COMMENTS OF ATTORNEYS GENERAL OF WASHINGTON, CALIFORNIA, NEW YORK, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW MEXICO, OREGON, VERMONT, RHODE ISLAND, THE DISTRICT OF COLUMBIA AND HARRIS COUNTY, TEXAS

August 4, 2025

VIA REGULATIONS.GOV

U.S. Department of Transportation
1200 New Jersey Ave. SE
Washington, DC 20590

Re: Revision of National Environmental Policy Act Regulations Interim Final Rule, 90 Fed. Reg. 29426 (July 3, 2025); Procedures for Considering Environmental Impacts Notice of availability and request for Comment, (July 3, 2025)

To Whom It May Concern:

The Attorneys General of the States of Washington, California, New York, Arizona, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, New Mexico, Oregon, Vermont, Rhode Island; the Commonwealth of Massachusetts and the District of Columbia; and Harris County, Texas (collectively, States) respectfully submit these comments on two actions: one taken by the United States Department of Transportation and one taken jointly by the Federal Highway Administration, Federal Railroad Administration, and Federal Transit Administration (collectively, the Transit Administrations) to revise their NEPA implementing procedures: an Interim Final Rule (the Transit Rule) revising FHWA, FRA, and FTA regulations implementing the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347 and DOT's Notice of Availability for a revised Order providing NEPA procedures (DOT Order).[1]

NEPA has long supported informed and transparent agency decision-making and allowed for meaningful public participation in developing and reviewing proposed federal actions.[2]

[1] The Interim Final Rule is entitled "Revision of National Environmental Policy Act Regulations," 90 Fed. Reg. 29426 (July 3, 2025), Docket ID FHWA-2025-0007; the Notice of Availability is titled "Procedures for Considering Environmental Impacts," 90 Fed. Reg. 29621 (July 3, 2025), Docket ID DOT-OST-2025-0171.

[2] U.S. Gov't Accountability Off., GAO-14-370, *National Environmental Policy Act: Little Information Exists On NEPA Analyses*, 16 (2014), https://www.gao.gov/products/gao-14-370 (last visited Mar. 20, 2025) ("[a]ccording to studies and agency officials, some of the qualitative benefits of NEPA include its role as a tool for encouraging transparency and public participation and in discovering and addressing the potential effects of a proposal in the early design stages to avoid problems that could end up taking more time and being more costly in the long run.").

Congress enacted NEPA to advance a national policy of environmental protection by requiring federal agencies to conduct thorough and careful reviews of their actions' environmental impacts.[3] As the Supreme Court has explained, Congress intended NEPA's "action-forcing procedures" to help "[e]nsure that the policies [of NEPA] are implemented."[4] In order to implement NEPA within its work, the Transit Administrations promulgated regulations and DOT created procedures.[5] DOT and the Transit Administrations' (collectively, the Agency) abrupt action to revise longstanding NEPA regulations will disrupt and undermine the implementation of NEPA across the country.

States have a strong interest in robust NEPA compliance and the significant opportunities for public participation required under CEQ's NEPA regulations in order to protect their residents, property, and natural resources. The States and our residents are injured by the effects of environmental degradation, including effects exacerbated by climate change.[6] The States also have a quasi-sovereign interest in preventing harm to the health of our natural resources and ecosystem[7] and are entitled to "special solicitude" in seeking redress for environmental harms within our borders.[8]

The Transit Rule and DOT Order will harm this guiding framework for federal agencies' environmental review under NEPA to the detriment of the States. These comments describe how the Transit Rule (1) harms the States; (2) is arbitrary and capricious (3) fails to conform to the requirements for notice-and-comment rulemaking under the Administrative Procedure Act (APA); and (4) is contrary to law. In sum, the Transit Rule is unlawful. For the reasons stated below, the States oppose the Transit Rule and request that it be withdrawn in its entirety.[9] The DOT Order should also be withdrawn because it similarly harms the States, is arbitrary and capricious, fails to conform to the requirements for notice and comment rulemaking under the Administrative Procedure Act (APA), and is contrary to law.

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[3] 42 U.S.C. §§ 4331, 4332.

[4] *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979) (quoting S. Rep. No. 91-296, at 19 (1969)); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) ("Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.").

[5] 23 C.F.R. § 771; DOT Order 56101.1C, "Procedures for Considering Environmental Impacts," *https://www.transportation.gov/sites/dot.gov/files/docs/Procedures_Considering_Environmental_Impacts_5610_1C.pdf*.

[6] *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 737–38 (1981).

[7] *Massachusetts v. EPA*, 549 U.S. 497, 519–22 (2007).

[8] *Id*. at 520.

[9] By separate correspondence through Regulations.gov, on March 14, 2025, California, Washington, New York, Colorado, Delaware, Illinois, Maine, Maryland, Minnesota, New Jersey, Oregon, Rhode Island, Wisconsin, the Commonwealth of Massachusetts, the District of Columbia, and Harris County, Texas filed a letter requesting that CEQ extend the comment period for the Rescission Rule. Comment ID CEQ-2025-0002-17196.

I. BACKGROUND

Since 1969, NEPA has promoted informed, transparent, and coordinated agency decisionmaking and meaningful public participation in the development of major infrastructure projects. By requiring thorough environmental review ahead of significant federal actions, NEPA has helped regulatory agencies and the American people evaluate and understand how such projects impact the environment and public health.[10] NEPA's procedural safeguards have—among other things—protected drinking water from radioactive contamination, protected the public from exposure to harmful air pollutants and pathogens, and alerted agencies to wildfire risk so that damage from those fires could be mitigated.[11] Across the country, Americans have benefited from increased safety, preservation of natural resources, and long-term reductions in costs as a result of NEPA's review process.

A. CEQ adopted regulations to address inconsistent agency practices and interpretations.

From 1978 to 2025, CEQ's regulations implementing NEPA guided environmental review for agencies across the federal government. This single set of overarching regulations ensured consistency across federal agencies' environment review of federal actions.[12]

CEQ began providing federal agencies with guidelines for consistent application of NEPA across agencies in 1970, soon after NEPA was enacted.[13] After seven years of attempting to implement NEPA across agencies with only guidelines, however, CEQ found that "inconsistent agency practices and interpretation of the law . . . impeded Federal coordination

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[10] *See* Comments of Attorneys General of California, Illinois, Maryland, Massachusetts, New Jersey, New York, Oregon, Vermont, and Washington, and the Secretary of the Commonwealth of Pennsylvania Department of Environmental Protection on Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28591, at 2–5 (Aug. 20, 2018) [hereinafter 2018 Multistate Comments], https://www.regulations.gov/comment/CEQ-2018-0001-11812; Comments of Attorneys General of Washington, California, New York, District of Columbia, Connecticut, Delaware, Guam, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, and Vermont on Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684, at 8–12 (Mar. 10, 2020), https://www.regulations.gov/comment/CEQ-2019-0003-172704.

[11] *See* Env't L. Inst., *NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government* (2010), https://ceq.doe.gov/docs/get-involved/NEPA_Success_Stories.pdf; Elly Pepper, *Never Eliminate Public Advice: NEPA Success Stories*, NRDC (Feb. 1, 2015), https://www.nrdc.org/resources/never-eliminate-public-advice-nepa-success-stories.

[12] Implementation of Procedural Provisions: Final Regulations, 43 Fed. Reg. 55978 (Nov. 29, 1978).

[13] CEQ issued interim guidelines for implementing NEPA to agencies in May 1970, Statements on Proposed Federal Actions Affecting the Environment: Interim Guidelines, 35 Fed. Reg. 7390, 7,391 (May 12, 1970), pursuant to President Nixon's Executive Order directing CEQ to issue such guidelines, Exec. Order 11514, 35 Fed. Reg. 4247, 4248 (Mar. 7, 1970). CEQ finalized the guidelines in 1971 and revised them in 1973. Statements on Proposed Federal Actions Affecting the Environment: Guidelines, 36 Fed. Reg. 7724 (Apr. 23, 1971); Preparation of Environmental Impact Statements: Proposed Guidelines, 38 Fed. Reg. 10856 (May 2, 1973).

and made it more difficult for those outside government to understand and participate in the environmental review process."[14] To address those difficulties, President Carter issued (E.O.) 11991 in May 1977, directing CEQ to "[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA] (42 U.S.C. § 4332(2))."[15] CEQ's regulations would serve to create a "uniform, government-wide" approach to NEPA review;[16] to "make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to . . . focus on real environmental issues."[17] CEQ issued final NEPA implementing regulations in 1978 (1978 Regulations).[18]

The 1978 Regulations were binding on all federal agencies.[19] Agencies conformed their NEPA procedures accordingly: The regulations of the Army Corps of Engineers, the Environmental Protection Agency (EPA), the United States Forest Service, the Federal Highway Administration, and other agencies referred to and in some cases explicitly incorporated CEQ's regulations.[20] In addition to promoting uniformity across the federal government, CEQ's regulations aided development of state environmental regulations and facilitated public involvement in the environmental review process. And by providing a unified set of standards for environmental review across dozens of different agencies, CEQ's regulations helped the public to understand the NEPA process and made participation in the process more accessible.

B. CEQ rescinded its NEPA regulations in 2025.

CEQ's 1978 Regulations were remarkably durable, with only a few minor revisions made over the following four decades.[21] However, in 2017, after nearly 40 years of stable NEPA implementation, President Trump issued E.O. 13807 directing CEQ to revise its regulations.[22] In July 2020, CEQ finalized a rule that improperly narrowed environmental review under NEPA,

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[14] 43 Fed. Reg at 55978.

[15] Exec. Order No. 11991, 42 Fed. Reg. 26967 (May 24, 1977).

[16] 43 Fed. Reg. at 55978.

[17] Exec. Order No. 11,991, 42 Fed. Reg. at 26967.

[18] National Environmental Policy Act-Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. 55978 (Nov. 29, 1978).

[19] 43 Fed. Reg at 55978.

[20] *See, e.g.,* 33 C.F.R. § 230.13(b) ("A supplement to the draft or final EIS should be prepared whenever required as discussed in 40 C.F.R. § 1502.09(c)."") (Army Corps); 40 C.F.R. § 6.100(b) (". . . adopts the CEQ Regulations (40 CFR Parts 1500 through 1508) implementing NEPA . . . Subparts A through C supplement, and are to be used in conjunction with, the CEQ Regulations") (EPA); 36 C.F.R. § 220.4(e)(2) ("Scoping shall be carried out in accordance with the requirements of 40 C.F.R. § 1501.7.") (Forest Service); 23 C.F.R. § 771.107 (2018) ("The definitions contained in the CEQ regulations . . . are applicable.") (Federal Highway Administration).

[21] U.S. Dep't of Energy, History of CEQ NEPA Regulations and Guidance, Office of NEPA Policy and Compliance, Guidance & Requirements, https://www.energy.gov/nepa/history-ceq-nepa-regulations-and-guidance (last visited Jul. 11, 2025).

