Reduction Act passed in August 2022 includes nearly \$370 billion in incentives for clean energy investments. A substantial portion of these investments likely will require NEPA review. No matter the type of project, NEPA adds a heightened level of uncertainty for investors. Due to the scale of modern energy projects and the inefficiency of the current NEPA review process, investors must often choose between developing a project in the U.S., with its increasing NEPA-related uncertainties and threats of litigation or deploying that capital in other parts of the world. Indeed, even where the federal government has pursued its policy priorities such as renewable energy projects, it has



witnessed nearly the same array of NEPA-based tactics and arguments to slow or stop realization of those projects. For example, offshore wind approvals to date have been the subject of litigation, and alleged NEPA deficiencies have been the featured claims.

The battles around offshore oil and gas are well known, and hampering American energy development will only increase reliance on foreign energy from countries with, at times, wildly differing geopolitical objectives than our own. However, in the case of our members' offshore wind projects, this delay also hampers efforts to bring clean energy to parts of the U.S. that have lagged behind other areas of the country in deploying renewable energy. We know that there is a \$70 billion market for offshore wind on the horizon in this country, but this will only come to fruition if permits are issued in a timely way and project investors have the certainty they need to put capital on the line.<sup>1</sup> At the same time, experts such as the Brattle Group have warned that New England in particular will need to beat even current ambitious projections for offshore wind if the region is to meet its 2050 emissions goals around climate change.<sup>2</sup>

A prime example of the global nature of energy investment opportunities is CCUS. According to the International Energy Agency:

Carbon capture, [utilization] and storage (CCUS) technologies offer an important opportunity to achieve deep carbon dioxide (CO<sub>2</sub>) emissions reductions in key industrial processes and in the use of fossil fuels in the power sector. CCUS can also enable new clean energy pathways, including low-carbon hydrogen production, while providing a foundation for many carbon dioxide removal (CDR) technologies.

See <https://www.iea.org/reports/the-role-of-co2-storage>.

The U.S. has thus far led efforts in CCUS, with 10 of the 19 worldwide projects operating in the U.S. as of 2019.<sup>3</sup> As it relates specifically to offshore, the National Petroleum Council concluded: "One of the largest opportunities for saline formation storage in the United States can be found in federal waters, particularly in the Gulf of Mexico."<sup>4</sup> The U.S. Gulf of Mexico offshore region provides tremendous advantages for an emerging U.S. CCUS sector. The Gulf of Mexico is characterized by vast geologic prospects for CO<sub>2</sub> storage, extensive and established energy infrastructure along the Gulf Coast and throughout the OSC, a proximity to industrial centers for capturing emissions, and an accessible engineering and energy knowledge base and workforce, along with associated research, development, demonstration, and deployment (RDD&D) capabilities.

However, investment in U.S. CCUS projects is at risk, including on the OCS before even the initial wave of projects is set in motion. Projects compete for investment at a global scale and federal permitting remains a serious obstacle to billions of dollars of investment that could flood

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<sup>1</sup> McClellan, Stephanie, White Paper, "Supply Chain Contracting Forecast for U.S. Offshore Wind Power," University of Delaware, Special Initiative on Offshore Wind, March 2019.

<sup>2</sup> Hagerty and Weiss, "Achieving 80% GHG Reduction in New England by 2050: Why the Region Needs to Keep its Foot on the Clean Energy Accelerator," Brattle Group, September 25, 2019.

<sup>3</sup> Meeting the Dual Challenge: A Roadmap to At-Scale Deployment of Carbon Capture, Use, and Storage, The National Petroleum Council, December 2019, at 17.

<sup>4</sup> *Id.* at 27.



the U.S. market. This is abundantly clear in the momentum in Europe to scale up CCUS projects. According to the International Association of Oil and Gas Producers, there are more than seventy existing or planned projects in Europe.<sup>5</sup> With vast amounts of capital required and long lead times, the U.S. could quickly fall behind in its ability to secure the decarbonization opportunity of CCUS because of inefficiencies and confusion stemming from NEPA reviews.

