September 10, 2024

Re: Legislative Hearing on H.R. ____ (Rep. Westerman), To amend the National Environmental Policy Act of 1969, and for other purposes, H.J. Res. 168 (Rep. Graves), Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Council on Environmental Quality relating to "National Environmental Policy Act Implementing Regulations Revisions Phase 2," and H.R. 6129 (Rep. Yakym), "Studying NEPA's Impact on Projects Act"

Dear Representative,

On behalf of the undersigned organizations and our millions of supporters and members, we write to express our firm opposition to legislative efforts under consideration by the House Natural Resources Committee to enact sweeping detrimental changes to the National Environmental Policy Act (NEPA) and prioritize private profit over the public interest, reduce government accountability, and disregard the voices and welfare of communities impacted by federal decisions. These efforts under consideration include H.J. Res. 168, which would roll back critical bipartisan rulemaking made to enhance and restore regulations governing the application of NEPA, legislation mirroring portions of Representative Grave's "BUILDER Act" which many of the organizations listed below also opposed, and H.R. 6129, that would create an unnecessary burden on federal agencies regarding NEPA compliance. **We strongly oppose these efforts and urge you to vote NO on these measures.**

First signed into law in 1970, NEPA forms the bedrock of environmental laws and, along with the Administrative Procedure Act, enshrines the principle that federal agencies ought to be responsible to the public for their actions. NEPA's role is to ensure that agencies take the opportunity to stop and consider the impacts their actions might have on public health, critical ecosystems, and the environment we all rely on. Through public comment opportunities, NEPA further helps maintain the democratic process by allowing the public to directly communicate with decision-makers about actions before they are taken. It has achieved its stated goal of improving the quality of the human environment by relying on sound science to reduce, avoid, and mitigate harmful environmental impacts. NEPA is a critical tool to guarantee that our nation will swiftly and equitably transition to a clean energy economy.

Last year, the Biden-Harris Administration's Council for Environmental Quality (CEQ) finalized the "Bipartisan Permitting Reform Implementation Rule" to update NEPA regulations in response to the first major legislative changes to NEPA in nearly five decades as a part of the Fiscal Responsibility Act (FRA). While many of the groups listed here opposed the changes made in the FRA, this rule accurately reflects the changes made by Congress. Critically, this rule also corrects the most damaging aspects of the Trump Administration's attempts to weaken NEPA, restoring certainty to project sponsors and ensuring meaningful public participation in the environmental review process. The rule also clarifies the existing responsibility, long settled by the courts, of federal agencies to consider and disclose the potential effects of decisions on climate change, public health, and communities historically exposed to pollution. This update follows decades of court rulings stating that government agencies have a clear obligation under NEPA to assess the climate impacts of their decisions. By including these provisions in the "Bipartisan Permitting Reform Implementation Rule," CEQ has ensured that federal agencies will comply with the law as written. Further, if well-implemented, this approach will reduce conflict, avoid unnecessary

litigation, and result in more robust, more resilient projects, while ensuring that the voices of impacted individuals are heard.

H.J. Res. 168:

Unfortunately, H. J. Res. 168 would undermine Congress' bipartisan agreement while weakening environmental protections and slowing environmental review and permitting decisions at federal agencies. A key driver of a more effective permitting process is providing clarity and certainty to agencies, project sponsors, and the public on exactly how and when agencies should conduct reviews under NEPA. By increasing community participation, the "Bipartisan Permitting Reform Implementation Rule" will result in improved energy and infrastructure projects. Too often, unresolved conflicts between communities and project developers can result in prolonged reviews, delayed project timelines, and costly litigation. Studies have shown that federal agencies can help resolve these conflicts by proactively engaging with communities early and often.

Furthermore, by passing H. J. Res. 168, under the Congressional Review Act, Congress would forbid CEQ from issuing any future regulations substantially similar to the current rule. This rule faithfully implements the changes included by Congress in the FRA and changes required to comply with repeated court rulings on the application of NEPA to issues including climate change and environmental justice. These changes align the implementation of NEPA with the law. The effect of passing this resolution would be to make it nearly impossible for CEQ to effectively implement the changes to NEPA regulations that Congress required in the FRA or have been required by courts. As such, this resolution would only create legal uncertainty for federal permitting decisions to the detriment of project sponsors and the public alike.

Discussion Draft of H.R. ____ (Rep. Westerman), To amend the National Environmental Policy Act of 1969, and for other purposes:

Similarly, as drafted, this legislation would radically limit the scope of reviews by federal agencies and entirely eliminate government accountability when agencies fail to adequately consider the health, environmental, or economic impacts of their decisions. If passed, this legislation would fundamentally undermine the purpose of NEPA, codify climate denial, and essentially silence the voices of frontline communities and local governments.

