Initial Draft Outline for NRECA Comments on CEQ NEPA Phase 2 Proposed Rule

I. High-level Introduction

II. Executive Summary

a. America's not-for-profit electric cooperatives are committed to keeping the lights on at a cost local families and businesses can afford. This commitment to providing affordable, reliable, and safe electricity underpins NRECA's comments on CEQ's NEPA Phase 2 Proposed Rule. Electric cooperatives operate without shareholders and are uniquely affected by regulatory mandates.

b. Electric cooperatives are key players in the ongoing transformation of the electric utility industry and are focused on ensuring the provision of affordable, reliable, and safe electricity in an environmentally responsible manner and support common sense solutions to environmental impacts. Many electric cooperative projects and activities require navigating the NEPA process.

c. Environmental review and permitting processes must be significantly accelerated to support the modernization of our nation's infrastructure and to facilitate economic development. In addition, accelerated processes are necessary to ensure the funding opportunities provided by the Bipartisan Infrastructure Law and Inflation Reduction Act to upgrade our power infrastructure and expand the grid are not squandered.

d. Unfortunately, CEQ's proposed rule takes the NEPA process in the wrong direction by adding new burdensome requirements and increasing complexity. The proposed rule will prolong NEPA reviews and increase litigation risk, which is particular concerning for electric cooperatives that are pursuing numerous projects aimed at modernizing their electric infrastructure, bringing cleaner energy to the grid, and adding capacity as electricity demand increases to ensure they can continue provide safe, reliable and affordable service to their members.

e. Moreover, CEQ attempts to transform NEPA's procedural requirements into substantive ones to achieve results that align with this Administration's policy preferences which is inconsistent with decades of case law, agency practice, and longstanding interpretations.

f. NRECA has supported Congress' efforts to focus and accelerate NEPA reviews and permitting processes.

g. NRECA also supported changes made by CEQ in the 2020 rule to clarify the NEPA process, focus NEPA reviews, and make the process more efficient, timely and predictable.

h. Unfortunately, the NEPA Phase 2 Proposal is not fully consistent with NEPA and the recent bipartisan amendments to NEPA, layers on additional requirements that

will make reviews more complex and less focused, and removes helpful elements of the existing regulations.

i. The proposed rule undermines bipartisan efforts to improve the focus, quality, and efficiency of NEPA reviews and should be withdrawn.

III. Background on NRECA and Its Electric Cooperative Members

a. Co-ops operate at cost, without a profit incentive – private, independent, not-for-profit

b. NRECA members – 63 G&Ts and 832 distribution cooperatives

c. Rely on a diverse suite of resources (insert fuel mix data)

d. Cost-effective regulations are critical to America's electric cooperatives

i. Co-ops serve large expanses of the United States, primarily residential and typically sparsely populated – more expensive to serve

ii. Fewer customers, less revenue per mile of line (insert statistics)

iii. No equity shareholders

iv. Financing projects requires reliance on debt

v. All but two of NRECA's member cooperatives are "small entities" under the Regulatory Flexibility Act

e. Policy decisions and other challenges are threatening the reliable delivery of electricity in the United States.

i. Discussion of challenges to maintaining reliable electricity including increased electrification and demand, premature requirements caused by EPA regulations, prolonged NEPA and permitting process, interconnection queues, supply chains and natural gas shortage.

IV. The proposed rule is inconsistent with the National Environmental Policy Act.

a. NEPA is a procedural statute. It does not mandate a particular result or that agencies elevate environmental concerns over other considerations. Rather it imposes procedural requirements that require agencies to analyze the environmental impact of their proposed actions as part of their decision-making process. (Cite Supreme Court caselaw, including *Robertson v. Methow Valley Citizens Council, Kleppe v. Sierra Club, Balt. Gas & Elec. Co. v NRDC, Metro Edison Co. v. People Against Nuclear Energy*)

b. While Section 101 of NEPA announces a national environmental policy, the policy does not alter federal agencies' authorities under their authorizing statutes.

c. Section 101 makes clear that the environment should be considered along with social, economic and other requirements.

d. Further Section 105 explicitly states that the policy and goals of NEPA are supplementary to those in agencies' authorizing statutes.

e. Nevertheless, CEQ proposes numerous changes that seek to transform Section 101's policy aspirations into mandates, which is inconsistent with the statute.

