IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

NO. 4:24-cv-73

DEFENDERS OF WILDLIFE and SIERRA CLUB, Plaintiffs, v. THE UNITED STATES FISH AND WILDLIFE SERVICE; MARTHA WILLIAMS, in her official capacity as Director of the United States Fish and Wildlife Service; MICHAEL OETKER, in his official capacity as Southeast Regional Director of the United States Fish and Wildlife Service; COUNCIL ON ENVIRONMENTAL QUALITY; BRENDA MALLORY, in her official capacity as Chair of the Council on Environmental Quality, Defendants.	)	**COMPLAINT** [Fed. R. Civ. P. 7]

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This case challenges the actions of the United States Fish and Wildlife Service ("Service"), Martha Williams, in her official capacity as Director of the Service, Michael Oetker, in his official capacity as Southeast Regional Director of the Service, the Council on Environmental Quality ("CEQ"), and Brenda Mallory, in her official capacity as Chair of CEQ (collectively, "Defendants"), in the unlawful review and allowance of an experimental algaecide treatment with a toxic-to-birds product at Mattamuskeet National Wildlife Refuge.

2. Mattamuskeet National Wildlife Refuge in eastern North Carolina was established as a migratory bird sanctuary in 1934. Since that time, the Refuge has been widely recognized as a critical stopover for migratory birds along the Atlantic Coast. The 40,000-acre lake supports more than 250 species of birds. Hundreds of thousands of migratory birds use the Refuge every year.

3. In 2022, the Service was approached by the North Carolina Policy Collaboratory at the University of North Carolina at Chapel Hill and a private company about conducting a trial treatment of a specific algaecide that is labeled as "toxic to birds," and floats on the surface of water, slowly dissolving over a matter of hours.

4. Despite the potential harm to the Refuge's iconic inhabitants, the Service decided to allow the use of this experimental algaecide. A recent press release from the North Carolina Department of Environmental Quality states that this project will begin as soon as June 1, 2024.

5. The Service's review and authorization of this experimental algaecide was rushed and cursory and violated the National Wildlife Refuge System Administration Act, as amended by the National Wildlife Refuge System Improvement Act ("Refuge Act"), the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA"). The analysis failed to fully analyze whether the project was compatible with the refuge's migratory bird protection purposes, failed to take the required look at environmental impacts and alternatives under NEPA, and failed to disclose the full scope of environmental consequences of the project and prepare a full Environmental Impact Statement that a project of this significance requires.

6. In conducting its rushed and incomplete NEPA review, the Service relied on regulations that had been unlawfully promulgated by CEQ in 2020 ("2020 Rule"). The use of

those regulations in the environmental review of this project led to an incomplete analysis, a failure to disclose key information, and an inadequate public engagement process, all of which harmed the Plaintiffs and their members. The illegal promulgation of the 2020 regulations by CEQ violated both the APA and NEPA.

7. Plaintiffs Defenders of Wildlife and Sierra Club (collectively, "the Conservation Groups") seek declaratory and injunctive relief to address these ongoing violations of federal law.

JURISDICTION AND VENUE

8. This action arises under the National Environmental Policy Act, 42 U.S.C. §§ 4321–4347, the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd–668ee, and the Administrative Procedure Act, 5 U.S.C. §§ 701–706.

9. This Court therefore has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (action to compel a federal officer to do his duty), and it may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201–2202. The Conservation Groups are entitled to bring this action pursuant to the APA, 5 U.S.C. § 702.

10. A challenge to CEQ's NEPA regulations is appropriate in the context of a specific project where a final decision under NEPA has threatened actual imminent harm to plaintiffs. *Wild Va. v. Council on Env't Quality*, 56 F.4th 281, 302 (4th Cir. 2022) (quoting concession from CEQ). Because the Service issued a final decision under the 2020 NEPA regulatory scheme that is threatening harm to the Conservation Groups, this Court has jurisdiction to review the Conservation Groups' claims regarding the illegality of the 2020 NEPA Rule.

