State of West Virginia
Office of the Attorney General
John B. McCuskey
Attorney General

July 27, 2026

The Honorable Lee Zeldin
Administrator, Environmental Protection Agency
1200 Pennsylvania Ave NW, Suite 1101A
Washington, DC 20460

Submitted Electronically via Regulations.gov

Re: Comments of the Attorneys General of the States of West Virginia, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, and Wyoming on "Update of Procedures for Implementing the National Environmental Policy Act and Assessing the Environmental Effects Abroad of EPA Actions" (Docket No. EPA-HQ-AO-2025-1080)

Dear Administrator Zeldin:

The States are grateful for the opportunity to write in support of EPA's proposal to update its procedures for implementing the National Environmental Policy Act at 40 C.F.R. Part 6. *See Update of Procedures for Implementing the National Environmental Policy Act and Assessing the Environmental Effects Abroad of EPA Actions*, 91 Fed. Reg. 38,359 (June 25, 2026).

In overhauling its implementing procedures for the National Environmental Policy Act, EPA has embraced the reform this country has needed for decades. For too long, NEPA has entangled States, industry, and everyday citizens in years-long reviews, ballooning environmental reports, and endless litigation risk. This rule helps cut through that morass. By aligning EPA's procedures with new changes in the law, EPA respects NEPA's original purpose: a disciplined procedural check, not an obstructionist's paradise.

The proposed rule works for everyone. States gain predictability to plan and fund infrastructure. Citizens gain faster access to the roads, water systems, and energy projects that improve their daily lives. And EPA gains a workable NEPA process it can actually administer. The States strongly support this effort and urge EPA to finish the job. EPA should adopt the proposed rule unmodified.

BACKGROUND

Congress enacted the National Environmental Policy Act in 1970 as a "short, simple, and comprehensive" procedural statute. Alvin L. Alm, *NEPA: Past, Present, and Future*, 14 EPA J. 32 (1988). The statute empowers agency regulators to "identify and develop methods and procedures" to "ensure … presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking." 42 U.S.C. § 4332(B).

Congress meant for NEPA to accomplish its objectives through a series of relatively modest procedural requirements. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008). Broadly speaking, the statute obligates agencies to perform studies and create reports under certain circumstances. *See* 42 U.S.C. § 4332(C). Relevant here, NEPA requires an agency to produce an environmental impact statement—or "EIS"—for "major federal actions," *id.* § 4332(C), with a "reasonably foreseeable significant effect on the quality of the human environment," *id.* § 4336(b)(1). And short of an EIS, agencies should prepare a "concise" environmental assessment—or "EA"—that says whether an EIS is needed. *Id.* §§ 4332(C), 4336(b)(2). NEPA *does not* dictate specific substantive outcomes. *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 177 (2025).

Yet after enactment, special interest groups and project opponents weaponized NEPA's provisions to challenge disfavored projects. Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 375 (1999). In its "early history, the years 1969-1973," the statute served "as a 'garbage can': an opportunity for various policy entrepreneurs to market their diverse reforms of resources policymaking." Paul J. Culhane, *NEPA's Impacts on Federal Agencies, Anticipated and Unanticipated*, 20 ENVTL. L. 681, 684 (1990). NEPA was "like grain dust to the environmental litigators' match," Alm, *supra*, because it "afford[ed] extraordinary opportunities to throw up procedural roadblocks that may delay or kill projects," Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 339 (2004). *See also* Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929, 972 (1993) (describing "sandbagging" to interfere with projects).

NEPA-abusers were (and still are) aggressive. With an average of 100 to 150 cases filed annually, "NEPA is … one of the most litigated federal environmental statutes." Kristen Hite, CONG. RSCH. SERV., *National Environmental Policy Act: Judicial Review and Remedies* (June 26, 2025). "Between 2013 and 2022, circuit courts heard approximately 39 NEPA appeals cases per year, a 56% increase over the rate from 2001 to 2015." NIKKI CHIAPPA ET AL., UNDERSTANDING NEPA LITIGATION 3 (2024).