[22] Exec. Order No. 13807, 82 Fed. Reg. 40463 (August 24, 2017).

threatened meaningful public participation, and impermissibly restricted judicial review of agency actions (2020 Rule).[23] The States and numerous public interest organizations filed lawsuits challenging the unlawful 2020 Rule.[24]

The lawsuits were dismissed[25] after CEQ, under the Biden Administration, issued revised NEPA regulations in 2022 and 2024 (2022 Rule and 2024 Rule, respectively) which reversed many provisions of the 2020 Rule and restored key provisions of the 1978 Regulations.[26] Among these, the 2022 Rule required analysis of all reasonably foreseeable effects of a major federal action.[27] The 2024 Rule restored most of the remaining provisions of the 1978 Regulations, strengthened participation, strengthened analysis of climate change and human health impacts including environmental justice concerns, and implemented amendments to the NEPA statute enacted in the 2023 Fiscal Responsibility Act (FRA).[28]

In 2024, a group of states led by Iowa filed a lawsuit—*Iowa v. Council on Environmental Quality*—in federal district court, seeking to vacate the 2024 Rule and reinstate the 2020 Rule.[29] In February 2025, the *Iowa* court vacated the 2024 Rule, though this decision has since been vacated.[30] A 2024 D.C. Circuit case also held that CEQ lacked authority to issue binding regulations even though the Court did not vacate CEQ's NEPA regulations.[31]

In January 2025, President Trump signed E.O. 14154, entitled "Unleashing American Energy".[32] E.O. 14154 revoked President Carter's E.O. 11991directing CEQ to issue regulations and directed CEQ to "expedite and simplify the permitting process" for energy infrastructure projects proposing to rescind CEQ's NEPA regulations and providing new guidance for NEPA

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[23] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020).

[24] *E.g.*, *California v. CEQ*, No. 3:20-cv-06057 (N.D. Cal. August 28, 2020).

[25] *State of Iowa v. CEQ*, D.N.D. Case No. 1:24-cv-00089, at ECF Nos. 145, 146.

[26] Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021); *see also* Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34154 (June 29, 2021).

[27] *See* National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23453 (Apr. 20, 2022) (2022 Rule).

[28] *See* National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442 (May 1, 2024) (2024 Rule); Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat.10.

[29] Complaint, *Iowa v. CEQ*, No. 1:24-cv-00089 (D.N.D. May 21, 2024), ECF No. 1.

[30] *See* Order Regarding All Mots. for Summ. J. & Partial Summ. J., *Iowa v. CEQ*, No. 1:24-cv-00089-DMT-CRH (D.N.D. Feb. 3, 2025), ECF No. 145; *Iowa v. Washington*, No. 25-1641. (8th Cir, Jul. 29, 2025). The *Iowa* court also reviewed plaintiffs' claims that the Phase 2 Rule was arbitrary and capricious, granting some and rejecting others.

[31] *Marin Audubon Soc'y v. Fed. Aviation Admin.*, 121 F.4th 902, 908 (D.C. Cir. 2024).

[32] Exec. Order No. 14154, 90 Fed. Reg. 8353 (Jan. 20, 2025).

implementation.[33] In addition to directing CEQ to reconsider its NEPA regulations, E.O. 14154 called for the coordinated "revision of agency-level implementing regulations," requiring any resulting agency regulations to "expedite permitting approvals and meet deadlines established in the FRA."[34] E.O. 14154 further directed that "[c]onsistent with applicable law, all agencies must prioritize efficiency and certainty over any other objectives, including those of activist groups, that do not align with the policy goals set forth in section 2 of this order or that could otherwise add delays and ambiguity to the permitting process."[35]

In February 2025, CEQ issued an interim final rule rescinding its NEPA implementing regulations (CEQ Repeal Rule).[36] In place of the regulations, CEQ issued a guidance memorandum to heads of federal agencies recommending that agencies "revise . . . their NEPA implementing procedures (or establish such procedures if they do not yet have any) to expedite permitting approvals" (CEQ Guidance).[37] The CEQ Guidance further directed agencies to "prioritize efficiency and certainty over any other policy objectives,"[38] which is in conflict with NEPA's focus on environmental protection.[39] The CEQ Guidance "encourage[d]" agencies to use the unlawful 2020 Rule "as an initial framework for the development of revisions to their NEPA implementing procedures."[40] Like the 2020 Rule, the CEQ Guidance improperly limited environmental review. Among other things, it directed agencies to omit environmental justice analysis from NEPA documents[41] and to avoid providing the opportunity for public comment on proposed NEPA regulations[42] unless either is required by law. The Guidance also suggested that the scope of effects that agencies are required to analyze should be narrowed.[43]

In early July 2025, several agencies, including the Transit Administrations, the Department of Energy, Department of Agriculture, Department of the Interior, and Department of Defense, issued interim final rules modifying and/or rescinding their NEPA implementing

[33] *Id.* at 8355.

[34] Exec. Order No. 14154, 90 Fed. Reg. at 8355.

[35] *Id.*

[36] Removal of National Environmental Policy Act Implementing Regulations, 90 Fed Reg. 10610 (Feb. 25, 2025), *as corrected by* Removal of National Environmental Policy Act Implementing Regulations, 90 Fed Reg. 11221 (Mar. 5, 2025).

[37] Council on Env't Quality, Memorandum for Heads of Federal Departments and Agencies (Feb. 19, 2025) [hereinafter CEQ Guidance], https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf.

[38] CEQ Guidance at 1.

[39] 42 U.S.C. § 4321(a).

[40] CEQ Guidance at 1.

[41] *Id.* at 5.

[42] *Id.* at 7.

[43] *Id.* at 5.

regulations.[44] The Transit Administrations issued the Transit Rule on July 3, 2025. To support these changes, the Transit Rule cited E.O. 14154, the CEQ Repeal Rule and Guidance, and other developments such as the Supreme Court's decision in *Seven County Infrastructure Coalition v. Eagle County* (*Seven County*),[45] claiming that the NEPA regulations had caused delay and uncertainty in permitting.[46]

As a result of the CEQ Repeal Rule, CEQ's uniform and binding NEPA regulations were eliminated.[47] With CEQ's regulations now gone, individual agencies face increased pressure to develop individual agency regulations to provide stability, transparency, and guide consistent environmental review in compliance with NEPA. Otherwise, environmental review under NEPA will return to the era of "inconsistent agency practices and interpretation" that the Carter Administration had sought to correct. Although the Transit Administrations have revised their NEPA regulations, the revised regulations are problematic and unlawful in several ways.

C. Problematic Provisions of the Transit Rule and DOT Order

1. The Transit Rule

The FHWA, FRA, and FTA jointly issued an Interim Final Rule modifying their NEPA implementing regulations. This action revised the NEPA regulations effective upon publication of the IFR in the Federal Register.[48] The revisions address changes in the statutory text of NEPA and remove references to CEQ's now rescinded NEPA regulations.[49] The Transit Rule provides additional definitions, including for a Major Federal Action.[50] However, the Transit Rule does not explicitly include indirect or cumulative effects as defined in the NEPA regulations.

2. Order 5610.1 D

DOT issued a new Order with NEPA regulations for all DOT Operating Administrations (OA). The Order replaces the previous DOT NEPA procedures in Order 56101.1C which DOT promulgated in 1979 and last updated in 1985. Order 165101.C had previously been a

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[44] Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. 29676 (Jul 3, 2025) (DOE); National Environmental Policy Act, 90 Fed. Reg. 29632 (Jul. 3, 2025) (USDA); National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 29498 (Jul. 3, 2025) (DOI); Procedures for Implementing NEPA; Removal, 90 Fed. Reg. 29461 (Jul. 3, 2025) (Army Corps); Procedures for Implementing NEPA; Processing of Department of the Army Permits, 90 Fed. Reg. 29465 (Jul. 3, 2025) (also Army Corps).

[45] *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 145 S. Ct. 1497 (2025).

[46] Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. at 29426-30

[47] *See* Comments of Attorneys General of Washington, California, New York, Arizona, Colorado, Connecticut, District of Columbia, Delaware, Harris County, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Vermont, and Wisconsin on Removal of National Environmental Policy Act Implementing Regulations, 90 Fed Reg. 10610, at 18–46 (Mar. 27, 2025) [hereinafter 2025 Multistate Comments], https://www.regulations.gov/comment/CEQ-2025-0002-88344.

[48] 90 Fed. Reg. 29426.

[49] 90 Fed. Reg. 29426.

[50] 90 Fed. Reg. 29432.

supplement to CEQ's now rescinded NEPA regulations.[51] The new order is binding for all DOT OAs.[52] The Order provides DOT's "interpretations of existing law."[53] These regulations apply to all DOT OAs, including the Transit Administrations. The Order updates NEPA terminology to be consistent with the updated text of NEPA. This includes providing a definition for impacts and directing that "Impacts should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Impacts do not include those impacts that the agency has no ability to prevent due to the limits of its regulatory authority, that would occur regardless of the proposed action, or that would need to be initiated by a third party."[54] Similarly, for both EAs and EISs, the Order directs that OAs need not "analyze environmental impacts from other projects separate in time, or separate in place, or that fall outside of the OA's regulatory authority, or that would have to be initiated by a third party."[55]

While DOT states that it "encourages meaningful, proactive, open, and transparent public participation and collaboration with affected and interested stakeholders, including Federal agencies, States, Tribes, localities, and the public in its environmental decision-making process,"[56] DOT is weakening public comment requirements in comparison to what was previously required. For instance, the Order notes that scoping can be a time for coordination with the public, but does not provide any details about how to do so or mandate any outreach. The Order also does not mandate public comment on draft Environmental Assessments or draft EISs.[57]

II. THE TRANSIT RULE WILL ADVERSELY IMPACT THE UNIQUE INTERESTS OF STATES, TERRITORIES, AND LOCAL GOVERNMENTS IN ROBUST NEPA REGULATIONS

NEPA is an example of cooperative federalism, envisioning a strong role for states, territories, and local governments in environmental reviews. Indeed, when enacting NEPA, Congress declared that the federal government must act, "in cooperation with States and local governments" to evaluate potential environmental impacts in fulfillment of NEPA's purposes.[58] Indeed, NEPA's success has led to the enactment of similar statutes in many states. The Agency's revision of its NEPA regulations threatens the interests of the States in protecting our

[51] 90 Fed. Reg. at 29621.

[52] Order at p. 4 ("Each OA must implement NEPA in accordance with the criteria set forth by this Order.")

[53] 90 Fed. Reg. 29622.

[54] Order at p. 27.

[55] Order at 13, 18.

[56] Order at 3.

[57] Order at 14, 19

[58] 42 U.S.C. § 4331(a).

residents and environmental resources through public participation and robust, informed decision-making processes for major federal actions.

A. The Transit Rule will Harm State Sovereign and Proprietary Interests

NEPA regulations protect state sovereign and proprietary interests in at least two fundamental ways: (1) by enabling States to participate meaningfully to assess the impacts of agency actions on state natural resources and public health; and (2) by lessening the strain on state resources of shouldering the regulatory burden of those reviews. The Transit Rule will adversely impact both of those types of interests.