V. CEQ should not improperly attempt to transform NEPA from a procedural statute to a substantive one.

a. CEQ should retain the current regulatory provisions in Part 1500, Purpose and Policy. The proposed rule seeks to make a number of changes this section which seeks to improperly elevate Section 101 broad, aspirational policy goals above Section 102's procedural requirements. This is inconsistent with the statute and will increase litigation risk.

b. CEQ should not revise Part 1502 with the new mandate to require the identification of an "environmentally preferable alternative or alternatives." This new requirement would go well beyond NEPA's requirements by requiring agencies (and applicants) to incorporate these considerations into the development alternatives themselves. This is likely to result in new litigation challenges as agencies' and applicants' efforts to develop and identify the "environmentally preferable alternative" are second guessed. Furthermore, this is contrary to NEPA, decades of case law, as well as the Fiscal Responsibility Act amendments. Alternatives to the proposed agency action must be tied to the proposed action, be technically and economically feasible, and *meet the purpose and need of the proposal* consistent with Section 102(2)(C)(iii) of NEPA.

VI. CEQ should not amend the NEPA regulations to favor certain types of projects and disfavor others.

a. NEPA requires agencies to consider reasonably foreseeable environmental effects of a proposed agency action, and agencies consider the specific facts of a project when making those evaluations. While many NEPA reviews already incorporate consideration of greenhouse gas emissions and environmental justice concerns depending on the details of a particular project, for the first time CEQ is proposing to explicitly incorporate in the NEPA regulations requirements regarding consideration of climate change-related effects and effects on environmental justice communities, including Tribal communities.

b. The proposed changes would elevate those concerns above all others regardless of their relevance to a particular project or significance. Incorporating requirements to specific impacts, resources, and alternatives throughout the regulations would create an analysis that will favor certain projects and disadvantage others. Moreover, the proposed changes will increase the complexity and breadth of

NEPA reviews, wasting time and limited resources, and increasing litigation risk as agencies seek to assess these impacts.

c. This approach is inconsistent with NEPA.[1] The Supreme Court has repeatedly emphasized that the reasonably foreseeable standard limits consideration of environmental impacts under NEPA and that standard has recently been codified into the statute by the FRA amendments. When the causal chain between a proposed action and potential effects becomes more attenuated, attempting to consider these effects is more speculative and less helpful to the agency and the public. (Cite to Supreme Court case law *Metro Edison Co. v. People Against Nuclear Energy, DOT v. Public Citizen* and *Vt. Yankee* re: reasonable close causal relationship, the scope of an agency's inquiries must remain manageable, and alternatives must be bounded by notions of feasibility)

d. Moreover, the statutory text of NEPA does not elevate one type of effect over others. Doing so in the NEPA regulations, as CEQ proposes, would undermine NEPA's effect-neutral information gathering process. CEQ should not make these changes, in particular:

1. proposed § 1500.2(e) (strongly encouraging agencies to consider alternatives that reduce climate change-related effects and affects on environmental justice communities)

2. proposed § 1502.15 (affected environment section of an EIS shall include consideration of "anticipated climate-related changes to the environment and when such information is lacking, provide relevant information consistent with § 1502.21. This description of baseline environmental conditions and reasonably foreseeable trends should inform the agency's analysis of environmental consequences and mitigation measures (§ 1502.16)."

3. proposed § 1502.17(a)(7) (environmental consequences section of an EIS shall include "[a]ny reasonably foreseeable climate change-related effects, including the effects of climate change on the proposed action and alternatives.")