Over time, NEPA transformed from a "legislative acorn … into a judicial oak that has hindered infrastructure development 'under the guise' of just a little more process." *Seven Cnty.*, 605 U.S. at 184. Just look at the numbers. Projects that face NEPA litigation are delayed by 4.2 years on average. Chris Thomas, et al., *Will NEPA Reform Actually Work This Time?*, NAT. RESOURCES & ENV'T, 30-31, (Winter 2026). During its first forty years, NEPA litigation delayed or halted approximately 2,000 projects. Mark C. Rutzick, *A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective*

Environmental Law in the History of the United States, and How to Fix It, REGULATORY TRANSPARENCY PROJECT, (Oct. 16, 2018). And in reaction to this deluge of NEPA cases, EISs became longer and took longer. Between 2013 and 2018, final EISs averaged 661 pages and took an average of 4.5 years to complete. CEQ, LENGTH OF ENVIRONMENTAL IMPACT STATEMENTS 1-3 (2013-2018) (June 12, 2020) (listing "potential legal challenges" as reason for length); CEQ, ENVIRONMENTAL IMPACT STATEMENT TIMELINES 1-3 (2010-2018) (June 12, 2020).

The tide began to turn in 2023, "when the Fiscal Responsibility Act … was signed into law and made several overarching and immediately effective changes to NEPA." L. S. Clark, Catherine E. Kanatas & Maxwell C. Smith, *Realizing NEPA's Reasonable, Productive, and Enjoyable Harmony: The Fiscal Responsibility Act's Amendments and Implications for Practitioners*, 15 MICH. J. ENV'T. & ADMIN. L. 1, 4-5 (2025). Congress finally put hard limits on the scope of EA and EIS reviews. 42 U.S.C. § 4336a. Now, an EIS must generally run no more than 150 pages (300 pages for a proposal of extraordinary complexity), and an EA no more than 75 pages, exclusive of citations and appendices. *Id.* § 4336a(e). The amendments also impose firm deadlines—one year to complete an EA and two years to complete an EIS—enforceable through a project sponsor's right of action if an agency misses the deadline. *Id.* § 4336a(g). More, Congress required designation of a lead agency to coordinate multi-agency reviews, *id.* § 4336a(a), and allowed agencies to use another agency's categorical exclusions rather than promulgating their own, *id.* § 4336c.

Two years later, the Trump administration made more changes to right the ship. On President Trump's first day in office, he issued Executive Order 14154, which proposed "rescinding CEQ's NEPA regulations." *Unleashing American Energy*, Exec. Order No. 14154, 90 Fed. Reg. 8353, 8355-56 (Jan. 29, 2025). CEQ followed through on that directive. In February 2025, it issued an interim final rule removing its NEPA implementing regulations from the Code of Federal Regulations, effective mid-April 2025. *Removal of National Environmental Policy Act Implementing Regulations*, 90 Fed. Reg. 10,610 (Feb. 25, 2025).

The Supreme Court spoke up recently, too. Last year, in *Seven County Infrastructure Coalition v. Eagle County*, it confirmed again that courts must account for how NEPA is a "purely procedural" statute. 605 U.S. at 180. In line with that understanding, an EIS need only address the environmental effects of the project at hand—not the effects of separate projects that are separate in time, separate in place, or outside the acting agency's regulatory authority. *Id.* at 186-92. The Court also explained that courts must give agencies "substantial deference" in defining an EIS's scope, content, and degree of detail. *Id.* at 179-85.

Congress added to this momentum. In July 2025, it enacted the One Big Beautiful Bill Act, which added NEPA Section 112—a new, optional fast-track for project sponsors willing to pay for it. *See* Pub. L. No. 119-21, § 60026, 139 Stat. 72 (2025) (codified at 42 U.S.C. § 4336f). To opt in, a project sponsor first submits a project description to CEQ and declares whether it will self-prepare an EA or EIS. *Id.* § 4336f(a)(1). Within 15 days, CEQ must notify the project sponsor of a fee equal to 125% of the lead agency's anticipated costs of preparing the EA or EIS. *Id.* § 4336f(a)(2), (b)(1). Once the fee is paid, the lead agency must complete the EA within 180 days of payment and the EIS within one year of the notice of intent—half of the default deadlines. *Id.* § 4336f(a)(4).