1. The Transit Rule Will Impair the Ability of States to Meaningfully Participate in the NEPA Process

NEPA contains provisions directly incorporating states, territories, and local governments into federal decision making.[59] The States rely on participation in the NEPA process to protect their proprietary and sovereign interests in their natural resources by, *inter alia*, identifying harms from federal actions to their resources, including to air, water, public lands, cultural resources, wildlife, and the public health and welfare of their residents that agencies might otherwise ignore. [60] Participation also allows the States to thoroughly weigh in on the environmental impacts of an action, such as the long-term effects of climate change and the reduction of scarce water resources. And for certain federal projects where state environmental review may be limited or even preempted, a robust NEPA process is critical to protecting state interests, resources and residents from harmful environmental effects, which may otherwise evade review. State agencies thus regularly engage in the federal NEPA process as cooperating and commenting agencies or as agencies with special expertise highlighting potential effects to each State's natural resources and public health.

2. The Transit Rule Would Place an Increased Burden on States to Evaluate the Impacts of Federal Actions

Many States have their own state environmental policy statutes and regulations modeled on NEPA—the so-called "little NEPAs." These include the California Environmental Quality Act,[61] Washington's State Environmental Policy Act,[62] New York's State Environmental Quality

[59] 42 U.S.C. §§ 4331(a), 4332(G).

[60] For example, many of the States have commented on CEQ's NEPA rulemakings since 2018. *See* Comments of Attorneys General of Washington, *et al* on the Proposed Phase 2 Rule, 88 Fed. Reg. 49924 (July 31, 2023); Comments of Attorneys General of Washington, et al., on the Interim Final Rule, 86 Fed. Reg. 34154 (July 29, 2021); Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking 86 Fed. Reg. 55757 (Nov. 22, 2021); Comments of Attorneys General of Washington, et al., on Notice of Proposed Rulemaking, 85 Fed. Reg. 1684 (March 10, 2020); Comments of Attorneys General of California, et al., on Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 28591 (August 20, 2018). Many of the States also challenged the unlawful 2020 Rule and defended the 2024 Rule in the *Iowa* litigation. First Amended Complaint, *California v. CEQ*; Proposed Intervenor-Defendant States' Cross Mot. for Partial Sum. J., *Iowa v. CEQ*, No 1:24-cv-00089 (D.N.D. Aug. 30, 2024), ECF No. 83.

[61] Cal. Pub. Res. Code § 21000–21189.57.

[62] Wash. Rev. Code. ch. 43.21C.

Review Act, [63] Connecticut's Environmental Policy Act,[64] the Massachusetts Environmental Policy Act,[65] and the District of Columbia's Environmental Policy Act.[66] Where an action subject to state environmental review also requires NEPA review, state and local agencies can often comply with their own environmental review requirements by adopting or incorporating by reference certain environmental documents prepared under NEPA, but only if those NEPA documents exist and meet state statutory requirements.[67] This collaboration allows state, local, and federal agencies to share documents, reduce paperwork, and efficiently allocate limited time and resources.

Taken together, the Transit Rule and the DOT Order working in the space vacated by CEQ's rescinded NEPA regulations would increase the burden on the States to rely more heavily on and prepare more documents under the States' little NEPAs. The States' laws are often administered in conjunction with the NEPA regulations, either through coordinated state and federal review or by relying on NEPA review to satisfy state environmental review requirements. For instance, in situations where a federal agency's limited analysis of indirect and cumulative impacts would be less stringent than a state's little NEPA standards, a state agency would be unable to rely on the federal Environmental Impact Statement (EIS) to make its own environmental findings. Thus, the burden would fall on the States to conduct additional analysis, such as preparing a separate state EIS. CEQ's rescission of its NEPA regulations left a vacuum which the DOT Order and Transit Rule do not fill. For instance, where CEQ's regulations had included guidance for agencies to analyze indirect and cumulative impacts of a federal agency action, neither the DOT Order not the Transit Rule provide this guidance.[68] By curtailing the scope of impacts analysis, the Transit Rule shifts the burdens of environmental review to state and local jurisdictions. As a result, the States will need to expend additional time and resources on environmental review of proposed federal actions. The Agency's finding that the Transit Rule would have no federalism implications under Executive Order 13132 is therefore wrong and unsupported. The Agency should have engaged in the state consultation process and other procedures mandated by that executive order prior to issuing the Transit Rule and the DOT Order.

Moreover, where analysis of indirect or cumulative effects is not required under a State's little NEPA, the Transit Rule and the DOT Order would diminish the amount of information available to state and local agencies and the public with regard to environmental impacts of proposed projects. In such a case, neither the federal nor the State agency responsible for a project would be required to analyze or disclose the same level of information that would have been required under the Agencies' previous regulations. This deprives the States and the public

[63] N.Y. Env't. Conserv. Law art. 8; N.Y. Comp. Codes R. & Regs. tit. 6, pt. 617.

[64] Conn. Gen. Stat. § 22a-1 *et seq.*

[65] Mass. Gen. Laws, ch. 30, §§ 61-62I.

[66] D.C. Code § 8-109.01–109.12; D.C. Mun. Regs. tit. 20, § 7200–7299.

[67] *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 6, § 617.15; Mass. Gen. Laws, ch. 30, § 62G.

[68] 40 C.F.R. § 1508.1(g), as amended in 2022 by 87 Fed. Reg. 23453, 23469-70.

of the ability to participate in the NEPA process and ensure that the Agencies' environmental decision-making is well-informed.

B. The Transit Rule and DOT Order Will Undermine the Full Evaluation of Major Federal Actions at a Time When Climate Change Threats Make Comprehensive Analysis Even More Critical to the States

A robust NEPA process—resulting in full evaluation of reasonably foreseeable environmental impacts of major federal actions—has become even more critical in the face of the increasing severity and frequency of compounding climate change impacts on States' sovereign lands and coastal areas, natural resources, infrastructure, and the health and safety of residents.

Climate change is causing significant environmental and economic losses for States and our residents, including, but not limited to, damage to infrastructure and natural resources,[69] housing[70] and job instability,[71] and the cost of health care and lives lost from environmental pollutants,[72] extreme storms, heatwaves, and wildfires.[73] For instance, New Mexico already faces serious environmental challenges, with the entire state currently suffering from drought conditions and average temperatures increasing fifty percent faster than the global average over the past century. The escalating heatwaves, flooding, sea-level rise, extreme storms, and infectious diseases brought on by climate change have greater impacts on "[r]acially and socioeconomically marginalized communities," including communities of color, low-income communities, and Indigenous Peoples and Tribal Nations, as well as people with disabilities and

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[69] JEC Democratic Majority, *Climate-Exacerbated Wildfires Cost the U.S. Between $394 to $893 Billion Each Year in Economic Costs and Damages* (Oct. 2023), https://www.jec.senate.gov/public/_cache/files/9220abde-7b60-4d05-ba0a-8cc20df44c7d/jec-report-on-total-costs-of-wildfires.pdf; NOAA National Centers for Environmental Information (NCEI), *Billion-Dollar Weather and Climate Disasters* (2025), https://www.ncei.noaa.gov/access/billions/ (last accessed August 4, 2025).

[70] Mariya Bezgrebelna et al., *Climate Change, Weather, Housing Precarity, and Homelessness: A Systematic Review of Reviews*, 18 Int. J. Environ. Res. Public Health 5812 (May 28, 2021); Taylor Gauthier & Financial Security Program, *The Devastating Effects of Climate Change on US Housing Security*, The Aspen Institute (April 21, 2021), https://www.aspeninstitute.org/blog-posts/the-devastating-effects-of-climate-change-on-us-housing-security/.

[71] A. R. Crimmins et al., Fifth National Climate Assessment, at Ch. 19 (2023), https://repository.library.noaa.gov/view/noaa/61592 (Climate change is anticipated to "impact employment by changing demand for workers, reducing worker safety, altering the location of available jobs, and changing workplace conditions in heat-exposed jobs.") (citations omitted).

[72] American Lung Association, *Asthma Trends and Burden* (last updated July 15, 2024), https://www.lung.org/research/trends-in-lung-disease/asthma-trends-brief/trends-and-burden.

[73] Kim Knowlton et al., *Six Climate Change-Related Events in the United States Accounted for About $14 Billion in Lost Lives and Health Costs*, 30 Health Affairs 2167, 2170 (Nov. 2011); Vijay S. Limaye et al., *Estimating the Health-Related Costs of 10 Climate-Sensitive U.S. Events During 2012*, 3 GeoHealth 245, 245 (Sep. 2019), https://doi.org/10.1029/2019GH000202; Steven Woolf et al., *The Health Care Costs of Extreme Heat*, Center for American Progress (Jun. 27, 2023), https://www.americanprogress.org/article/the-health-care-costs-of-extreme-heat/.

unhoused people.[74] Such climate-related impacts disproportionately affect vulnerable populations facing existing environmental burdens,[75] exacerbating both environmental risk[76] and economic inequality.[77]

The States are already committing significant resources to meet policy goals and comply with statutory mandates to reduce in-state greenhouse gas emissions, as well as co-pollutants, while also investing in infrastructure to protect communities and state resources from the effects of climate change. A fully informed decision-making process requires that federal agencies work closely with states, territories, and tribal and local governments, as well as the public, to ensure that decisions account for the climate change impacts on communities already overburdened with pollution and associated public health harms.

The Transit Rule and the DOT Order undermine efforts by the States to study and abate climate-driven harms associated with major federal actions. As described above, the Agencies may take the position that its new NEPA procedures do not compel it or its subcomponents to consider potential climate change impacts from an agency action. In fact, the Agency's procedures do not mention consideration of climate change impacts at all. This position will make it more challenging for the States to assess greenhouse gas emissions and co-pollutants from projects subject to NEPA review, particularly where some of the emissions generated by the project will occur in a different state. For example, there could be projects sited outside of New York that have emissions associated with electricity generation or fossil fuel transportation in New York. Under New York's Climate Leadership and Community Protection Act, which requires significant statewide emission reductions by set dates,[78] such out-of-state emissions contribute to statewide greenhouse gas emissions. If the Transit Rule and the DOT Order are not withdrawn, New York may need to implement additional and potentially costly regulatory, policy, or other actions to ensure the achievement of the requirements of its state climate law. The Transit Rule and the DOT Order thus threaten the States' significant interests in evaluating and addressing the effects of climate change.

C. The Transit Rule and DOT Order will Make it More Difficult for States to Protect Overburdened Communities

The States have significant interests in robust and consistent evaluation of the full range of direct, indirect, and cumulative effects of the Agency's actions to prevent public health

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[74] Alique Berberian et al., *Racial Disparities in Climate Change-Related Health Effects in the United States*, 9 Current Environmental Health Rep. 451, 454 (May 28, 2022); *see also* A. R. Crimmins et al., *Fifth National Climate Assessment*, at ch. 15 (2023), https://repository.library.noaa.gov/view/noaa/61592.