11. The Conservation Groups are not required to wait until they have actually suffered an environmental injury before they may sue. Rather, "ripeness may be satisfied by a future injury, as long as that future injury is 'not dependent on future uncertainties.'" *Id.* (quoting *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013)). Because the Service has issued its final decision in its NEPA review authorizing the algaecide treatment to begin this summer, and the Department of Environmental Quality has authorized the algaecide treatment to begin June 1, there are no more future uncertainties, and this case is ripe for review.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) and (e)(1)(B) because a substantial part of the events or omissions giving rise to this claim occurred in this judicial district.

13. Venue is proper in this division because this matter relates to Mattamuskeet National Wildlife Refuge, which is located in Hyde County, North Carolina, and the contested decisions were primarily conducted by Refuge staff. Local Civil Rule 40.1(c)(1).

PARTIES AND STANDING

Plaintiffs

14. Plaintiff Defenders of Wildlife ("Defenders") is a national nonprofit membership organization founded in 1947. Defenders has more than 2 million members and supporters nationwide, including more than 8,000 members in North Carolina.

15. Defenders is dedicated to the protection and restoration of all native wild animals and plants in their natural communities, and the preservation of the habitats on which these species depend. Defenders advocates for innovative approaches to wildlife conservation that will help prevent species from becoming endangered, using education, litigation, research, legislation, and advocacy to defend wildlife and habitats. Headquartered in Washington, DC,

Defenders has regional and field offices around the country, including a regional office for the southeastern United States in Asheville, North Carolina. Defenders has a long history of advocating for the expansion and proper management of the National Wildlife Refuge System.

16. Defenders has members who live near, visit, recreate, photograph, participate in conservation efforts for, and otherwise use and enjoy Mattamuskeet National Wildlife Refuge and the resources present on the refuge, including the birds that may be harmed by the use of an algaecide that is toxic to birds on Lake Mattamuskeet.

17. For example, Defenders has a member who is a wildlife and nature photographer who enjoys visiting Mattamuskeet National Wildlife Refuge and observing the birds that live on the Refuge. The interests of this member and other members are threatened by the planned use of a toxic algaecide at Mattamuskeet National Wildlife Refuge, as sanctioned by the legally insufficient NEPA analysis underpinning the decision.

18. On behalf of its members, Defenders has been actively opposed to the Service's decision to allow the experimental use of a toxic algaecide at Mattamuskeet National Wildlife Refuge. Defenders participated in the NEPA process and submitted comments on the decision through counsel.

19. Defenders and its members were actively involved in the rulemaking process that led to CEQ's 2020 NEPA Rule.

20. On behalf of its members, Defenders joined detailed technical coalition comment letters on the Advanced Notice of Proposed Rulemaking and the Notice of Proposed Rulemaking for the 2020 NEPA Rule. Defenders also submitted its own technical comment letter focusing in particular on the impacts that the 2020 Rule would have in undermining Defenders' and the public's capacity to use the NEPA process to ensure federal agencies recognize and address

biodiversity loss. Defenders staff also participated in a meeting with CEQ to discuss the 2020 Rule and to raise these concerns.

21. Defenders subsequently participated as a plaintiff in a facial challenge to the 2020 NEPA rule, which challenged the rule for violating the APA because it was illegally promulgated and inconsistent with the NEPA statute. *Wild Va. v. Council on Env't Quality*, 56 F.4th 281, 303 (4th Cir. 2022).

22. The use of the illegally promulgated 2020 Rule in the NEPA review of the Mattamuskeet project harmed Defenders and its members.

23. Sierra Club is a nonprofit, grassroots organization founded in 1892 to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

24. Sierra Club has over 1.5 million current members and supporters across more than 60 chapters, including an especially active North Carolina Sierra Club chapter. Sierra Club has over 18,000 members in North Carolina.

25. Sierra Club has members who live near, visit, recreate, photograph, participate in conservation efforts for, and otherwise use and enjoy Mattamuskeet National Wildlife Refuge and the resources present on the refuge, including the birds that may be harmed by the use of a toxic algaecide on Lake Mattamuskeet.