Unreasonable bureaucracy has already created a serious drag on U.S. investment in CCUS. The Infrastructure Investment and Jobs Act (IIJA) was passed into law in November 2021. The IIJA includes a requirement for DOI to promulgate regulations for the sequestration of carbon dioxide on the U.S. OCS by November 2022. DOI missed this deadline and has yet to issue a proposed rule or the corresponding programmatic NEPA review. As a result, there is no framework or timeline in sight for leasing OCS acreage for sequestering carbon dioxide, which is merely the first step in the process for investment. Beyond regulations for federal offshore CCUS, NEPA adds substantial uncertainty in investment and major delays for those projects that ultimately get the greenlight from applicants and investors to pursue development.

### **General Comments on CEQ's Proposed Rule**

NOIA supports protection of the human environment and the appropriate role of NEPA to promote environmentally informed federal decision-making and public participation. NOIA also supports the goals of addressing climate change and environmental justice (EJ), and the need to develop and implement Environmental, Social & Governance (ESG) best practices and solutions and ultimately achieve an optimal balance between environmental and societal needs.

NOIA supports the Proposed Rule to the extent it reflects recent statutory improvements and furthers efficiency in NEPA reviews, consistent with the 2020 Rule and the 2023 FRA. For the offshore industry, smart NEPA reforms can ensure that our members are able to continue building a better world through energy security and economic growth and provide a higher standard of living for Americans and consumers throughout the world.

However, NOIA and its members are concerned that the Proposed Rule's deletions and added provisions overstep NEPA and risk yielding the opposite of its stated goals (e.g., § 1500.1, "The regulations in this subchapter also are intended to ensure that Federal agencies conduct environmental reviews in a coordinated, consistent, predictable, and timely manner, and to reduce unnecessary burdens and delays.>").

The Proposed Rule inappropriately injects substantive, policy-driven directives designed to achieve particular outcomes into a purely procedural statute. As noted above, the Supreme Court has long recognized that "NEPA itself does not mandate particular results." Yet, the Proposed Rule steers federal agencies toward, or away from, particular outcomes and picks winners and losers. Moreover, many of the Proposed Rule's prescriptive standards are vague and subjective. The Proposed Rule also transforms proposed, legally unrequired mitigation into enforceable obligations.

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<sup>5</sup> "CCUS Projects in Europe," International Oil and Gas Producers, January 2023, <https://iogpeurope.org/resource/map-of-eu-ccus-projects/>.

No less problematic, the Proposed Rule introduces additional steps and sources of delay in NEPA. For example, it impedes the use of categorical exclusions (CEs), appears to direct new agency analyses rather than best available data, places oversized emphasis on climate change and EJ versus other relevant resource areas, and squanders the opportunity for timely and consistent endorsement of applicant- and consultant-prepared NEPA documents given the ever-present reality of scarce agency resources. Also, it is questionable whether the proposed new section on “innovative approaches” (§ 1506.12) is necessary or justified. Innovative approaches presumably already can be considered (and often are) through current NEPA rules and procedures. Indeed, CEQ should be encouraging NEPA innovations across the board to save time and resources. Yet, the addition of this section could create confusion and inconsistency in application among agencies. If CEQ moves forward with this section, then “innovative approaches” must be circumscribed by appropriate legal parameters and should be available for *all* NEPA reviews, not only ones favored by a particular agency or administration under the umbrella of perceived “extreme environmental challenges.”

The Proposed Rule likely will exacerbate rather than reduce NEPA litigation. Its new requirements create new opportunities for deficiency arguments for project opponents, it inexplicably removes express exhaustion requirements in the existing regulations, and it adds new ambiguous and subjective terms. Although the Proposed Rule uses all three terms, project opponents will urge agencies and courts to read “should” and “may” as synonymous with “shall.” CEQ should not punt key issues to courts or individual agencies for case-by-case resolution, thereby undercutting the very purpose of CEQ having regulations governing implementation of NEPA across the federal government.

### **Positive Aspects of the Proposed Rule**

NOIA agrees with CEQ’s regulations codifying the 2023 FRA’s changes to NEPA, such as recognition of applicants’ and contractors’ ability to prepare all types of NEPA documents, now-mandatory time and page limits for NEPA documents, joint NEPA documents and decision-making by federal agencies, and adoption of other agencies’ categorical exclusions.