[75] Alique Berberian et al., *supra* at 451-52 (May 28, 2022), https://doi.org/10.1007/s40572-022-00360-w.

[76] H. Orru et al., *The Interplay of Climate Change and Air Pollution on Health*, 4 Current Envtl. Health Report 504, 504 (2017).

[77] Avery Ellfeldt & E&E News, *Climate Disasters Threaten to Widen U.S. Wealth Gap,* Scientific American (Oct. 2, 2023), https://www.scientificamerican.com/article/climate-disasters-threaten-to-widen-u-s-wealth-gap/.

[78] Chapter 106 of the Laws of 2019 (New York State Climate Leadership and Community Protection Act); N.Y. Envtl. Conservation L. § 75-0107(1).

disparities flowing from uninformed federal decisions that adversely impact vulnerable communities. The Transit Rule and DOT Order threaten these important interests.

The Transit Rule and DOT Order threaten the ability of the States to understand the full range of effects from the Agencies' actions. Without a full understanding of the direct, indirect, and cumulative effects, States will be limited in their ability to protect already overburdened communities. The Transit Rule and DOT Order threaten to eliminate consideration of cumulative effects of a federal project on communities that face a historic and disproportionate pattern of exposure to environmental hazards. These communities are more likely to suffer future health disparities if cumulative impact review is eliminated from the NEPA process. President Trump's E.O. 14173, which rescinds President Clinton's Executive Order on environmental justice,[79] and the Agencies new procedures, which lack any explicit direction to consider, environmental justice will exacerbate that risk. Increased public health and community harms from weakened NEPA reviews will require greater expenditures of state, territorial, tribal, and local funds to evaluate and remedy increased public health disparities flowing from uninformed federal agency action.

Studying cumulative impacts is essential to preventing further harm to disadvantaged communities and vulnerable populations, including communities of color, low-income communities, and Indigenous Peoples and Tribal Nations, already burdened with the effects of disproportionately high levels of pollution. Consideration of cumulative effects is also vital in understanding population vulnerability and assisting decision-makers to mitigate and prevent disproportionate environmental and climate harms.[80] Agencies simply cannot know the full impact of a project on a community without considering its existing levels of pollution and the cumulative impacts of adding another pollution source. Similarly, without considering existing burdens, agencies cannot identify meaningful alternatives or mitigation measures to reduce or avoid harms to impacted communities.

III. THE TRANSIT RULE AND THE DOT ORDER VIOLATE THE APA

The Transit Rule and DOT Order violate the procedures and standards established by the APA and fail to comply with NEPA's text and purpose. Under the APA, an agency action is unlawful if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or "without observance of procedure required by law."[81] The Transit Rule and DOT Order are arbitrary and capricious because the agency (1) fails to provide a reasoned explanation for its position; (2) fails to provide a rational connection between the facts found and the choice made; (3) entirely fails to consider the unifying purpose of the regulations and the confusion that

[79] Exec. Order 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994) (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations).

[80] *See* Comments of Attorneys General of Washington, et al., on Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020); Comments of the Attorneys General of Massachusetts et al. on the U.S. Environmental Protection Agency Interim Framework for Advancing Consideration of Cumulative Impacts, 89 Fed. Reg. 92125 (November 21, 2024).

[81] 5 U.S.C. § 706(2)(A), (D).

will occur following their repeal; and (4) ignores serious reliance interests engendered by the regulations. Additionally, the Transit Administrations promulgated the Transit Rule without observance of procedure required under the APA by (1) asserting "good cause" exists to circumvent the APA rulemaking process when none exists; (2) denying that the regulations are legislative rules; (3) improperly asserting that the Transit Rule is a rule of agency organization, an interpretive rule, or a general statement of policy; and (4) curtailing public participation in the rulemaking process. The DOT Order has several further deficiencies as DOT appears to have adopted it as a final but "interim" order without providing any basis for making the order effective immediately,[82] prior to the submission of public comment and without any provision that DOT will respond to comments that are submitted.[83] An agency action is final and subject to judicial review under the APA if it "marks the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (cleaned up). The DOT Order is a final agency action subject to the APA and DOT has improperly promulgated the DOT Order without observance of procedures required under the APA.

A. The Transit Rule and DOT Order are Arbitrary and Capricious

Under the APA, a "reviewing court shall … hold unlawful and set aside" federal agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[84] The agency must make a "rational connection between the facts found and the choice made."[85] An agency action is "arbitrary and capricious" under the APA where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[86] "Agencies are free to change their existing policies," but they must "provide a reasoned explanation for the change."[87] In this rulemaking, the agency fails to provide any reasoned explanation for the Transit Rule in violation of the APA, fails to assert a rational connection between the facts found and the choice it has made, makes a decision that runs counter to the evidence before the agency, and fails to consider important aspects of the problem.

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[82] Order at 1. *See also* Procedures for Considering Environmental Impacts, 90 Fed. Reg. 29621("This Order is effective immediately upon publication of this notice in the Federal Register.")

[83] Procedures for Considering Environmental Impact, 90 Fed. Reg. 29621, (July 3, 2025).

[84] 5 U.S.C. § 706(2).

[85] *Burlington Truck Lines, Inc. v. United States,* 371 U. S. 156, 168 (1962).

[86] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[87] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

1. The Agency Failed to Provide a Reasoned Explanation for its Abrupt Change in Position

The Agency has not provided a reasoned explanation for reversing its position that its NEPA implementing procedures should be subject to full notice and comment. In its prior rules setting out its NEPA policies and procedures, the Agency accepted written comments.[88] Any "unexplained inconsistency" between a rule and its repeal is "a reason for holding an interpretation to be an arbitrary and capricious change."[89] Moreover, as the basis for its Transit Rule, the Agency makes several arguments for its change in position from incorporating CEQ's regulations by reference to utilizing procedures, all of which are unavailing.

a. The repeal of CEQ's implementing regulations is no justification for rescinding the Agency's NEPA regulations

First, the Agency explains that it previously relied on CEQ's NEPA implementing regulations, but that CEQ repealed its regulations after President Trump rescinded Executive Order 11991 which had underpinned them. The Agency argues that there is an "obvious need" for DOT to update its NEPA procedures in light of this rescission and that it is "important that DOT move quickly" to promulgate new procedures..[90] However, DOT does not provide an explanation for why it is "obvious" that CEQ's repeal drives the particular path DOT chose here.[91]

This argument fails because it makes CEQ Repeal Rule the predicate for the Agency's Rule. As several of our States explained in a comment letter in opposition to the CEQ Repeal Rule, that rule was unlawful for multiple reasons, including that CEQ did not adequately explain its complete reversal in its position as to whether it had authority to adopt regulations.[92]

The Agency's argument also misrepresents the degree to which the Agency's rescission of regulations incorporated by reference is demanded by E.O. 14154. E.O. 14154 *did not* direct agencies to rescind their own regulations. Instead, the order refers to agency level implementing regulations multiple times. It states that CEQ shall convene a working group to "coordinate the revision of agency-level *implementing regulations* for consistency." It further notes that "resulting *implementing regulations*" must meet certain additional requirements, like meeting deadlines established in the Fiscal Responsibility Act of 2023.[93]

Moreover, the reasoning that CEQ utilized to rescind its NEPA implementing regulations does not apply to the Agency's NEPA regulations. CEQ argued that it may not have authority to

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[88] *See, e.g.*¸ Department of Transportation Environmental Impact and Related Procedures, 72 Fed. Reg. 44038 (Aug. 7, 2007); Department of Transportation Environmental Impact and Related Procedures, 80 Fed. Reg. 72624 (Nov. 20, 2015).

[89] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005).

[90]Procedures for Considering Environmental Impact, 90 Fed. Reg. 29621 (July 3, 2025).

[91] *Id.* at X.

[92] *See* 2025 Multistate Comments.

[93] Exec. Order 14154, 90 Fed. Reg. 8353 (Jan. 29, 2025).

administer its own regulations following the revocation of Executive Order 11991 and with passing references to the *Marin Audubon* and *Iowa v. CEQ* decisions.[94] E.O. 11991 addressed regulations by CEQ, not other agencies, so its revocation is irrelevant. And though *Marin Audubon* and *Iowa v. CEQ* cases that called into question CEQ's ability to issue binding regulations, the courts *never* questioned the ability or propriety of other agencies promulgating regulations to implement NEPA. For example, in a part of *Marin Audubon Society v. Federal Aviation Admin*istration, 121 F.4th 902, 914 (D.C. Cir. 2024) not joined by the full panel, the court reserves the question of whether other agencies (i.e., not CEQ) have the authority to adopt CEQ's regulations or incorporate them by reference into their own NEPA regulations.[95]

The Agency's explanation related to the CEQ Repeal Rule is also arbitrary and capricious because the Agency failed to consider the obvious alternative[96] of adopting CEQ's NEPA implementing regulations that the Agency and its subcomponents previously incorporated by reference. The Agency is wrong to say that CEQ's regulations cannot exist again under existing executive orders. Though the Agency argues that CEQ's regulations no longer exist, the Agency could have initiated a rulemaking to move the language previously codified at 23 C.F.R. part 771, where the Agency's regulations were incorporated by reference.

Even short of recodifying CEQ's NEPA regulations as its own, the Agency had many additional and obvious alternatives. The Agency could have and should have initiated a more traditional and deliberative notice-and-comment rulemaking process, involving input from stakeholders on which, if any, regulations to rescind or modify. This process could have evaluated a number of alternatives. For example, CEQ recently encouraged agencies to use the final 2020 Rule as an initial framework for the development of revisions to their NEPA processes.[97] CEQ further directed agencies to "apply their current NEPA implementing procedures with any adjustments needed to be consistent with the NEPA statute as revised by the FRA." Where agencies have historically utilized regulations to implement NEPA, the obvious approach, consistent with the public transparency standards the agency has adhered to in the past, was to update their regulations rather than delete important regulations in favor of procedures.

Finally, the Agency's argument that the Transit Rule was necessary to promote certainty is wrong. Regulations that are binding promote certainty. But internal procedures do not promote certainty.

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[94] Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610, 10614 (Feb. 25, 2025).

[95] This analysis appeared in a separate section of the opinion unnecessary to the panel's ultimate decision, and there were serious party presentation concerns called out by CEQ itself as well as by the dissent in *Marin Audubon*.

[96] *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 & n.36 (D.C. Cir. 1986) (noting that "failure of an agency to consider obvious alternatives has led uniformly to reversal" and collecting cases); *see, e.g., State Farm* , 463 U.S. at 48 (failure to "even consider the possibility" of "alternative way of achieving the objectives of the Act" was arbitrary and capricious).