4. proposed § 1501.3(d)(1) (in determining the significance of effects, would require agencies to consider the potential global context and duration). In the Preamble, CEQ states that oil and gas extraction or natural gas pipelines have reasonably foreseeable global indirect and cumulative effects related to GHG emissions (88 Fed. Reg. at 49,935)

ii. Oppose codification of CEQ's Interim Guidance on Consideration of Greenhouse Gas Emissions and Climate Change. CEQ solicits comment on codifying the guidance. In NRECA's April 10, 2023 joint comments

[1] CEQ took this misguided approach in its Interim NEPA GHG Guidance. Cite to NRECA/APPA joint comments.

with the American Public Power Association ("APPA") on that Interim Guidance, NRECA and APPA urged CEQ to withdraw and revise that guidance which encourages overbroad NEPA reviews divorced from the statutory limitations and purposes of NEPA.

VII. CEQ does not have authority under NEPA to require mitigation or compel enforcement through mitigation and monitoring compliance plans.

a. NEPA is a procedural statute and does not require adoption of any particular mitigation measures or provide authorization for CEQ or other agencies to require mitigation; however, it recognizes that certain types of mitigation measures may be effective. In the proposal, CEQ proposes a number of changes that put greater emphasis on mitigation and to the extent mitigation is relied upon to avoid significant effects, it proposes changes to require a mitigation and monitoring compliance plan.

b. CEQ cannot require mitigation or "monitoring and compliance plans". Oppose (Proposed § 1501.6(c)) (requiring plans for any mitigation related to mitigated FONSIs), (Proposed § 1505.2(c) (requiring records of decision for EISs to adopt plans), (Proposed § 1505.3(c) (detailing mitigation plan requirements and directing agencies to consider mitigation measures related to ameliorating environmental justice concerns)

c. Discuss practical consequences including that this will further complicate the NEPA process, stretch limited agency resources, increase litigation risk and potentially dissuade project proponents from pursuing voluntary mitigation measures.

VIII. CEQ should restore language in the 2020 Rule that codified important caselaw.

a. The 2020 rule incorporated language from important NEPA litigation decisions that have broad application to NEPA reviews. This ensured the CEQ NEPA regulations were aligned with well-established caselaw and provided clarity for agencies, project proponents, and members of the public that are not familiar with U.S. Supreme Court and lower court decisions that have clarified key questions about NEPA reviews.

b. CEQ should restore language from the 2020 Rule that incorporated the U.S. Supreme Court's holding in *Public Citizen*.

i. Restore language from the 2020 Rule's definition of "effects" that agencies should evaluate "reasonably close causal relationship" to the proposed action but that effects are remote in time, geographically remote, or the product of a lengthy causal chain generally should not be considered.

c. CEQ should restore language from the 2020 Rule that recognized the goals of the applicant in developing the purpose and need.

i. Restore the language in Section 1502.13 that clarified that the goals of the applicant must be considered in developing the purpose and need.

IX. CEQ should not proceed with proposed changes that will not improve the efficiency or effectiveness of the environmental review process.

a. CEQ should not reverse changes it made in the 2020 rule to modernize its NEPA regulations, increase efficiency, and provide clarity.

i. CEQ should retain language aimed at resolving NEPA noncompliance concerns expeditiously.

1. CEQ should not eliminate Section 1500.3(b) (exhaustion requirements, including requiring submission of public comments during public comment periods) or strike text from Section 1500.3(c) expressing CEQ's intention that allegations of NEPA noncompliance should be resolved expeditiously. Resolving NEPA compliance issues as soon as practicable are in the interest of federal agencies, project proponents and the public.

ii. CEQ should not revive the context and intensity factors.

1. The 2020 rule made changes to clarify the confusing 1978 framework for determining the significance of effects and provided agencies a simpler, more flexible approach that used terminology in a consistent way. CEQ now proposes to reverse course and mandate agencies consider context and intensity and adds to the 1978 list of factors that agencies must consider. CEQ should not reverse course.