NOIA also commends CEQ’s retention of several aspects of the 2020 Rule, which itself was a very recent and necessary generational update of the 1978 regulations and a compilation of diffuse directives and best practices over decades of implementing NEPA. Substantial departures from the 2020 Rule so soon after its promulgation would engender serious questions about the unexplained inconsistency of any final rule resembling aspects of the Proposed Rule.<sup>6</sup> It also upends regulatory stability essential for project development, which has been a hallmark of CEQ’s NEPA regulations, and instead would subject them to ping-ponging wholesale changes following each administration change as witnessed in many other agency regulatory programs.

NOIA further supports revisions improving the efficiency of the NEPA process and reflecting existing best practices, such as highlighting the effects of the no-action alternative (including

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<sup>6</sup> See, e.g., *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 212 (2016) (“[u]nexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice”) (citations and quotation marks omitted).



adverse consequences of doing nothing), abbreviated reevaluations in lieu of supplemental NEPA documents, and early interagency dispute resolution during the NEPA process.

## **NOIA's Objections to the Proposed Rule**

The Proposed Rule is problematic in several respects, as discussed below:

1. The Proposed Rule Seemingly Intends to Impermissibly Transform the Purpose and Role of NEPA from Process into Substantive Outcomes.

The Phase 2 proposed regulations place undue emphasis on certain environmental outcomes rather than on the review process comprising the core statutory basis of NEPA. NEPA has come to be abused as a tool by project opponents to delay or end projects and thereby achieve preferred substantive policy outcomes. CEQ should not endorse such efforts within its regulations, either expressly or tacitly.

Notably, the Proposed Rule removes the language in § 1500.1(a) stating that NEPA is “a procedural statute intended to ensure Federal agencies consider the environmental impacts...” and substitutes language that suggests it is, instead, an “action forcing” statute intended to implement the nation’s environmental policies and goals in federal actions. Similarly, proposed § 1502.1 would add: “(a) The primary purpose of an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA is to serve as an action-forcing device by ensuring agencies consider the environmental effects of their action in decision making, so that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.” Other proposed provisions are similar. At a minimum, these provisions foster substantive creep into NEPA’s requirements, which have always been understood as purely procedural. At worst, they promote widespread disapproval of projects with perceived adverse effects on the human environment. Either way, they ignore the operative provisions of NEPA and the broad-based policies the NEPA process is intended to foster rather than a singular focus on environmental outcomes. Such twisting of NEPA to serve certain desired substantive policy outcomes sends precisely the wrong message to agencies, litigants, and courts.

NOIA supports appropriate mitigation for projects and realization of proposed commitments. However, the Proposed Rule introduces new uncertainty and undue burdens around mitigation. The Proposed Rule deletes existing provisions, such as part of the § 1508.1 definition of mitigation, which reflect that NEPA requires only due consideration of mitigation. Instead, in proposed provisions such as § 1505.3, CEQ would mandate post-decision “monitoring and compliance plans,” even when mitigation is irrelevant to the significance of effects as in an environmental impact statement. This requirement is at odds with NEPA. As the Supreme Court has explained:

There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on



the other. . . . [I]t would be inconsistent with NEPA’s reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.

*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989). Moreover, the intent and import of such plans is unclear from the Proposed Rule. NEPA is only forward-looking, not a retroactive statute. Accordingly, CEQ should emphasize, as in proposed § 1505.3(c)(2), that such plans will not create perpetual reopeners for additional NEPA review. CEQ also should clarify that such plans will address only performance of mitigation commitments, rather than their effectiveness.

In addition, CEQ posits that agencies “should, where relevant and appropriate,” include EJ mitigation measures (§ 1505.3(b)). NEPA contains no such requirement. This new provision inevitably will create the expectation of substantive mitigation beyond the mandates and authority of NEPA, along with attendant new litigation claims. Given that EJ is presently undefined in any other law or Federal regulation, NOIA is concerned that CEQ thereby is utilizing NEPA to establish outcome-focused EJ policy goals.<sup>7</sup>

CEQ instead should provide clearer guidance to agencies on how they actually develop mitigation measures for consideration. Specifically, the regulations should encourage agencies to consider a range of available and practicable mitigation measures but should establish a preference for mitigation that is as minimally disruptive to the proposed project as possible. CEQ should not encourage overly conservative mitigation measures that permanently burden a project. Relatedly, CEQ should recognize that mitigation measures considered and adopted during the NEPA process may later prove unnecessary once the project is implemented.