[97] CEQ, Memorandum for Heads of Federal Departments and Agencies: Implementation of the National Environmental Policy Act 4 (Feb. 19, 2025), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf

b. The FRA does not justify rescinding the Agency's NEPA implementing regulations and issuing procedures instead

The Agency also argues that its new NEPA implementing internal procedures are needed to implement the statute as amended in 2023. The FRA[98] added certain requirements, including those related to: page limits and deadlines for environmental assessments (EA) and environmental impact statements (EIS); the definition of "major federal action" and relevant exclusions; the procedure for determining the appropriate level of review; directions for categorical exclusions; the procedures governing project-sponsor-prepared EAs and EISs; and notice and solicitation of comments when issuing a notice of intent to prepare an environmental impact statement. This argument fails because the amendments introduced in the FRA are not a reason to rescind the NEPA regulations and issue procedures. Agencies implementing NEPA have previously responded to new legislation that impacts such implementation by updating their regulations.[99] The FRA amendments were in fact quickly and fully addressed in the CEQ's 2024 Rule, which were supported by a regulatory impact analysis and subject to extensive public input. As noted above, the appropriate approach for the Agency was to update its regulations to incorporate the FRA updates in compliance with APA notice and comment.

The FRA's revisions to NEPA therefore do not justify the Agency's change in position from utilizing NEPA implementing regulations to utilizing a procedural Order.

c. The *Seven County* decision does not justify the Agency's rescission of NEPA implementing regulations.

Finally, the Agency notes that the changes in its NEPA regulations reflect the Supreme Court's decision in *Seven County*.[100] In removing and/or revising key parts of its NEPA implementing regulations, the Agency invoked the Supreme Court's recent decision in *Seven County*, pointing out that NEPA review is a "purely procedural" requirement that "does not itself require any substantive outcome."[101] Yet, the fact that a statute poses only procedural requirements provides no justification for an agency to *revoke* codified regulations. *Seven County* held that courts should "substantially" defer to agencies regarding the "scope and contents" of environmental review—specifically, their identification of particular impacts and alternatives in environmental impact statements and that NEPA did not require the agency in that

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[98] Pub. L. No. 118-5 (2023).

[99] *See, e.g.*, Department of Transportation Environmental Impact and Related Procedures, 72 Fed. Reg. 44038, 44040 (Aug. 7, 2007) (making revisions prompted by enactment of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which prescribed additional requirements for environmental review and project decisionmaking that [we]re not appropriately reflected in the existing joint NEPA procedures").

[100] 145 S. Ct. 1497.

[101] "The agencies are revising their prior procedures and practices for implementing NEPA, a 'purely procedural statute' which 'simply prescribes the necessary process' for an agency's environmental review of a project'—a review that is, even in its most rigorous form, 'only one input into an agency's decision and does not itself require any particular substantive outcome.'" Revision of National Environmental Policy Act Regulations, 90 Fed. Reg. at 29429 (quoting Seven Cnty., 145 S. Ct. at 1507, 1511).

case to consider certain indirect impacts.[102] It did not address the propriety of NEPA's procedural requirements. Furthermore, the Court's decision acknowledged that agency choices about the scope of environmental review should still "fall within a broad zone of reasonableness."[103] Rescinding core regulations and replacing them with non-binding guidance effectively guts environmental review. This flies in the face of NEPA's text and purpose and so is unreasonable. The *Seven County* decision does not justify the Agency's changed position regarding its NEPA implementing regulations.

2. The Agency Failed to Provide a Reasoned Explanation for Excluding Consideration of Fundamental NEPA Requirements

The Agency failed to provide a reasoned explanation for its failure to include fundamental NEPA requirements in its new NEPA procedures. One of the core tenets set forth in *State Farm* is that "an agency changing its course…is obligated to supply a reasoned analysis for the change."[104] "Reasoned decision making…necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent."[105]

In outlining its basis for revising NEPA implementing regulations and procedures, there is no explanation or basis for the exclusion of certain requirements that that were included in CEQ's NEPA implementing regulations that had guided the Agency for decades. The Agency does not even provide a list of the provisions from CEQ's regulations that the Agency is no longer incorporating.

a. The Agency Fails to Provide a Reasoned Explanation for Excluding Consideration of Certain Effects

The Agency failed to provide a reasoned explanation for excluding core NEPA requirements through a redefinition of the term "effects." The Agency now states in its Order: "Impacts should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Impacts do not include those effects that the agency has no ability to prevent due to the limits of its regulatory authority, or that would occur regardless of the proposed action, or that would need to be initiated by a third party."[106] The prior CEQ regulations included in the definition of effects "direct, indirect, and cumulative effects,"[107] and clarified that "[e]ffects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural,

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[102] *Seven Cnty.*, 145 S. Ct. at 1508.

[103] *Id.* at 1513.

[104] 463 U.S. at 42 (finding the agency acted arbitrarily and capriciously in revoking the requirement that new motor vehicles include passive restraints).

[105] *Dillmon v. NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

[106] U.S. Dep't of Transp., DOT's Procedures for Considering Environmental Impacts (Jul. 3, 2025), https://www.transportation.gov/sites/dot.gov/files/2025-07/DOT_Order_5610.1D_OST-P-250627-001_508_Compliant.pdf.

[107] 40 C.F.R § 1508.1(g) (2023), as amended by Revisions to Implement the Procedural Provisions of the National Environmental Policy Act, 87 Fed. Reg. 23453, 23469-70 (Apr. 20, 2022).

economic, social, or health, such as disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative. Effects also include effects on Tribal resources and climate change-related effects, including the contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action and its alternatives."[108] The Agency provides no explanation, much less a reasoned or rational one, for excluding "indirect" and "cumulative" from the "impacts" definition.

The inclusion of "indirect" and "cumulative" impacts in the effects definition originated in CEQ's 1978 Regulations, which the Agency incorporated into its NEPA regulations.[109] Therefore, the Agency must explain why it is excluding the indirect and cumulative impact definitions. NEPA's plain language requires federal agencies to consider all "reasonably foreseeable" effects,[110] and to address impacts to future as well as present generations.[111] This statutory mandate cannot be met without analyzing cumulative and indirect effects where they are otherwise required under the statute. Moreover, since prior to CEQ's promulgation of its 1978 Regulations courts have consistently affirmed agencies' legal obligation to consider these effects.[112]

CEQ and federal agencies reasonably interpreted NEPA's statutory mandate to require federal agencies to consider "disproportionate and adverse effects on communities with environmental justice concerns" and "climate-change related effects," as set forth in the 2024 Rule.[113] Yet the Agency has not provided any explanation, much less a reasoned or rational one, for removing references to environmental justice and climate change. Consistent with section 102(2)(C) of NEPA, consideration of environmental justice and climate change-related effects has long been part of NEPA analysis. "The impact of GHG emissions on climate change is

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[108] 40 C.F.R § 1508.1(g)(4) (2024), as amended by the National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442, 35575 (May 1, 2024).

[109] CEQ has long recognized the need to consider indirect and cumulative effects under NEPA. CEQ recognized in NEPA guidance issued in 1973—less than four years after NEPA was enacted—that indirect or "secondary" effects "may often be even more substantial than the primary effects of the original action itself." Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20550, 20553 (Aug. 1, 1973). And even before that, CEQ recognized that the effects of many decisions can be "individually limited but cumulatively considerable." Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7724–25 (Apr. 23, 1971) (The 1971 Guidelines were later revised in 1973 (38 Fed. Reg. 20549–62 (Aug. 1, 1973)) (codified at 40 C.F.R. § 1502)). More recently, CEQ reaffirmed that "cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment." CEQ, Considering Cumulative Effects Under the National Environmental Policy Act (Jan. 1997), https://ceq.doe.gov/publications/cumulative_effects.html.

[110] 42 U.S.C. § 4332(C)(i)-(ii).

[111] 42 U.S.C. §§ 4321, 4331.

[112] *See, e.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (interpreting NEPA to require consideration of "cumulative or synergistic environmental impact."); *NRDC v. Hodel*, 865 F.2d 288, 297–98 (D.C. Cir. 1988) (stating "NEPA, as interpreted by the courts, and CEQ regulations both require agencies to consider the cumulative impacts of proposed actions," and holding that NEPA required the Secretary of the Interior to consider the cumulative impacts of offshore development in different areas of the Outer Continental Shelf).

[113] 40 C.F.R § 1508.1(g)(4), as amended in 2024 by 89 Fed. Reg. 35442, 35575.

precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."[114] With respect to environmental justice, NEPA makes it the federal government's responsibility to "assure for *all* Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,"[115] and states "that *each person* should enjoy a healthful environment."[116] Consideration of how a proposed federal action might disproportionately affect *some* Americans more than others is thus a highly relevant consideration under the statute. NEPA's focus on "the quality of the *human* environment,"[117] is also a concern advanced by analyzing the distribution of environmental burdens in the human environment. Courts have also reviewed NEPA analyses to determine if they appropriately considered environmental justice impacts.[118]

The Agency does not explicitly state that its definition of impacts flows from the Supreme Court's *Seven County* decision, so any attempt to make that argument in the future would be an impermissible *post-hoc* rationalization. However, to the extent that the Agency does make that argument in the future, the agency's narrow redefinition of what effects should be considered does not follow the *Seven County* decision. In fact, the Supreme Court explicitly recognized that "environmental *effects* of the project at issue may fall within NEPA even if those *effects* might extend outside the geographical territory of the project or might materialize later in time—for example, run-off into a river that flows many miles from the project and affects fish populations elsewhere, or emissions that travel downwind and predictably pollute other areas."[119] The Supreme Court also noted that other projects may still be "interrelated and close in time and place to the project at hand" and require analysis under NEPA.[120] Thus, by stating that the term "impacts" should not generally consider any environmental effects that are "remote in time, geographically remote, or the product of a lengthy causal chain," the Agency precludes consideration of effects that the Supreme Court has specifically stated may fall within NEPA's statutory requirements.[121]

b. The Agency Fails to Provide a Reasoned Explanation for Curtailing Public Comment During the NEPA Process

Public involvement by States and our residents is critical to identifying and evaluating public health and environmental issues of local or statewide concern that may result from federal

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[114] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008); *see also* National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442, 35452 n.58 (May 1, 2024); *WildEarth Guardians v. U.S. Bureau of Land Mgmt*., 870 F.3d 1222 (10th Circ. 2017) (invalidating an EIS and Record of Decision for coal leases for failing to consider climate change).

[115] 42 U.S.C. § 4331(b)(2) (emphasis added).

[116] 42 U.S.C. § 4331(c) (emphasis added).

[117] 42 U.S.C. § 4332(c) (emphasis added).

[118] *See, e.g.*, *Mid States Coalition for Progress v. Surface Transp. Bd*., 345 F.3d. 520, 541 (8th Cir. 2003); *Sierra Club v. Fed. Energy Regulatory Comm.,* 867 F.3d 1357, 1370 (D.C. Cir. 2017).

[119] *Seven Cnty.* 145 S. Ct. at 1515 (emphasis in original).

[120] *Id.* at 1517.