Despite the persistent myth that NEPA reviews are the primary cause of permitting delay, this is demonstrably false. This theory has been comprehensively examined and thoroughly debunked by administrations of both parties through numerous studies, including those conducted by the Congressional Research Service (CRS), the Government Accountability Office (GAO), the U.S. Department of Treasury, and other federal agencies and academia. CRS has repeatedly concluded that NEPA is not a primary or major cause of delay in project development. Instead, CRS identified causes entirely outside the NEPA process, such as lack of project funding, changes in project design, and other factors. Subsequent studies have confirmed that to the extent that there are delays within the NEPA process, they are not attributable to the law or regulations themselves but rather to lack of staff and funding – a problem that Congress began addressing in the Inflation Reduction Act (IRA) by including historic investments for environmental review. Building a more robust process for a federal environmental review workforce is an

essential reform needed to ensure the timely permitting of projects and it is already bearing fruit under the Biden-Harris administration with faster review times and more projects put through the process. Even after the historic investments made by the IRA, there remains a need within agencies responsible for permitting and environmental review for additional staff capacity. Instead of weakening environmental protections that ensure responsible permitting, we would encourage this Committee to consider advancing legislation to help agencies better recruit, retain, and pay the staff needed to meet growing demands for environmental reviews.

Concerningly, this bill would also essentially eliminate meaningful judicial review. The ability to challenge violations under NEPA and obtain an injunction before a project impacting the health, economy, and environment of frontline communities and the broader public is essential to accountability and the underlying purpose of requiring environmental review. An environmental review process without meaningful judicial review would undermine the ability of communities to have their voices heard by allowing agencies to simply look the other way regardless of public input. Meanwhile, legal challenges to NEPA decisions are rare. Agency data and a review of court filings demonstrate that less than .25% of actions subject to NEPA result in litigation. Overwhelmingly, the clear majority of actions subject to NEPA go unchallenged.

We strongly urge the Committee to consider the extensive actions that have been taken by the Biden-Harris Administration and Congress to promote effective and efficient environmental reviews and ensure time for robust implementation for proposed projects. Alongside several reforms made by Congress in the FRA and implemented by the "Bipartisan Permitting Reform Implementation Rule," this Administration has taken several actions to reform federal permitting. As a result of these changes, the Biden-Harris Administration has cut six months off the median time it takes agencies to complete environmental impact statements. In particular, the Department of Energy has reduced the time it takes to complete environmental impact statements by half. These changes, aided by investments made by Congress in the IRA and Infrastructure Investment and Jobs Act (IIJA), are also a direct result of regulatory changes made in the last year by the Biden-Harris Administration. Additional actions taken by Congress threaten to increase uncertainty and undo the progress made by this administration in creating a more inclusive and efficient environmental review process.

Despite these facts, this proposed legislation would make sweeping changes to NEPA, whose effect would be to overwhelmingly tip the scales in favor of project approval above informed decision-making, putting private profits above the public interest. The list of problems with this bill is extensive, but several merit particular attention. The proposed legislation would:

- **Dramatically Narrow Application of NEPA and Limit the Scope of Reviews** – The bill would radically limit the application of NEPA by redefining the threshold consideration of what is a "major federal action" for the purposes of NEPA. Further, the bill excludes federal loans, loan guarantees, and other forms of financial assistance from NEPA, which could allow projects such as coal-fired generating facilities and concentrated animal feeding operations to evade any review or public scrutiny. For reviews that do occur, it relieves agencies of any responsibility to undertake any new research necessary for informed decision-making and potentially prevents the consideration of upstream and downstream impacts of decisions.

- **Essentially Eliminate Judicial Review** – In addition to reducing the statute of limitations to a mere 120 days, the bill would bar legal challenges to categorical exclusions, which account for nearly 98% of actions subject to NEPA. For example, under this provision, the misapplication of the categorical exclusion to the Deepwater Horizon project could never be challenged. The bill also prohibits challenges to environmental assessments where no public comment was provided. Further, the bill limits judicial review to alternatives and effects "considered" in an environmental document when it is invariably the lack of consideration of reasonable alternatives or adequate analysis of significant environmental effects in environmental documents that is the reason for NEPA litigation. For the few remaining projects subject to review, vacatur or injunctive relief would be extremely limited, thus ensuring that projects move forward regardless of how egregiously deficient a review is or how harmful the impacts of a project on a community or the environment.

- **Prioritize Project Sponsors Over the Public Interest –** The legislation would prohibit an agency from extending the time it needed to do essential scientific work or to accommodate public comment unless the project sponsor agrees. Further, the bill would severely narrow what has long been considered the "heart" of the NEPA process by prioritizing consideration of alternatives that meet the project sponsor's goals.

- **Authorizes agencies to skip NEPA all together, even in the few instances when it would still apply**. Agencies would be able to avoid NEPA by complying with any other law's requirements that serve a "similar function" as NEPA.

H.R. 6129 (Rep. Yakym) - Studying NEPA's Impact on Projects Act

Under this bill CEQ is required to create a report on the impacts of NEPA solely through the lens of timelines, page lengths, and litigation. In order to accurately understand the impacts of NEPA, a report must instead consider factors such as how costs were avoided, and how negative health and environmental impacts were mitigated or averted as a result of public engagement and review. Instead of assessing the benefits of review, disclosure, and public engagement on project development and government decisionmaking, this legislation mandates a report with metrics entirely unrelated to the statutory purpose of NEPA, which is to improve government decisionmaking so that present and future generations can enjoy a healthful human environment.