Each of these shifts marks an improvement in NEPA implementation. Together, they set the stage for EPA's proposed rule here.

DISCUSSION

NEPA was meant to "inform agency decisionmaking, not to paralyze it." *Seven Cnty.*, 605 U.S. at 173. In many beneficial ways, the proposed rule is a recalibration of EPA's approach to comport with that construction.

I. The proposed rule's implementation of the Fiscal Responsibility Act promotes efficiency, clarity, and flexibility.

The proposed rule properly frames out an efficient, flexible, practical, and accountable system for coordinated review, consistent with the Fiscal Responsibility Act. The States support all of the proposed rule's changes.

A. Section 6.204: The categorical exclusion reforms let practical judgment govern.

Section 6.204 makes two reforms that, together, make agency development and use of categorical exclusions—that is, the classes of actions that EPA has determined should not be subject to full NEPA review—more efficient and practical. Section 6.204(a) gives EPA flexibility in applying the extraordinary circumstances standard, a standard that has been used to decide when an otherwise categorically excluded activity *should* be subject to a fuller review. Sections 6.204(g), (h), and (i) expand the pool of categorical exclusions EPA can actually use.

Both reforms are needed. NEPA practitioners have long recognized that expanded, well-administered categorical exclusion use is one of the most effective tools available to prevent project delay. *See Impacts to Onshore Jobs, Revenue, and Energy: Review and Status of Sec. 290 Categorical Exclusions of the Energy Policy Act of 2005: Oversight Hearing Before the Subcomm. on Energy & Mineral Res. of the H. Comm. on Nat. Res.*, 112th Cong. 1 (2011) (Statement of Hon. Doug Lamborn), https://bit.ly/3RFGdtB ("Categorical exclusions have been successful in expediting American energy production and are an essential part of streamlining an already overly burdensome bureaucratic energy permitting process."). And because of their efficiency benefits, experts of all political persuasions have pushed for their expanded use for years. *See, e.g.*, Bipartisan Policy Center, *The Role of Categorical Exclusions in Achieving Net-Zero by 2050* (Sept. 27, 2022), https://tinyurl.com/mr3r8tfx.

1. EPA's current rule contains an absolute bar on applying categorical exclusions: even if a project falls within a categorical exclusion, EPA must still prepare an EIS or EA if ill-defined "extraordinary circumstances" are present. 40 C.F.R. § 6.204(a); *see Rhodes v. Johnson*, 153 F.3d 785, 790 (7th Cir. 1998). That inflexibility gives project opponents an easy lever to challenge common-sense categorical-exclusion determinations, and even a thin record can be enough for a court to unwind an agency's categorical-exclusion finding. *California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002). Little wonder agencies have been reluctant to use categorical exclusions even where clearly appropriate. *The NEPA Task Force Report to the Council on Environmental Quality, Modernizing NEPA Implementation* 58 (September 2003), https://bit.ly/3Rf96fT ("NEPA Task Force Report").

But worse, the current "extraordinary circumstances" requirement is an arbitrary administrative construct. The current rule has no basis in NEPA's text, which says *nothing* about "extraordinary circumstances." It merely requires EPA—absent a categorical exclusion—to prepare an EIS when a proposed action will have a "reasonably foreseeable significant effect on the quality of the human environment." 42 U.S.C. § 4336(a)(2), (b)(1); *see also id.* § 4332(C). The standard appears to have developed merely from CEQ's *ipse dixit.*

Proposed Section 6.204(a) hews closer to NEPA's text—rightly so. It permits EPA to apply a CE *despite* an extraordinary circumstance where the action is not likely to result in significant reasonably foreseeable effects or where EPA modifies the action to avoid or mitigate those effects. Nothing about this change touches what counts as an extraordinary circumstance in the first place; the list of triggering circumstances in Section 6.204(b) is unchanged in substance. What changes is what happens once one is found: an extraordinary circumstance no longer automatically forecloses a categorical exclusion and instead becomes a reason for closer agency scrutiny. That shift restores EPA's discretion to reserve EIS preparation for the cases that truly warrant it, rather than every case that happens to touch a listed circumstance regardless of its real-world significance. Removing the automatic bar is the correct approach for a concept NEPA's text never mandated be treated as all-or-nothing to begin with.