[121] "[S]o-called indirect effects can sometimes fall within NEPA . . . ." *Id. at 1515.*

actions. Public participation further provides a critical tool for identifying alternatives that improve a proposed action or reduce its environmental impacts, identifying shortfalls in the agency's analyses, spotting missing issues, and providing additional information that the agency may not have known existed. For these reasons, NEPA prioritizes democratic values by providing a central role for public participation in the environmental review process.[122]

Consistent with the above principles, the Agency's regulations required federal agencies to request comments on draft environmental impact statements from federal and state agencies, Tribes, and the public.[123] In contrast, the Agency's new procedures only require the agency to solicit public comments at the notice of intent stage; they call for as much public input into preparation of an environmental assessment as "practicable," but not necessarily an opportunity to comment on or even see a draft of the document; and make disclosure and comment on a draft EIS discretionary except when required by a statute other than NEPA.[124] This elimination of public participation opportunities vitiates one of the core purposes of an EIS under NEPA, which is to "make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information."[125] If the public is not allowed to review and comment on the draft EIS—the Agency's assessment of environmental effects and rationale for its findings—before it is finalized, then the public's ability to engage in the development of information will be hampered. The Agency provides no reasoned or rational explanation, or indeed, any explanation at all, for impairing the public's ability to engage in the NEPA decision-making process in this manner.

3. The Agency Failed to Consider Important Aspects of the Problem

Moreover, the Agency fails to consider multiple important issues in the Transit Rule and DOT Order. An agency action is "arbitrary and capricious" under the APA where "the agency has…entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency."[126] Thus, when an agency amends its regulations, it must demonstrate by reasoned explanation that it has considered the context and intent behind the original regulation.[127] The Agency also fails to consider the confusion that will be caused by multiple federal agencies promulgating new and disparate NEPA internal procedures and guidance. The Agency therefore is making a decision that runs counter to the evidence before the agency, which include CEQ's 1978 findings that inconsistent

[122] *Kleppe*, 427 U.S. at 409 (quoting Conference Report on NEPA, 115 Cong. Rec. 40416 (1969)) (internal quotations omitted).

[123] 40 C.F.R. § 1503.1(a) 2024, as amended in 2024 by 89 Fed. Reg. 35442, 35575.

[124] U.S. Dept. of Transp., Order 5610.1D: *Procedures for Considering Environmental Impacts*, at 6d, 10f, 13k (Jul. 3, 2025) (noting that "some OAs require public comment on a Draft EIS per statute," but otherwise indicating that comment should be "considered" when it "would aid in the decisionmaking for the proposed action").

[125] *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1287 (9th Cir. 1974)).

[126] *State Farm*, 463 U.S. at 43.

[127] *See NAACP, Jefferson County Branch v. Donovan*, 765 F.2d 1178, 1185 (D.C. Cir. 1985).

agency regulations make it difficult for the public to participate in the environmental review process, and cause unnecessary duplication, delay, and paperwork.[128]

a. The Agency Failed to Consider the Impact of Rescinding Key Aspects of the Agency's Regulations in Conjunction with the Repeal of the CEQ's Regulations.

The Agency acted arbitrarily and capriciously by ignoring the importance of its reliance on time-tested and unifying regulations to guide its decisions under NEPA, and the impact of the revision of its NEPA regulations and rescission of its subcomponents' regulations together with the repeal of the CEQ regulations on this situation. The Agency does not consider that the CEQ's repeal of the NEPA regulations left a chasm in the NEPA regulatory landscape. Where the CEQ regulations previously bridged the gap between NEPA and unique agency regulations such as the Agency's specific categorical exclusions, federal agencies are now left with a dissonant set of individual guidance documents. Nothing prevents federal agencies from adopting CEQ's unifying regulations as their own and restoring the order that these regulations used to provide. The Agency's failure to even consider doing so exhibits a disregard for the history of the CEQ regulations.

As described in Section II(A) above, in 1978, in accordance with E.O. 11991, CEQ promulgated regulations to address concerns of "inconsistent agency practices and interpretations of the law" under CEQ's non-binding guidance, which impeded both Federal coordination and public participation in the environmental review process.[129] CEQ's prior NEPA regulations fulfilled their intended purpose of guiding federal agencies in a "uniform, government-wide approach" to NEPA implementation.[130] The Agency fails entirely to address the lack of a uniform regulatory approach to implementing NEPA in the Transit Rule. It provides no recognition of the initial rationales for CEQ's NEPA implementing regulations or Agency's and its subcomponents' NEPA regulations and no explanation why revising the Agency's NEPA regulations and issuing a procedural order, will not implicate the same concerns.

In addition, the varied and inconsistent NEPA procedures issued by other federal agencies also create confusion. There is now a patchwork of regulations, partial regulations, and guidance across different federal agencies. When planning projects that require NEPA approvals from multiple federal agencies, States, local governments, and project proponents will be subject to uncertainty as to how to apply multiple agencies' divergent and possibly conflicting internal procedures.

For example there are several differences between the procedures of the Department of Energy, the Department of Defense, and the DOT:

- The Department of Energy (DOE)'s new NEPA procedures list the actions that a project applicant must take, including initiating any request to DOE to prepare the NEPA review

[128] 1978 Final Rule at 55,978.

[129] 43 Fed. Reg at 55978.

[130] *Id*.

with the application or during the early scoping period, providing environmental information used to prepare or evaluate the environmental document, replacing the applicant-directed contractor at DOE's request, and developing a consolidated administrative record within two weeks of DOE's request.[131] In contrast, the Department of Defense's (DoD) NEPA procedures do not set forth these expectations for project applicants.[132]

- The DOE procedures state that "the environmental document needs a description of the affected environment that is sufficient to support a reasoned explanation of DoE's conclusion regarding the significance of effects,"[133] whereas the DoD's NEPA procedures call for the DoD to "consider the potentially affected environment and degree of the effects of the action" without expressly requiring a description of the affected environment.[134]
- DOT's revised NEPA procedures outline a notification and consultation process and guidelines for preparing environmental documentation during emergencies.[135] DoD's and DOE's NEPA procedures do not provide as much detail regarding emergencies that may interfere with the preparation of environmental documents.[136]

As a result, state agencies, that are delegated authority to comply with NEPA, must develop different procedures to meet various federal agency regulations and guidelines. Additionally, for projects involving more than one federal agency, the revisions will increase uncertainty about which of the federal agencies' inconsistent NEPA processes apply.

In promulgating new and disparate regulations without consideration of the important unifying role served by the Agency's and its subcomponents' prior regulations and CEQ's regulations the Agency has "entirely failed to consider an important aspect of the problem" in violation of the APA.[137]

b. The Agency Failed to Evaluate the Uncertainty the New Regulations and Procedures Will Cause

While the Agency claims that the Interim Final Rule and adoption of internal procedures will reduce uncertainty in accordance with E.O. 14154, it will do the opposite. The Agency's rationale ignores and minimizes the uncertainty the revision of its NEPA procedures will cause

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[131] DOE, *National Environmental Policy Act (NEPA) Implementing Procedures* (DOE Procedures) at pp. 10-11. (June 30, 2025), https://www.energy.gov/sites/default/files/2025-06/2025-06-30-DOE-NEPA-Procedures.pdf.

[132] Department of Defense National Environmental Policy Act Implementing Procedures (DoD Procedures) at p. 23 (June 30, 2025), https://www.denix.osd.mil/nepa/denix-files/sites/55/2025/06/DoD-NEPA-Procedures-FINAL.pdf.

[133] DOE Procedures at p. 14.

[134] DoD Procedures at p. 3.

[135] Department of Transportation, DOT Order 5610.1D, *DOT's Procedures for Considering Environmental Impacts*, at pp. 25-26, https://www.transportation.gov/sites/dot.gov/files/2025-07/DOT_Order_5610.1D_OST-P-250627-001_508_Compliant.pdf.

[136] DoD Procedures at p. 21; DOE Procedures at p. 20.

[137] *State Farm*, 463 U.S. at 43.

to federal and state agencies' environmental review under NEPA, especially in the absence of CEQ's unifying regulations. The Agency's explanation for the Interim Final Rule also "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[138] The evidence before the Agency shows that the Interim Final Rule will increase rather than minimize uncertainty and litigation.

Moreover, the CEQ's regulations were far more detailed than the Agency's new procedures. The regulations provided, inter alia, requirements for how each reasonable alternative is developed and analyzed, data source and quality standards for information used, specific environmental consequences that must be addressed, and criteria for cost-benefit analyses.[139] In comparison, the Agency's new internal procedures do not provide sufficient guidance for conducting NEPA reviews. The inconsistent decision-making that the new procedures will engender will lead to uncertainty in environmental reviews and project approvals. Revisions to partially completed documents to meet the requirements of the new procedures will also introduce delay. This will be detrimental to the stated goals of efficiency and certainty.

The Agency's promulgation of new regulations and procedures also may significantly increase litigation. Currently, most NEPA analyses do not result in litigation.[140] According to CEQ data, "the number of NEPA lawsuits filed annually has consistently been just above or below 100, with the exception of a period in the early- and mid-2000s."[141] "Given that the number of federal actions potentially subject to NEPA is roughly 100,000 or so annually, litigation rates are exceedingly low."[142] Even for EISs, which represent a small fraction of NEPA review processes, on average 20% are challenged and just 13% are actually litigated."[143] However, the Agency cannot rely on the rescinded CEQ regulations, which have been upheld time and again by the courts, and therefore, the Agency's environmental decision-making may be subject to an increasing number of legal challenges. Courts will need to determine whether the Agency's environmental review of federal projects is consistent with NEPA without the benefit of CEQ's regulations. Furthermore, if various agencies' regulations and NEPA procedures are challenged in court, confusion will likely arise as different courts may make conflicting decisions about the myriad agency rules and procedures, which do not rely on the unifying provisions set forth in the former CEQ regulations. This position is thus arbitrary and capricious.

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[138] *Id.*.

[139] 40 C.F.R. § 1502.

[140] U.S. Gov't Accountability Off., GAO-14-369, *National Environmental Policy Act: Little Information Exists on NEPA Analyses* [hereinafter "GAO Report"], at 19 (2014), https://www.gao.gov/products/gao-14-369.pdf.

[141] *Id*.

[142] David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 Ariz. St. L.J. 4, 50 (2018).

[143] *Id*.; *see also* GAO Report, *supra* note 141, at 19; Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1510 (2012), http://law.harvard.edu/faculty/rlazarus/docs/articles/Lazarus_APeekBehindtheCurtain_2012.pdf (as of 2012, the Supreme Court had decided only 17 NEPA cases).

In sum, the varied and unpredictable application of standards and procedures leads to uncertainty in environmental review and introduces greater ambiguity in the event of legal challenges under NEPA.

4. The Agency Failed to Adequately Consider Reliance Interests

The Agency does not mention or consider reliance interests when it issued the Transit Rule and DOT Order.