26. For example, Sierra Club has members who are nature photographers and who enjoy visiting Mattamuskeet National Wildlife Refuge to capture images of the resident and migratory waterfowl and the natural splendor of the lake. The interests of these and other

members are threatened by the planned use of a toxic algaecide at Mattamuskeet National Wildlife Refuge, as sanctioned by the legally insufficient NEPA analysis underpinning the decision.

27. On behalf of its members, Sierra Club has been actively opposed to the Service's decision to allow the experimental use of an algaecide toxic to birds at Mattamuskeet National Wildlife Refuge. Sierra Club participated in the NEPA process and submitted comments on the decision through counsel. Additionally, more than 2,000 members and supporters provided individual comments on the proposal to the Service.

28. On behalf of its members, Sierra Club and its members were actively involved in the rulemaking process that led to CEQ's 2020 NEPA Rule.

29. Sierra Club and its members joined detailed technical coalition comment letters on the Advanced Notice of Proposed Rulemaking and the Notice of Proposed Rulemaking for the 2020 NEPA Rule outlining concerns that the rule would result in harmful environmental outcomes and would limit public participation in important decisions that affect the environment. Sierra Club and its members participated in public hearings and participated in a meeting with CEQ to discuss the 2020 Rule and raise these concerns.

30. Sierra Club subsequently participated as a plaintiff in a facial challenge to the 2020 NEPA rule, which challenged the rule for violating the APA because it was illegally promulgated and inconsistent with the NEPA statute. *Env't Just. Health All. v. Council on Env't Quality*, No. 1:20-cv-06143-JLR (S.D.N.Y. 2020). That case is still pending in the United States District Court for the Southern District of New York.

31. The use of the illegally promulgated 2020 regulations in the NEPA review of the Mattamuskeet project harmed Sierra Club and its members.

Defendants

32. Defendant United States Fish and Wildlife Service is a federal agency within the Department of the Interior. The Service is responsible for administration of the National Wildlife Refuge System.

33. The Service prepared the Final Environmental Assessment ("EA") and Finding of No Significant Impact challenged in this action and was responsible for ensuring the agency's decisionmaking complied with NEPA, the Refuge Act, and other laws.

34. Defendant Martha Williams is the Director of the Fish and Wildlife Service and is sued in her official capacity.

35. Director Williams had the final authority over the Service's preparation and approval of the decisions challenged in this action, including the Final EA and Finding of No Significant Impact and the Service's compatibility determinations for wildlife refuges.

36. Defendant Michael Oetker is the Southeast Regional Director of the Fish and Wildlife Service and is sued in his official capacity. The Southeast Region includes North Carolina and Mattamuskeet National Wildlife Refuge. As such, he has decisionmaking authority and is responsible for ensuring compliance with federal law related to the NEPA and Refuge Act reviews at issue in this case.

37. Defendant Council on Environmental Quality is the federal agency responsible for overseeing the implementation of NEPA and promulgating regulations that all federal agencies must follow in complying with NEPA. CEQ was established by NEPA as an agency within the Executive Office of the President, with the duty to "develop . . . national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation." 42 U.S.C. § 4344(4).

38. Defendant CEQ issued the regulations used by the Service to conduct the NEPA review that is challenged in this action.

39. Defendant Brenda Mallory, Chair of CEQ, is the highest-ranking official in CEQ. She replaced Mary Neumeyer, who signed the issuance of the 2020 NEPA regulations. Chair Mallory was responsible for the issuance of more recent NEPA regulations. Plaintiffs sue Chairman Mallory in her official capacity.

LEGAL BACKGROUND

Refuge Act

40. The National Wildlife Refuge System is managed pursuant to the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd–668ee.

41. The primary mission of the National Wildlife Refuge System is "to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." 16 U.S.C. § 668dd(a)(2).

42. The Refuge Act requires the Service, "[i]n administering the [Refuge] System," to "provide for the conservation of fish, wildlife, and plants, and their habitats within the System." *Id*. § 668dd(a)(4), (a)(4)(A).

43. The term "conservation" means "to sustain and, where appropriate, restore and enhance, healthy populations of fish, wildlife, and plants utilizing, in accordance with applicable Federal and State laws, methods and procedures associated with modern scientific resource programs." *Id.* § 668ee(4).