2. Flexibility in applying existing categorical exclusions solves only half the problem, though—EPA also needs a broader set of categorical exclusions to which to apply that flexibility. Sections 6.204(g), (h), and (i) govern how many categorical exclusions EPA has available to it, and the proposed rule correctly expands that supply.

Section 6.204(h) gives EPA a clearer framework for adopting categorical exclusions that other agencies have already developed and vetted, as NEPA Section 109 now expressly permits. 91 Fed. Reg. at 38375. And the framework is built for efficiency—without sacrificing accountability. EPA need only identify the categorical exclusion in the other agency's NEPA procedures that covers its proposed action, consult with that agency to confirm the adoption is appropriate, and then provide public notice.

Thus, EPA isn't merely borrowing another agency's judgment unchecked: it still must confirm the categorical exclusion fits its own proposed action. And the public still gets notice of what's being adopted and how extraordinary circumstances will be handled going forward. What EPA doesn't have to do is recreate the wheel and rebuild, from scratch, a substantiation record and vetting process that another agency has already completed for the same category of action.

Section 6.204(g) makes EPA's process for adopting new categorical exclusions easier, too. The proposed rule replaces full notice-and-comment rulemaking with a process built on CEQ consultation and public notice, cutting the time and resources EPA must spend just maintaining its own categorical-exclusion inventory. That change preserves accountability while increasing speed.

Here again, the changes provide an appropriate balance. Under the proposed standards, the public still gets notice of what EPA is doing and why, and CEQ still has a check on the process before it's finalized. What's gone is the multi-year rulemaking overhead that NEPA never required. Full notice-and-comment rulemaking makes sense for decisions with the weight of a legislative rule; it's a poor fit for administrative housekeeping that keeps EPA's categorical-exclusion list current with its own experience.

Finally, Section 6.204(i) appropriately clarifies how EPA is to apply categorical exclusions that Congress establishes directly by statute or directs EPA to establish. Where a legislative categorical exclusion covers a proposed action, EPA may conclude its review consistent with that legislation, examining extraordinary circumstances or modifying the action only where the statute's own terms allow. This approach gives legislatively created categorical exclusions—like the oil-and-gas exclusion Congress enacted in the Energy Policy Act—their full intended effect within EPA's own procedures, rather than leaving EPA to improvise an implementation process for each one.

* * *

Together, these tools give EPA the flexibility to expand categorical exclusion use efficiently while keeping the process accountable. The States urge EPA to adopt Section 6.204 as proposed.

B. Section 6.202: EPA's revised interagency-cooperation procedures give interagency review the clarity it has lacked.

Interagency coordination has long undermined efficient NEPA implementation. Lead agencies have lacked meaningful clarity about what agency players must be involved and about the scope of each agency's role. A 2003 CEQ task force identified clearly defined agency roles as essential to effective interagency NEPA collaboration. NEPA Task Force Report, *supra*, at 25-26, 30-31 (describing importance of clearly defined agency roles for interagency NEPA collaboration). Yet agencies have largely been left to their own devices to sort that all out. *Id*. In practice, individual agency roles are often informally designated and unstructured during interagency coordination.

Section 6.202 solves that problem without overcorrecting into rigidity. When EPA serves as the lead agency, Section 6.202(a) assigns it clear, default responsibilities: it is "responsible for completing the NEPA process and for coordinating with cooperating and participating … agencies," and it will "determine and document the scope of the proposed action at hand." That directive avoids micromanagement and leaves plenty of room for EPA officials to exercise discretion on mechanics of how coordination must occur in any given case.