Under the APA, in changing course, an agency must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[144] When an agency's "prior policy has engendered serious reliance interests that must be taken into account," it must "provide a more detailed justification [for its change in policy] than what would suffice for a new policy created on a blank slate."[145] An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[146]

Over the nearly fifty-year lifespan of CEQ's NEPA regulations, significant reliance interests have developed across the nation. CEQ's regulations have been in place as legislative rules since 1978, and had been relied on by states, industry, and the public. At the state level, the States drafted their own little NEPAs in reliance on CEQ's NEPA implementing regulations providing clarity as to the content of federal environmental reviews. The States conduct environmental reviews at the state level in coordination with federal agencies' environmental reviews under NEPA. With the repeal of CEQ's NEPA implementing regulations, and the revision of the Agency's NEPA regulations, States will need to reassess not only their own state environmental law processes, but also the procedures applicable to and content of individual project environmental reviews to ensure they meet the statutory goals and requirements of state law. The repeal of CEQ's regulations and subsequent rescission of key NEPA regulations will "necessitate systemic, significant changes" for all who interact with NEPA.[147]

DOT summarily dismisses these reliance interests in its Notice of Availability. First, DOT states that because NEPA is a "purely procedural statute" that "imposes no substantive environmental obligations or restrictions," there are no reliance interests.[148] But this argument is misguided. Procedural obligations set forth by CEQ's previous NEPA regulations and previously applied by DOT[149] form a central, and enduring (until now), part of an environmental review framework relied upon by the States, applicants and the public for federal projects across the country. In addition, DOT's focus on the *type* of reliance interests is too narrow; the argument

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[144] *Dep't. of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1914-15 (2020).

[145] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[146] *Encino Motorcars, LLC*, 579 U.S. at 222.

[147] *Id*..

[148] 90 Fed. Reg. 29622.

[149] See Order 5610.1C at Sec. 1 ("all operating administrations and Secretarial Offices shall comply with both the CEQ regulations and the provisions of this Order.")

that NEPA is a procedural statute does not overcome the fact that the States and project applicants rely on the dependability of DOT's NEPA procedures when planning potential projects, or series of projects under a program or programmatic environmental document, that may stretch over a period of years. DOT cannot absolve themselves of the responsibility to "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns" by simply declaring that there are no reliance interests in the first place.[150]

Second, DOT also appears to argue that there are no reliance interests in prospective NEPA procedures.[151] This argument misses the mark, however, as the States have reliance interests not in prospective procedures, but in the longstanding agency NEPA procedures revised by DOT. As stated above, the States have a reliance interest in the stability of the rules that govern environmental review of decision-making; this stability was undermined by DOT's revision of its NEPA procedures.

Third, DOT claims that to the extent any reliance interests exist, they are outweighed by other policy considerations.[152] But this argument is unsupported by any assessment of what the reliance interests are and only highlights the fact that DOT both failed to determine whether the public's reliance interests in the relative stability provided by NEPA regulations is significant and unlawfully declined to weigh these interests against competing policy concerns.

Troublingly, the Transit Administrations fail to assess reliance interests at all in the Interim Final Rule.[153] The Transit Administrations do not mention reliance interests even once. This failure to assess, or even mention, reliance interests is arbitrary and capricious.

If the Transit Administrations argue later that it was not required to consider reliance interests because NEPA is a "purely procedural statute" that "imposes no substantive environmental obligations or restrictions," there are no reliance interests.,[154] that argument would be misguided. Procedural obligations set forth by NEPA regulations form a central, and enduring (until now), part of an environmental review framework relied upon by the States, applicants and the public for federal projects across the country. In addition, the Agency's focus on the *type* of reliance interests would be too narrow; the argument that NEPA is a procedural statute does not overcome the fact that the States and project applicants rely on the dependability of the Agency's NEPA regulations when planning potential projects, or series of projects under a program or programmatic environmental document, that may stretch over a period of years. The Transit Administrations cannot absolve itself of the responsibility to "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against

[150] *Department of Homeland Security*, 140 S. Ct. at 1914-15 (2020).

[151] 90 Fed. Reg. at 29622 ("it is unclear how any party could assert reliance interest in *prospective* procedures.")(emphasis in original).

[152] 90 Fed. Reg. at 29623.

[153] See generally 90 Fed. Reg. 29426; 29621.

[154] 90 Fed. Reg. 29622.

competing policy concerns" by simply declaring that there are no reliance interests in the first place.[155]

The States' and the public's reliance interests in stable and well-established NEPA regulations should not be waved off arbitrarily. The states rely on NEPA regulations to guide the uniform and adequate review of projects. Without sufficient NEPA review by federal agencies, the States are required to expend costs and resources to understand project impacts and, for some projects, to comply with state law.[156] As explained above, the Transit Administrations revision of their NEPA regulations will lead to uncertainty as to which procedures to follow, and will disrupt environmental reviews across the country, where the States already have significant resources devoted to NEPA implementation. It will also require the States to invest more resources in environmental review processes because the staff assigned in each State must familiarize themselves with the regulations of the individual federal agencies involved in each project.

B. The Agency's Action is Procedurally Improper

The APA requires agencies to follow the same procedural steps when amending or repealing a rule as they do when promulgating a rule, including providing notice and an opportunity for public comment unless a specific exception applies. The APA prohibits an agency from issuing an interim final rule to revise a regulation promulgated through rulemaking.

1. Transit Rule

Under the APA, the effort to amend regulations is a rulemaking and held to the same standard as a rulemaking to promulgate new regulations.[157] The Agency cites to the text of NEPA and E. O. 14154 as the authority under which the Agency issues the Interim Final Rule.

The APA explicitly requires notice and comment for rulemaking. Specifically, agencies must publish a general notice of proposed rulemaking in the Federal Register and provide an opportunity for public participation through written comments before adopting, amending, or repealing a rule.[158] This requirement applies equally to the amendment of a previously promulgated final rule, as the APA defines "rulemaking" to include the process of "formulating, amending, or repealing a rule."[159] Courts have consistently held that the repeal of a rule constitutes substantive rulemaking and is therefore subject to these procedural requirements.[160]

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[155] *Dep't. of Homeland Security*, 140 S. Ct. at 1914-15.

[156] *See, e.g., Texas v. United States*, 40 F.4th 205, 227-28 (5th Cir. 2022) (finding the Department of Homeland Security did not adequately consider relevant costs to the plaintiff States or their reliance interests in the pre-existing enforcement policy).

[157] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015) (quoting F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515, (2009) (the APA "make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action")).

[158] 5 U.S.C. § 553.

[159] 5 U.S.C. § 551(5).

[160] *See Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2018) ("These requirements apply with the same force when an agency seeks to delay or repeal a previously promulgated final rule").

Notice and comment prior to amending a rule prevents agencies from undoing their prior rulemaking efforts without giving stakeholders an opportunity to comment on the proposed repeal. As the D.C. Circuit has recognized, notice and comment ensures agencies cannot arbitrarily reverse their prior decisions.[161]

The APA provides limited exceptions to the notice-and-comment requirement, such as when an agency finds "good cause" that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. But courts have narrowly construed this exception.

a. The "Good Cause" Exception Does Not Apply

The Agency invokes the "good cause" exception as a basis for avoiding notice and comment, citing a supposed "need to meet the deadlines in E.O. 14154" and "to expeditiously resolve agency confusion." But neither of these purported justifications constitutes "good cause."

The APA only exempts rules from notice and comment "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest."[162] The APA makes clear that the exception "should be limited to emergency situations,"[163] or scenarios where notice and comment "could result in serious harm."[164] The good cause exception is "narrowly construed and only reluctantly countenanced."[165] Neither self-imposed deadlines in E.O. 14154 nor purported agency confusion fit into these categories.

First, the CEQ Guidance specifically instructs agencies to rely on prior regulations, undercutting any argument that this scenario constitutes an emergency warranting evasion of notice-and-comment rulemaking. The CEQ Guidance provides: "While these revisions are ongoing, agencies should continue to follow their existing practices and procedures for implementing NEPA consistent with the text of NEPA, E.O. 14154, and this guidance."[166] It is simply illogical for the Agency to claim that there is an "emergency" need to remove all of its NEPA implementing regulations from the Code of Federal Regulations at the same time that CEQ has directed agencies to continue to rely on its own removed regulations.

Second, even if the Agency misinterpreted CEQ's Guidance as requiring it to issue a final rule to revise the Agency's NEPA regulations within thirty days, emergencies that are of the

[161] *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982).

[162] 5 U.S.C. § 553(b)(B).

[163] *Consumer Energy Council of America v. Fed. Energy Regul. Comm'n*, 673 F.2d 425, 448 (D.C. Cir. 1982).

[164] *Chamber of Com. of U.S. v. S.E.C.*, 443 F.3d 890, 908 (D.C. Cir. 2006); *see also Jifry v. F.A.A.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004).

[165] *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018).

[166] Memorandum from Katherine R. Scarlett, Council on Environmental Quality, for Heads of Federal Departments and Agencies (Feb. 19, 2025) (on file with author).

executive's own making do not qualify for the "good cause" exception.[167] For example, in *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004), the court considered a Department of Energy rule that delayed the effective date of certain efficiency standards without notice and comment because the agency wanted more time to consider the standards, and the standards were set to become effective imminently. The court held "an emergency of DOE's own making" could not "constitute good cause."[168] Further, the court noted that no true emergency existed because the only thing "that was imminent was the impending operation of a statute intended to limit the agency's discretion (under DOE's interpretation), which cannot constitute a threat to the public interest."[169] Here, similarly, the mere existence of a rule repealing NEPA regulations by CEQ as directed by E.O. 14154 does not constitute good cause.

Third, the Agency fails to explain in the Transit Rule how the purported need to resolve agency confusion is an emergency or situation where allowing time for the Agency's consideration of comments would result in serious harm. To the contrary, receiving and responding to the public's and the States' input on a rule that revises all NEPA implementing regulations would reduce rather than exacerbate agency confusion. Moreover, the Agency nowhere explains how repealing its NEPA implementing regulations would serve the purported purpose of resolving agency confusion. For all these reasons, the "good cause" exception does not apply to the Transit Rule.

b. The exception for "interpretive rules, general statements of policy, or rules of agency organization, procedures, or practice" does not apply

For similar reasons, the Agency is simply incorrect in arguing that the Transit Rule is an "interpretive rule" that "provides an interpretation of a statute, rather than make[s] discretionary policy choices, which establish enforceable rights or obligations for regulated parties."

An interpretive rule is one in which an agency announces its interpretation of a statute in a way that "only reminds affected parties of existing duties."[170] These rules allow "agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings. . . . '[R]egulations,' 'substantive rules,' or 'legislative rules' are those which create law, usually complementary to an existing law; whereas interpretive rules are statements as to what administrative officer thinks the statute or regulation means."[171] Interpretive rules do not

[167] *See CEQ Guidance*, available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf. ("Agencies should complete the revision of their procedures no later than 12 months after the date of this memorandum.")

[168] 355 F.3d at 205.

[169] *Id.*

[170] *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc)).