Notably, the legislation also avoids any report requirement on the current status of agency resources, staff, and training to fulfill their responsibilities under NEPA. While the Inflation Reduction Act made an overdue and historic investment in making the review process more efficient and meaningful, it was only to a handful of the over 80 agencies charged with implementing NEPA. Instead of this legislation, we recommend a report on how NEPA implementation could be improved, focusing on how agency resources impact their ability to improve and carry out NEPA.

Taken in total, these bills would effectively give courts greater ability to stop federal agencies from thoroughly reviewing the impacts of proposed federal actions while simultaneously restraining the courts from reviewing actions on behalf of the public. The net effect of this proposal is to ensure the environmental review process benefits project sponsors and against communities and further direct courts to ensure this bias persists. This legislation would dramatically transform NEPA from its original intent of

creating a process by which federal agencies consider the impacts of their decisions with public input, to one where the public must prove in court that agency decisions might be harmful before an agency has to consider its actions at all. Instead of advancing legislation that increases government accountability and creates a process that ensures permitting is efficient because projects are adequately in the public interest, this legislation would require the public to conduct their own environmental reviews or suffer the consequences.

The legislative efforts described above will only increase litigation, weaken community support for federal actions, and result in worse environmental and public health outcomes for all Americans. Our organizations are eager to see a swift and equitable buildout of the critical infrastructure necessary to transition to a clean energy economy. However, the legislation under consideration by this Committee would make such a transition impossible. These bills are an extreme attack on government accountability, meaningful public input, and review under the NEPA. There are meaningful permitting reform proposals before Congress that would protect communities and speed the clean energy transition. For instance, we would urge the Committee to instead consider legislation such as the "Clean Electricity and Transmission Acceleration Act" or the "A. Donald McEachin Environmental Justice For All Act," which would ensure a transition to a just and equitable clean energy economy future.

Sincerely,

Accountable.US
Alaska Wilderness League
Better Brazoria: Clean Air & Water
Bold Alliance
Center for Biological Diversity
Center for Oil and Gas Organizing
Chester Residents Concerned for Quality Living
Clean Water Action
Climate Conversation Brazoria County
Climate Hawks Vote
Climate Justice Alliance
Dayenu: A Jewish Call to Climate Action
Defenders of Wildlife
Delaware Riverkeeper Network
Earth Ethics, Inc.
Earthjustice
Earthworks
Eloise Reid
Environmental Law & Policy Center
Environmental Protection Information Center- EPIC
Environmental Protection Network
Extinction Rebellion Houston
Food & Water Watch
Friends of the Earth Action
Great Old Broads for Wilderness
Green America
Habitat Recovery Project
Ingleside on the Bay Coastal Watch Association

Interfaith Power & Light
Kahtoola, Inc.
League of Conservation Voters
Los Padres ForestWatch
Memphis Community Against Pollution
National Audubon Society
National Ocean Protection Coalition
Natural Resources Defense Council
Ocean Conservancy
Ocean Conservation Research
Ocean Defense Initiative
Oceana
Oxfam America
Partnership for Policy Integrity
Port Arthur Action Network
Progress Texas
Property Rights and Pipeline Center
RESTORE
Save RGV
Sierra Club
Silvix Resources
Southern Utah Wilderness Alliance
Texas Campaign for the Environment
The Wilderness Society
Turtle Island Restoration Network
Vessel Project of Louisiana
Waterkeeper Alliance
WE ACT for Environmental Justice
Western Environmental Law Center
Wilderness Workshop
Winter Wildlands Alliance
Young, Gifted & Green
Zero Hour

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[1] *See*, Linda Luther, The National Environmental Policy Act: Streamlining NEPA, Congressional Research Service, RL33152, 26 (2011) (citing study indicating "factors 'outside the NEPA process'" the NEPA process were identified as the cause of delay the majority of time); Bureau of Land Management Operations report available at https://www.blm.gov/sites/blm.gov/files/docs/2021-03/Table12_TimetoCompleteAPD_2020.pdf indicating that the agency spends more time waiting for information from operators than it spends reviewing oil well drilling permit applications; U.S. Government Accounting Office, GAO-09-611, Federal Land Management: BLM and the Forest Service Have Improved Oversight of the Land Exchange

Process, But Additional Actions are Needed 15 (2009), indicating lack of qualified staff and shifts in agency priorities caused delay in the BLM review process; Toni Horst, et al., 40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance. AECOM, (2016) (finding that "a lack of funds is by far the most common challenge to completing" major infrastructure projects).

[2] John C. Ruple and Kayla M. Race, Measuring the Litigation Burden: A Review of 1,499 Federal Court Cases, Environmental Law Vol 50 486, 500 (2020).