The lead agency designation process in Section 6.202(b) preserves the same balance. Where a proposed action requires "related actions" by other federal agencies, Section 6.202(b) directs the agencies involved to determine among themselves which will serve as lead, guided by the criteria in NEPA Section 107(a)(1)(A). And Section 6.202(b) appropriately accounts for the case where agencies simply cannot agree. EPA may consult with or request that CEQ designate a lead agency, an optional backstop rather than a mandatory first step. Agencies retain the discretion to work it out themselves; CEQ involvement is available, not required.

That combination—defined responsibility paired with room to exercise judgment—is precisely what interagency coordination has been missing. Section 6.202 gives agencies a clear starting point without forcing every case into the same procedural mold. EPA should adopt Section 6.202 as proposed.

C. Section 6.200(i): EPA's programmatic-reliance framework curbs the delay that supplemental-EIS practice has long imposed.

Section 6.200(i) addresses a second, equally persistent source of delay: repeated supplemental review of long-running programs.

NEPA does not require supplemental EISs. *See Robert F. Blomquist, Supplemental Environmental Impact Statements Under NEPA: A Conceptual Synthesis and Critique of Existing Legal Approaches to Environmental and Technological Changes*, 8 TEMP. ENVTL. L. & TECH. J. 1, 7–10 (1989). Nonetheless, supplemental-EIS practice has become a routine feature of project development, and a costly one. Preparing a supplement is expensive, slows an ongoing project, and can revive public opposition to an action that was already approved. Dale L. Gavin, *Supplements to Environmental Impact Statements: Implementation of the Standards Set by the Council on Environmental Quality*, 35 ME. L. REV. 111, 115-16 (1983). Supplemental-EIS litigation can even stall projects after most of the work is done. One court enjoined further construction on a water project that was 55% complete, pending completion of a supplemental EIS. *Env't Def. Fund v. Marsh*, 651 F.2d 983, 1007 (5th Cir. 1981). This dynamic gives project opponents a recurring opportunity to force delays long after the agency's initial review is complete.

Section 6.200(i)—consistent with 42 U.S.C. § 4336b—offers a direct remedy for projects that fall within a common programmatic umbrella. It allows EPA to rely on a programmatic EA or EIS for five years without additional review and to continue relying on that document after five years if EPA reevaluates the analysis and confirms it remains valid. For States managing multiple projects under a shared program, this carefully timed process for renewal is a meaningful efficiency gain: it removes the recurring opening for delay that a single alleged deficiency can otherwise create, without excusing EPA from revisiting its analysis when circumstances genuinely change. The States urge EPA to adopt Section 6.200(i) as proposed.

D. Sections 6.205 and 6.207: EPA's certification and extension procedures give the Fiscal Responsibility Act's deadlines and page limits real meaning.

Before the Fiscal Responsibility Act, EA and EIS review had no natural end point. Reviews commonly spanned thousands of pages and consumed multiple years, in part because litigation-averse agencies had every incentive to over-document. As one D.C. Circuit judge recently put it, agencies "spend years writing thousands of pages of environmental review in an attempt to stave off litigation." *Appalachian Voices v. FERC*, 139 F.4th 903, 916 (D.C. Cir. 2025) (Henderson, J., concurring). CEQ data confirms the scale of the problem. Final EISs published between 2013 and 2018 took an average of 4.5 years to complete and averaged 661 pages. Some EISs have run far longer. The EIS at issue in *Seven County* spanned more than 3,600 pages.

The Fiscal Responsibility Act changed that trend. It imposed mandatory deadlines and page limits on EA and EIS review, using "shall" throughout to make the requirements binding. EAs can run no more than 75 pages and must be completed within one year. EISs are capped at 150 pages (or 300 for actions of extraordinary complexity) and must be completed within two years.

The proposed rule gives those statutory limits the accountability mechanism they need. Sections 6.205 and 6.207 require a Responsible Official to certify that the EA or EIS complies with the applicable page limit and deadline. That certification is a built-in accountability check that gives agency staff a concrete reason to take the limits seriously. The proposed rule also closes an obvious workaround: appendices may be used only for material that substantiates the analysis, such as data tables and technical calculations, not to house substantive analysis that would otherwise count against the page limit.