2. In particular, CEQ's new requirement that agencies consider the effects of an action on any habitat where a threatened or listed species may occur is concerning because it would substantially expand the scope of the significance determination and may lead to project delays and siting issues, particularly where a species is widespread. CEQ should remove the expanded habitat intensity factor.

iii. CEQ should not strike language requiring cooperating agencies to limit their comments to matters for which they have jurisdiction by law or special expertise.

1. CEQ should not strike language in § 1501.8(b)(7) that directs cooperating agencies to limit their comments to matters for which they have jurisdiction by law or special expertise. This is an unnecessary, unhelpful change that will create uncertainty about a cooperating agency's role.

b. CEQ should ensure public engagement is consistent with the schedules set by agencies to ensure deadlines are achieved.

i. The existing CEQ NEPA regulations include robust processes for involving and engaging with the public on major federal actions that will have significant environmental impacts. (Discuss EIS and EA opportunities and the flexibility afforded to federal agencies on EAs which cover a wide range of actions.) Furthermore, when proposed actions are part of a permitting process, the statute or regulations governing that permitting process also may provide opportunities for public input and engagement. CEQ should ensure that public engagement is conducted consistent lead agency schedules to ensure the deadlines for EAs and EISs, which were recently codified in Section 107(g) of NEPA are achieved.

c. CEQ should not mandate that agencies must invite public comment on draft EAs.

i. EAs are completed for a wide-range of activities. Agencies currently have the discretion to manage public involvement on the development of EAs. It not necessary for CEQ to codify a new public comment requirement that removes agency discretion over how to manage EAs.

X. CEQ should fully and faithfully implement the amendments to NEPA made by the FRA.

a. While NRECA appreciates that CEQ has proposed changes to align certain regulatory text with the recent FRA amendments, however, the proposed changes are not fully consistent with the statutory text. Further, CEQ has proposed changes that will undermine the effectiveness of the recent statutory amendments to NEPA.

b. In Section 106 of NEPA, Congress has added provisions that first require a threshold determination as to whether NEPA applies, and then sets forth the levels of NEPA review. In Section 106(a) of NEPA, Congress has added a list of threshold matters that must be considered by agencies to determine if NEPA applies. CEQ should fully incorporate these requirements into § 1501(a)(3) (Applicability). As proposed, incorporates some of these determinations under the questions of whether a proposed action is a "major federal action." All should be incorporated in § 1501(a)(3) for clarity and consistency with Section 106(a) of the statute.

c. CEQ proposes numerous changes related to establishment and application of categorical exclusions (CEs) that will make using this lower level of NEPA review less efficient and more burdensome. (Proposed § 1501.4)

i. Requires documentation of evaluation of "extraordinary circumstances" and encourages agencies to publish documentation of determination on its website and requests comment on whether documentation should be

required. (Proposed § 1501.4(b)). CEQ invites comments on whether it should require agencies to publish such documentation. 88 Fed. Reg. 49,938. CEQ has estimated that agencies apply CEs over 100,000 times a year. 85 Fed. Reg. at 43,322. While it is unclear how many require evaluation of "extraordinary circumstances," mandating publication of all extraordinary circumstances documentation appears likely to strain agency resources.

ii. The FRA added Section 109 of NEPA which allows an agency to adopt another agency's categorical exclusion. Adds section pursuant to new Section 109 of NEPA that allows an agency to apply a CE listed in another agency's NEPA procedures but complicates it rather than aligning the provision with the statutory text. (Proposed § 1501.4(e)). This proposed provision is not completely consistent with the NEPA statutory text which uses "apply" rather than "adopt". In addition, CEQ proposes to require that agencies publish application of the CE, a requirement which does not appear in the FRA. CEQ should revise this proposed provision to align with the statutory text.

iii. CEQ also proposes to requires publication of CE adoption determinations on an agency's website or making the determination publicly available. (Proposed § 1506.3(d)). As discussed above, CEs are used thousands of times a year and often for activities that no or minimal environmental impacts. Requiring publication of CE adoption determinations, particularly for activities that have no extraordinary circumstances is unnecessary and adds burdens to the efficient adoption of CE determinations.

XI. Conclusion