The Proposed Rule’s new emphasis (e.g., §§ 1502.14, 1508.1) on identifying the “environmentally preferable alternative” that “will best promote the national environmental policy expressed in section 101 of NEPA by maximizing environmental benefits,” including climate change and EJ, is amorphous and would skew NEPA reviews. This new directive ignores NEPA’s operative provisions and appears to compel creation of new alternatives rather than following the current practice of identifying which alternative among the otherwise developed reasonable range of alternatives is least environmentally impactful. The Proposed Rule also inherently deters selection of any other alternative. NOIA is concerned that this will be the no action alternative in many instances, even when no action is not a reasonable alternative (e.g., does not meet the purpose and need). This construct risks placing our members’ offshore wind, CCUS, low-carbon offshore oil and gas, and other projects in an unduly adverse light, thereby increasing agency paralysis in the face of critical energy needs.

## 2. The Proposed Rule Adds Unnecessary Steps and More Delays that Undermine Its Stated Goals to Streamline and Provide Concise but Informative NEPA Documents.

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<sup>7</sup> EPA’s and CEQ’s prior definitions of EJ have provided a clearer focus, specifically on the “fair treatment and meaningful involvement” of all communities, than the Proposed Rule’s definition from EO 14096. *See, e.g.*, Environmental Protection Agency, <https://www.epa.gov/environmentaljustice>.

Lack of agency resources is a leading cause of NEPA delays. What is more, there is much variability among agencies and even among individual offices in utilizing outside assistance. Accordingly, the 2023 FRA made clear that it is perfectly acceptable for applicants or their contractors to prepare or be directly involved in preparation of any type of NEPA document. Yet, the Proposed Rule inserts confusion and limitations on external preparation of NEPA documents (e.g., §§ 1506.5, 1507.3(c)(12)). The existing regulations, like the Proposed Rule, already protect against conflicts of interest. *See* § 1506.5(b)(4). Rather than punt to an individual “agency’s NEPA procedures” (§ 1506.5(a)), CEQ should affirmatively specify what, if any, additional conditions apply to external preparers of draft NEPA documents for independent agency review.

The Proposed Rule enables subjective, inconsistent, and inequitable application of NEPA across projects, based on whether they are perceived as favored actions. For example, as noted above, proposed “innovative approaches” (§ 1506.12) are reserved for an amorphous class of projects that CEQ views as “actions to address extreme environmental challenges consistent with section 101 of NEPA,” and exists separately from “emergencies” eligible under both existing regulations and the Proposed Rule for “alternative arrangements for compliance” with NEPA (§ 1506.11). NEPA efficiencies for one type of project generally should be available to all types of projects.

Conversely, the Proposed Rule imposes extra process for other projects. For example, the proposed re-definition of extraordinary circumstances for CEs (§ 1508.1) to include EJ or climate change effects risks undercutting use of existing CEs that are well-accepted, such as for oil and gas projects. Indeed, utilizing the Proposed Rule, project opponents could wield EJ concerns in an effort to undermine use of a CE for offshore energy projects that largely occur many miles away from any populated area, much less a defined EJ community. In a similar vein, the Proposed Rule would exempt projects with only “beneficial” effects from preparation of an EIS (§ 1501.3(d)). This again is a subjective standard and lends itself to more limited analysis of favored activities that contribute to long-term benefits (e.g., conservation projects) as opposed to projects with short-term environmental effects. NOIA members’ projects, by comparison, could be relatively slow tracked based on perceived adverse effects by agencies or opponents, particularly if such projects and alternatives (including no action) are not viewed on a properly holistic basis.

Relatedly, the Proposed Rule illogically makes use of CEs harder rather than easier. CEs are the most common level of NEPA review and should remain so. Proposed additional CE verification requirements would require more evaluation and documentation for more types of situations. The Proposed Rule also would rigidly require reevaluation of existing CEs within 10 years (§ 1507.3(c)(9)), even absent significant new information questioning CEs, thus needlessly placing more burdens on already strained agency resources.

In addition, the Proposed Rule appears to invite agencies to undertake more detailed levels of NEPA review than necessary. For example, proposed § 1501.5(j) invites agencies to apply EIS procedures to EAs. Moreover, the Proposed Rule retains § 1501.5(b), which states that an agency “may prepare an environmental assessment on any action in order to assist agency planning and decision making.” CEQ instead should clearly require use of duly promulgated CEs where applicable.