The deadline provisions strike a balance between firmness and flexibility. Under Sections 6.205(i) and 6.207(d), EPA must publish the EA or EIS on the deadline "in as substantially complete form as is possible," even if the analysis isn't finished. Extensions are available, but only in a narrow circumstance: where the document is "so incomplete ... that issuance would ... result in an inadequate analysis." And even then, EPA must "specify the reason why the [document] was not able to be completed under the statutory deadline and whether the applicant consented to the new deadline." So, getting an extension is difficult—as it should be—and won't become a matter of course.

This framework matters because deadlines without accountability tend to erode in practice. By pairing the Fiscal Responsibility Act's mandatory limits with certification requirements and narrowly bounded extensions, the proposed rule ensures that NEPA review will operate on the timeline Congress set. The States urge EPA to adopt Sections 6.205 and 6.207 as proposed.

II. EPA properly implements the One Big Beautiful Bill's opt-in fee mechanism.

Section 6.303(d) properly implements Section 112's opt-in mechanism by encouraging front-end collaboration between EPA and project sponsors before they submit a fee request to CEQ. CEQ's September 2025 guidance confirms this coordination is essential. It lets sponsors give CEQ an accurate project description and helps CEQ gauge the anticipated review level and cost. CEQ, *Implementation of the National Environmental Policy Act*, at 5 (Sept. 29, 2025).

Section 6.303(d) implements that guidance directly. It provides that a project sponsor opting in "should consult with the EPA Responsible Official before submitting a request to the CEQ" when EPA is the lead agency. 91 Fed. Reg. at 38380. This coordination lets EPA and the sponsor align on scope before the clock starts, so review moves faster once it begins. *See Seven Cnty.*, 605 U.S. at 173 ("The goal of [NEPA] is to inform agency decisionmaking, not to paralyze it."). And because Section 6.303(d) makes consultation discretionary rather than mandatory, it will not become a procedural hurdle that slows the process it is meant to speed up.

For these reasons, EPA should adopt Section 6.303(d) as proposed.

III. EPA has properly scoped NEPA to apply to all American communities.

Efficiency and accountability are not the only values the proposed rule vindicates. It also corrects who NEPA was always meant to serve—and who it was not. The proposed rule's revised definition of "human environment" and the accompanying rollback of illegal DEI provisions finally make NEPA serve all *Americans*, equally. The States urge EPA to finalize the changes to Sections 6.102(b)(11), 6.203(a)(5), 6.203(c)(3)(v), and 6.204(b)(1), without modification.

A. Section 6.102(b)(11): NEPA applies to Americans only.

Under the new Section 6.102(b)(11), the "human environment" is "the natural and physical environment and the relationship of Americans with that environment." The proposed definition is the right one. It restores NEPA's promise as a purely domestic regulatory scheme. And now, courts shouldn't be able to question how NEPA stays at home.

NEPA is domestically focused. Just witness its policy statement. NEPA proclaims the "Federal Government's" policy as "promot[ing] the general welfare, … creat[ing] and maintain[ing] conditions under which man and nature can exist in productive harmony, and fulfill[ing] the social, economic and other requirements *of present and future generations of Americans*," "in cooperation with State and local governments." 42 U.S.C. § 4331(a) (emphasis added). It also bestows a "continuing responsibility" on the "Federal Government to use all practicable means" so "the *Nation* may" "assure for *all Americans*, safe, healthful, productive, and esthetically and culturally pleasing surroundings." *Id.* § 4331(b)(2) (emphasis added).

Despite this clear directive, the caselaw is mixed on whether NEPA applies extraterritorially—a question that should never have gotten traction to begin with.