[171] *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

"effect[] a substantive change in the regulations."[172] If a "rule effectively amends a prior legislative rule," it is a "legislative, not an interpretive rule" that requires notice and comment.[173]

The Transit Rule substantively changes the Agency's existing, longstanding NEPA regulations by diverging them from CEQ's longstanding provisions that impose requirements for how the agency must conduct environmental review to comply with NEPA. It therefore plainly exceeds the narrow exception for interpretive rules.

Further, as discussed above, "an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked" and "may not alter [such a rule] without notice and comment."[174]

The Agency's prior NEPA-implementing regulations went through notice and comment and were binding. The Agency in fact considered the comments it received on prior notices of rulemaking and incorporated those into the contents of the Order.[175] Revising those binding regulations is therefore not an interpretive act; it requires full notice and comment rulemaking. The "interpretive rule" exception does not apply to the Transit Rule.

Nor can the Agency succeed in arguing that the Transit Rule is a "general statement of policy" that "provide[s] notice of an agency's intentions as to how it will conduct itself, . . . without creating enforceable rights or obligations." Rather, the Transit Rule is a final and specific action revising the Agency's longstanding NEPA regulations.

A general statement of policy is "merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications."[176] Such statements are distinguished from substantive rules because they do not establish binding norms but instead "announce[] the agency's tentative intentions for the future."[177]

The Transit Rule is not a tentative announcement that is non-binding or an expression of future intentions. Instead, the Transit Rule is final and decisive. It revises the Agency's NEPA implementing regulations. In revising its NEPA implementing regulations, the Agency establishes that it is no longer required to follow either its own, or CEQ's former, NEPA regulations. Those previous requirements in fact will no longer exist. The rule is "final" and there is no suggestion that the Agency will undertake future rulemaking to resurrect regulations. The "general statement of policy" exception does not apply to the Transit Rule.

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[172] *Warder v. Shalala*, 149 F.3d 73, 80 (1st Cir. 1998).

[173] *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

[174] *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (quoting *Nat'l Family Planning & Reproductive Health Assoc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992)).

[175] 90 Fed. Reg. 29623.

[176] *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

[177] *Id.* at 38.

2. DOT Order

The Agency fails to provide any explanation at all for why it is not following the normal notice and comment rulemaking process to revise its Order. There is no mention of any exemptions, and none apply for the same reasons as just discussed with respect to the Transit Rule.

In summary, since none of the APA Section 553(b) exceptions apply to the Transit Rule or the DOT Order, the Agency violated the APA by not complying with notice and comment requirements.

3. The comment period for the Transit Rule and DOT Order is insufficient

Even if the Agency intends to respond to comments before issuing a final (rather than interim) Transit Rule, thirty days for comment is insufficient. FHWA's Rule fundamentally changes how the agency must consider the environmental impacts of major federal actions altering the analytical framework that has been in place for nearly 50 years. Thirty days is nowhere near enough time for the public to properly understand and meaningfully respond to the Transit Rule.

The Agency has determined that this rule is significant and that E.O. 12866 applies. Therefore, the Transit Administrations are required to abide by the terms of that executive order, which states that "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than sixty days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."[178]

"In cases involving the repeal of regulations, courts have considered the length of the comment period utilized in the prior rulemaking process as…well as the number of comments received during that time-period" in determining whether an agency has afforded sufficient time for comment. *California v. U.S. Dep't of Interior*, 381 F. Supp. 3d 1153, 1177 (N.D. Cal. 2019) (citing *North Carolina Growers' Ass'n*, 702 F.3d at 770).

Similarly, the Agency's provision of thirty days for comments on the DOT Order is insufficient given the significant changes incorporated into the new Order. The Agency had previously provided notice and an opportunity to comment *before* promulgating new final NEPA procedures.[179] It could and should have done so here.

A minimum of sixty days should be provided for the public to comment on the significant legal and factual issues implicated in the Transit Rule and DOT Order.

[178] Exec. Order. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

[179] 90 Fed. Reg. 29623.

C. The Agency's Action is Contrary to Law

The Agency's new NEPA procedures are contrary to law, and thus violates the APA.[180]

1. The Agency Unlawfully Limits Its Responsibility to Consider "Indirect" and "Cumulative" Effects

As noted above, the Agency did not reasonably explain its exclusion of the terms "indirect" and "cumulative" from the "effects" definition in the Agency's new NEPA procedures. For the same reasons that the redefinition of "effects" is unreasonable, it is also contrary to law. The analysis of reasonably foreseeable cumulative and indirect effects is necessary to allow for the full consideration of significant impacts required by NEPA. The elimination of that analysis thus violates one of NEPA's central mandates.

NEPA's "primary function is information forcing, … compelling federal agencies to take a hard and honest look at the environmental consequences of their decisions."[181] NEPA requires federal agencies to prepare a "detailed statement" on the impacts of certain actions prior to making decisions.[182] Section 102 of NEPA requires that agencies disclose "any adverse environmental effects which cannot be avoided" if the agency action goes forward.[183] And NEPA requires agencies to consider the larger context, directing them to "recognize the worldwide and long-range character of environmental problems."[184] NEPA's legislative history, too, makes clear that, through NEPA, Congress sought to prevent agencies from making decisions without considering the larger context and incremental impact of projects on the environment. For instance, the Senate expressed concern that "[i]mportant decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades."[185]

Consistent with NEPA's plain text and purpose, for over 40 years the courts and CEQ have interpreted NEPA's "hard look" requirement to demand consideration of direct, indirect, and cumulative effects.[186] Identifying and analyzing only direct effects that are close in time and geography to the proposed federal action ignores the true nature of most environmental

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[180] 5 U.S.C. § 706(2)(A).

[181] *Am. Rivers v. FERC*, 895 F.3d 32, 49 (D.C. Cir. 2018) (citations and internal quotation marks omitted).

[182] 42 U.S.C. § 4332(2)(C).

[183] *Id.* § 4332(2)(C)(ii).

[184] *Id*. § 4332(2)(F).

[185] S. Rep. No. 91-296, at 5.

[186] 40 C.F.R. §§ 1508.7, 1508.8, 1508.25(c); *Kleppe*, 427 U.S. at 410; *Hanly v. Kleindienst*, 471 F.2d 823, 830–31 (2d Cir. 1972); *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 666 (9th Cir. 2009) ("NEPA requires the Forest Service to perform a cumulative impact analysis in approving projects.").

problems, which Congress recognized as "worldwide and long-range" in character.[187] A robust analysis of a project's environmental effects is critical for informing decision makers and the public, particularly where projects may contribute incrementally to larger environmental or climate harms. Or, as the Second Circuit noted in *Hanly v. Kleindienst*, "[o]ne more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel. Hence the absolute, as well as comparative, effects of a major federal action must be considered."[188] The *Seven County* decision does not change the principle that indirect effects should be considered in appropriate cases. As described above, the decision recognizes that indirect effects such as "run-off into a river that flows many miles from the project and affects fish populations elsewhere, or emissions that travel downwind and predictably pollute other areas" may fall under NEPA. [189]

The Agency, however, is excluding a clear requirement to consider the three categories of effects, replacing them with a vague redefinition directing agencies not to consider effects that are "remote in time, geographically remote, or the product of a lengthy causal chain."[190] NEPA requires that an agency assess *all* of the project's reasonably foreseeable significant impacts,[191] and the exclusion of impacts that are "remote in time" or "geographically remote," would unlawfully take such "long range" environmental impacts out of NEPA's purview and undermine NEPA's mandate and purpose to ensure that agencies are fully equipped to make decisions concerning all significant environmental impacts.[192]

The exclusion of the NEPA regulations in conjunction with the treatment of "remote" impacts also ignores the reality that some major federal actions will have adverse effects that are remote in time but also reasonably foreseeable if not certain. An example outside of the transportation context is the proposed geologic repository for the disposal of high-level radioactive wastes at Yucca Mountain, Nevada, identified in the Nuclear Waste Policy Act, as well as other interim storage options currently under development by the Department of Energy. Radioactive releases from the repository to the environment are not likely to occur for hundreds

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[187] 42 U.S.C. § 4332(2)(F); *see also* S. Rep. No. 91-296, at 5 (Senate report stating "[i]mportant decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.").

[188] *Id.* at 831.

[189] 145 S. Ct. at 1515.

[190] U.S. Dep't of Transp., DOT's Procedures for Considering Environmental Impacts (Jul. 3, 2025), available at https://www.transportation.gov/sites/dot.gov/files/2025-07/DOT_Order_5610.1D_OST-P-250627-001_508_Compliant.pdf.

[191] 42 U.S.C. § 4332. Moreover, CEQ itself previously stated that "[p]erhaps that most significant environmental impacts results from the combination of existing stresses on the environment with the individually minor, but cumulatively major, effects of multiple actions of over time." CEQ, Exec. Office of the President, National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years at 29 (Jan. 1997), https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf.

[192] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); 42 U.S.C. §§ 4332(2)(F), 4332(2)(C)(ii).

and possibly thousands of years, but after that, significant releases are certain to occur and must be evaluated.[193]

For these reasons, the Agency's exclusion of the traditional definition of effects with a definition that does not include indirect or cumulative impacts is unlawful and contrary to law. When conducting NEPA analyses, the agency is required to take the requisite "hard look" at all reasonably foreseeable impacts.

2. The Agency Unlawfully Curtails the Public Participation at the Heart of the NEPA Process

Public participation is one of the "twin aims" of NEPA.[194] The process is rooted in statutory obligations that a federal agency "consider every significant aspect of the environmental impact of a proposed action" *and* "inform the public that it has indeed considered environmental concerns in its decision-making process."[195] NEPA regulations have long "ensured that agencies identify, consider, and disclose to the public relevant environmental information early in the process before decisions are made and before actions are taken[,]"[196] just as courts even predating the 1978 regulations have recognized the public's role in making certain that federal decision-making is "premised on the fullest possible canvassing of environmental issues[.]"[197] Thus, NEPA requires that agencies prepare environmental impact statements to disclose and address potentially significant environmental effects of a project; and as stated above, one purpose of this document is to "make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information."[198]

As noted above, the DOT Order appears to curtail public comment at the scoping, EA, and EIS stage. By doing so, the Agency strikes at the heart of NEPA's purpose and environmental review requirements, in violation of NEPA and, accordingly, the APA.

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[193] The certainty of releases to the environment thousands of years into the future led both the U.S. EPA and the U.S. Nuclear Regulatory Commission to require the Department of Energy to estimate releases for one-million years. 40 C.F.R. § 197.20; 10 C.F.R. § 63.311; 40 C.F.R. § 197.12 (defining "period of geologic stability" as one million years following disposal).

[194] *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (internal citation omitted).

[195] *Id*.

[196] 40 C.F.R. § 1500.1(b).

[197] *Jones v. District of Columbia Rede v. Land Agency*, 499 F.2d 502, 511 (D.C. Cir. 1974).

[198] *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1287 (9th Cir. 1974).

IV. CONCLUSION

In conclusion, the Agency should repeal its Transit Rule and DOT Order and withdraw its NEPA procedures, and issue new NEPA regulations after undertaking notice and comment under the APA.

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