3. The Proposed Rule Muddles the Process for NEPA Reviews, Including Scoping, Draft Documents, and Public Outreach.

The Proposed Rule introduces new uncertainty as to the lengths to which agencies must go to obtain and review relevant information in NEPA reviews. For example, CEQ would delete from § 1502.23(b) that: “Agencies are not required to undertake new scientific and technical research to inform their analyses.” This proposed deletion is particularly concerning given the Congressionally envisioned expanded role of third parties in preparing initial NEPA documents. This deletion also conflicts with other aspects of the Proposed Rule, such as § 1506.5(b)(3) which preserves the existing regulations’ intent that “acceptable work not be redone, but that it be verified by the agency.”

CEQ’s approach to new scientific and technical research also must adhere to the requirements of the 2023 FRA. As required by the FRA, NEPA now states that an agency “is not required to undertake new scientific or technical research unless the new scientific or technical research is essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable.” 42 U.S.C. § 4336(b)(3). The clear intent of this language is to create a presumption against agencies needing to undertake new scientific or technical research. The Proposed Rule, however, arguably leaves open the possibility that agencies will undertake new, non-essential scientific or technical research (see proposed §§ 1503.1(c), 1502.21, 1502.23(c)). Additional scientific and technical research is time-consuming and implementing regulations that allow agencies wide discretion to undertake such research is at odds with not only the clear Congressional intent behind the FRA, but also the standard deadlines for completing an EA or EIS under the FRA. Also problematic is proposed § 1502.23(c), in which CEQ states that agencies “shall” use “projections,” including specifically for climate change—even when doing so would reflect a “range of possible future outcomes” potentially amounting to mere guesswork rather than “reasonably foreseeable” environmental effects as NEPA requires (42 U.S.C. § 4332(c)). The final rule therefore should preclude non-essential new scientific or technical research, especially research that cannot occur within the standard deadlines established by the FRA. At the same time, CEQ should deter use of research that is unreliable or unhelpful to the decision-maker and the public.

The 2021 Phase 1 Rule removed the 2020 Rule provision requiring uniformity across individual agency NEPA regulations. 87 Fed. Reg. 23,453 (Apr. 20, 2022) (amending § 1507.3). The Proposed Rule now openly invites inconsistency in NEPA application by different agencies (§ 1507.1)—particularly where multiple agencies have jurisdiction over the same project. CEQ should delete this new “flexibility” text.

The Proposed Rule (§ 1501.8) adds “Indigenous Knowledge” as a new area of special expertise for a cooperating agency and does not define that term. This new emphasis, together with significant ambiguity in the term, could affect offshore energy projects. This risk is pronounced in areas with prominent Tribal and other indigenous populations, such as offshore Alaska, Hawaii, and certain U.S. territories, where there could be resulting delays in identifying the issues at stake, obtaining information, and notifying and consulting with interested parties. While comments from locally-based agencies or stakeholders are important, they should be held to the

same evidentiary standard and given the same weight as input from others including the applicant. CEQ should delete the term or alternately include a clear definition.

Additional process for and emphasis on “meaningful” public “engagement” could further exacerbate delays in permit approval. This could encourage gamesmanship and delays through endlessly scheduled meetings based on purported “new” concerns or information. Agencies will also need time to hire a Chief Public Engagement Officer (§ 1507.2) with unspecified bureaucratic authority.

4. The Proposed Rule Creates Confusion about Adequate NEPA Reviews and Needlessly Invites New Opportunities for Litigation.

The basic utility of CEQ’s NEPA regulations should be to provide consistency and certainty in NEPA implementation across the federal government. Yet, in several instances the Proposed Rule inexplicably punts questions to the judicial system rather than resolving them via regulation. CEQ’s proposed statement in § 1500.1(a)(2) that the “President, the Federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the policy goals of section 101” is gratuitous and unhelpful. Courts inherently are presented with claims across federal programs. But other regulations do not carve out a role for courts as the Proposed Rule would. This addition is particularly misplaced since NEPA itself, unlike other statutes, affords no judicial review. Rather, CEQ should minimize the need for litigation. But the Proposed Rule does the opposite.