Some courts have rightly refused to apply NEPA where the environmental impacts occur exclusively in a foreign jurisdiction or in an area over which the United States has no legislative control. In *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, the Court of Appeals for the D.C. Circuit found that NEPA does not "impose[ ] an … EIS requirement … with respect to impacts falling exclusively within foreign jurisdictions." *Natural Res. Def.*

Council, Inc., 647 F.2d 1345, 1348 (D.C. Cir. 1981). In *Greenpeace USA v. Stone*, a district court found NEPA did not apply to agency actions on foreign soil that would have "grave foreign policy implications" and "interfere with a decision of the President and a foreign sovereign." 748 F. Supp. 749, 761 (D. Haw. 1990). Further, in *Basel Action Network v. Maritime Admin.*, a district court determined NEPA did not apply to agency action occurring on the high seas because the United States does not have "legislative control over the high seas." 370 F. Supp. 2d 57, 71-72 (D.D.C. 2005).

Yet, some courts have stretched NEPA to reach projects in global commons. In *Environmental Defense Fund, Inc. v. Massey*, the D.C. Circuit held that NEPA reached the NSF's decision to incinerate waste at a research station in Antarctica, reasoning that the presumption against extraterritoriality did not apply because the relevant decisionmaking took place entirely within the United States. 986 F.2d 528, 532-33 (D.C. Cir. 1993). A district court extended that same domestic-decisionmaking rationale to uphold NEPA's application to Navy sonar testing conducted on the high seas and within the U.S. Exclusive Economic Zone. *Nat. Res. Def. Council v. U.S. Dep't of Navy*, No. CV-01-07781, 2002 WL 32095131, at *10–12 (C.D. Cal. Sept. 17, 2002). And these decisions have endured despite conflicting Supreme Court precedent. *See Smith v. United States*, 507 U.S. 197, 203-05 (1993) (recognizing that FTCA did not apply extraterritorially to Antarctica).

Now, EPA has correctly treated the "human environment" as an American-centric one. The proposed rule creates a clean two-track system, lending predictability to project sponsors and the American public. NEPA applies where a proposed action has reasonably foreseeable effects on Americans' relationship with the natural and physical environment. Executive Order 12114, implemented through proposed Subpart D, governs the separate set of actions that produce effects felt abroad. By staying domestically focused, this approach to NEPA avoids needless foreign conflict, limits the risk of retaliatory regulatory measures from other nations, and ensures that foreign-policy matters are decided by foreign-policy personnel (not EPA personnel merely trying to implement a project).

In short, the proposed rule rightly confirms that NEPA reaches *Americans* and their environment—nothing more.

B. Sections 6.203(a)(5), 6.203(c)(3)(v), and 6.204(b)(1): All Americans deserve NEPA's protections, without favor to any community.

The proposed rule also ensures that NEPA protects *all* Americans rather than select groups. EPA's existing NEPA regulations include "environmental justice" language that tilted NEPA in favor of minority races. The proposed rule correctly eliminates that language.

NEPA can't fix what science can't explain. Some scholars have documented disproportionate pollution exposure among poor and minority communities. Spencer Banzhaf, Lala Ma & Christopher Timmins, *Environmental Justice: The Economics of Race, Place, and Pollution*, 33 J. ECON. PERSP. 185, 186 (2019). But the science isn't settled that a real, reliable disparity with tangible health consequences exists. *See* William M. Bowen, *An Analytical Review*

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of Environmental Justice Research: What Do We Really Know?, 29 ENVTL. MGMT. 3, 3, 10-11 (2002) (finding that "the empirical foundations of environmental justice are so underdeveloped that little can be said with scientific authority regarding the existence of geographical patterns of disproportionate distributions and their health effects on minority, low income, and other disadvantaged communities"). Too, the cause of any disparity remains unresolved. Banzhaf, *supra* at 188. It is "unclear how much weight" any explanatory mechanism (such as disproportionate facility siting, income-driven residential sorting, unequal bargaining power, or discriminatory enforcement disparities) carries. *Id.* If the true cause is unknown, EPA can't assume that demographic-specific provisions in NEPA address the problem.

For this same reason, NEPA's current slant in favor of "minority communities" is inconsistent with the Equal Protection Clause. 40 C.F.R. § 6.203(a)(5). "The core purpose of the Equal Protection Clause" is "do[ing] away with all governmentally imposed discrimination based on race." *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll.*, 600 U.S. 181, 206 (2023) (cleaned up). And "[e]liminating racial discrimination means eliminating all of it." *Id.* Race-based state action must face strict scrutiny, and those cases that pass are "rare." *Id.* at 208. Only the "extraordinary case" will justify overriding our constitutional principle that race distinctions are "odious" to a free society's foundation of equality. *Id.* (cleaned up).

EPA's move to protect all individuals is, thus, the right call. The current rule offering procedural preferences to minorities would likely not qualify as an "extraordinary" case. *SFFA*, 600 U.S. at 208. EPA lacks a compelling interest in favoring minority communities, and the rule isn't narrowly tailored. Environmental impacts don't distinguish based on race—so neither should EPA. And even accepting that pollution burdens have historically fallen on minorities, giving special solicitude to these groups doesn't cure the *cause*, which, as discussed, hasn't been pinpointed. Without getting to the root of disparity, favoring minorities risks undermining the EPA's aim by merely shifting environmental burdens onto other races—not eradicating it entirely.

The States accordingly support EPA's replacement of an "environmental justice" framework with a demographically neutral "all individuals" standard. EPA should resist any pressure to reintroduce population-specific language under alternative labels—"vulnerable communities," "overburdened populations," or similar formulations—that would simply reconstitute the same framework by another name. Such language would be equally exposed to legal challenge. EPA should finalize Sections 6.203(a)(5), 6.203(c)(3)(v), 6.204(b)(1), and 6.102(b)(11) as proposed.

IV. The severability clause protects the rule against piecemeal litigation.

Every improvement described above will only matter if it survives judicial review. The proposed rule's severability clause ensures that it will. The States strongly support the addition of a severability clause in Section 6.500.

Given how aggressively NEPA reforms are challenged in court, the proposed rule "is destined to reach the courts." CHARLES W. TYLER & E. DONALD ELLIOTT, ADMIN. CONF. OF THE U.S., TAILORING THE SCOPE OF JUDICIAL REMEDIES IN ADMINISTRATIVE LAW 25 (May 4, 2018);

see, e.g., First Amended and Supplemental Complaint for Declaratory and Injunctive Relief, *Center for Biological Diversity v. U.S. Dep't of Interior*, 3:25-cv-10793 (N.D. Cal. Apr. 3, 2026), ECF No. 27 (challenging Department of Interior's rescission of NEPA regulations). So, the benefit of a severability clause is at its "apex." Tyler, *supra* at 25. "Severing the invalid provisions of a rule from the valid provisions (and leaving the valid ones in effect) has the potential to avoid many of the costs of total vacatur." *Id.* at 24. And "the unchallenged provisions may remain good law and continue to benefit the public and the agency." *Id.* at 24.

Absent severability, a successful challenge to any one of the above could jeopardize the rest of the proposed rule's good work. Though we're confident that each proposed provision can and should survive judicial review, Section 6.500 limits the risk. It ensures that a court reviewing one provision cannot use that review as a vehicle to unwind the entire rule.

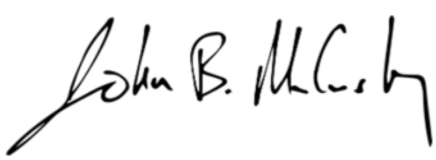
Thus, EPA should adopt Section 6.500. And to ensure the clause holds, as a "best practice," EPA should "include[] in the [final] rule's statement of basis and purpose a reasoned explanation for why the agency believes some portions of the rule can and should function independently." Administrative Conference of the United States, Administrative Conference Recommendation 2018-2, Severability in Agency Rulemaking (June 15, 2018).

CONCLUSION

The proposed rule brings Part 6 into the present. It is a comprehensive, carefully considered piece of rulemaking, and EPA should be commended for the work that went into it. The result is a NEPA process that works better for everyone it touches: States get faster review for the projects their residents depend on; project sponsors get predictability and, where they want it, the option to pay for speed; the public gets a process still grounded in real accountability; and EPA gets a rule it can defend with confidence, on the merits and in court.

The States urge EPA to finalize the proposed rule without delay, and we appreciate the opportunity to comment.

Sincerely,



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