Without explanation, CEQ proposes to remove its existing regulatory language on exhaustion and requiring specificity and timely submission of comments, judicial remedies, and speedy resolution of disputes. Doing so merely invites delays, gamesmanship, and litigation. CEQ states its intent in other parts of the Proposed Rule (e.g., §§ 1500.3(b), 1500.3(c), 1507.1) and should do the same here. Leaving the issue of exhaustion solely to the courts only invites more opportunities for litigation. Individual courts and judges have misconstrued and expanded the boundaries of NEPA, including the imposition of remedies, to go well beyond the spirit and intent of the law. NEPA is not a statute without limits. Retaining this language is essential as a means of clarifying the scope of intent of NEPA so that there are boundaries on both judicial review and remedies. To help avoid the continued expansion of litigation, CEQ should expressly state in the regulations that they should be interpreted in light of their specific and limited statutory purpose.

The Proposed Rule contains repeated soft directives couched in “should” or “encourage” language. This creates lack of clarity concerning agencies’ obligations (versus what they “may” or “should” do) under NEPA. As a result, agencies likely will conduct NEPA reviews in an even more defensive posture in an effort to render decisions “bulletproof,” resulting in additional delays and new openings for litigation. Instead, the regulations should highlight the objective of interpreting and applying NEPA in a consistent and efficient manner across agencies, as opposed to creating and enabling opportunities for disruptive litigation.

Though climate change and EJ may be relevant to analyze in a given NEPA analysis, CEQ’s preoccupation with these topics throughout the Proposed Rule over other relevant NEPA topics

risks additional delays and distorted NEPA reviews, which, in turn, may provoke outsized emphasis by project opponents in litigation. (*See, e.g.*, §§ 1502.16(a)(7) and (14)).<sup>8</sup> There is no statutory foundation to elevate these two topics in NEPA reviews, and thereby relatively downgrade other relevant considerations. Such emphasis is particularly unwarranted where those topics are “unimportant” issues for a given proposed action (*see* § 1502.4).

#### 5. Additional Comments

- § 1507.3(b): 12 months is unreasonably short for all agencies to propose revisions to their own NEPA implementing regulations after a CEQ final rule. It is only one-third of the time afforded by the 2020 Rule, and agencies (improperly) have largely been directed to not apply the 2020 Rule. This time crunch also compromises the stakeholder participation that the Proposed Rule touts, especially if all such regulatory proposals proceed simultaneously.
- § 1507.4: CEQ should use this opportunity to provide further guidance and options on technological tools and required interagency coordination of information technology tools, rather than letting individual agencies arrive at disparate software or inconsistent approaches.

### **Conclusion**

In closing, the offshore energy sector plays a central role in the provision of affordable and reliable supplies of energy to the American people. NOIA member companies provide the energy that is essential for our everyday lives and raises the quality of life of our communities, reducing poverty and hunger while promoting good health and well-being. Producing the diverse energy required by Americans for a high quality of life while advancing new technologies in support of reducing GHG emissions requires a far more streamlined permitting process. With NEPA at the heart of federal agency permitting and financial assistance, CEQ and implementing agencies must tighten the process with far greater certainty and predictability through lawful and sensible regulations and timely reviews. CEQ should strive toward a more effective NEPA process so that investment can be made with certainty in the key sectors that will be relied upon for decarbonization efforts, including offshore wind and CCUS. Aspects of the Proposed Rule unfortunately fall short of that mark, and thus should be removed or substantially revised.

We look forward to continued engagement with all agencies in the federal family as CEQ’s regulations are considered, finalized, and incorporated into the NEPA review process. We appreciate your consideration of the comments herein. NOIA and its members will continue to

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<sup>8</sup> *See also* proposed § 1501.5 public comment requirements for EAs; § 1505.3 requiring lead or cooperating agency to incorporate mitigation measures that address or ameliorate adverse effects on communities with EJ concerns; § 1506.12 allowing for possibility of modified NEPA procedures to address extreme environmental challenges including effects on communities with EJ concerns; and § 1508.1 defining “extraordinary circumstances” and “effects” to specifically call out effects on communities with EJ concerns and climate-change related effects.



work with CEQ and agencies on appropriate implementation of NEPA.

Very respectfully,

A handwritten signature in black ink, appearing to read "Erik Milito". The signature is fluid and cursive, with a prominent initial "E" and a long, sweeping tail.

Erik Milito  
President  
National Ocean Industries Association