44. The Refuge Act further asserts that the agency must "ensure that the mission of the [Refuge] System . . . and the purposes of each refuge are carried out." *Id.* § 668dd(a)(4), (a)(4)(D).

45. According to the Refuge Act, "[t]he term[] . . . 'purposes of each refuge' mean[s] the purposes specified in or derived from the law, proclamation, executive order, agreement, public land order, donation document, or administrative memorandum establishing, authorizing, or expanding a refuge, refuge unit, or refuge subunit." *Id.* § 668ee(10).

46. Under subsection (d) of the Refuge Act, the Service may "permit the use of any area within the System for any purpose . . . whenever [it] determines that such uses are compatible with the major purposes for which such areas were established." *Id.* § 668dd(d)(1)(A). However, with limited exceptions, the Service cannot "permit a new use . . . or expand, renew, or extend an existing use" without first determining whether that use is compatible. *Id.* § 668dd(d)(3)(A)(i). For a use to be "compatible" it must be "a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the [Service], will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge." *Id.* § 668ee(1).

47. Refuge Act regulations provide that "all areas included in the National Wildlife Refuge System are closed to public access until and unless [Service officials] open the area for a use or uses in accordance with" the Refuge Act. 50 C.F.R. § 25.21(a). The regulations further explain that a refuge may be opened for a particular use only if that use is a compatible use. *Id.* § 25.21(b).

48. To decide whether a use would be compatible, the Service must engage in a multi-factored analysis called a "compatibility determination." Examples of requisite

considerations during the analysis include the impacts of the use on the refuge's purpose, whether the use is a priority public use, and where, when, and how the use would be conducted. 50 C.F.R. § 26.41(a)(6)(i)–(iv), (a)(8). Compatibility determinations for a refuge must be signed by the Refuge Manager, along with the Regional Chief of the Refuge System. *Id.* § 25.12(a).

49. Pursuant to Refuge Act regulations, no one may conduct commercial activities on a refuge unless they are issued a permit by the Service, often referred to as a "special use permit." *Id*. § 27.97. Refuge Act regulations also assert that "[d]isturbing, injuring, spearing, poisoning, destroying, [or] collecting . . . any plant or animal on any national wildlife refuge is prohibited except by special permit unless otherwise permitted." *Id.* § 27.51(a).

National Environmental Policy Act

50. The purpose of NEPA is "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment." 42 U.S.C. § 4321.

51. NEPA demands a federal agency use "all practicable means and measures" to thoughtfully analyze the proposed action and inform the agency's decision-making. *Id.* §§ 4331(a), 4332.

52. To that end, NEPA requires federal agencies to "study, develop, and describe appropriate alternatives" to the agency's proposed course of action. *Id.*§ 4332(2)(H); *see id.* § 4332(2)(C)(iii), (2)(F).

53. In turn, NEPA also requires agencies to disclose "reasonably foreseeable environmental effects of the proposed action," including "any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented." *Id.* § 4332(2)(C)(i)–(ii).

54. NEPA requires that agencies "make use of reliable data and resources" and "ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document." *Id.* § 4332(D)–(E).

55. NEPA requires that federal agencies prepare a "detailed" and thorough Environmental Impact Statement ("EIS") before undertaking a major action that would significantly affect the quality of the human environment. *Id.* §§ 4332(C), 4336.

56. The EIS requirement serves both internal and external functions. Internally, preparing an EIS ensures that the agency takes a hard look at the direct, indirect, and cumulative environmental impacts of the proposed action. It also guarantees that the agency will consider a range of reasonable alternatives to accomplish the underlying goals of the proposed action—including options that may have fewer adverse impacts on the environment—before deciding whether to undertake the project as originally proposed. The alternatives considered must include a "no action" alternative. Externally, the EIS provides detailed public information about the proposed action, its impacts, and reasonable alternatives, so that the public and other government agencies may be informed participants in the decision-making process.

57. An agency prepares an environmental assessment if the proposed action "does not have a reasonably foreseeable significant effect on the human environment, or if the significance of such effect is unknown . . . ." 42 U.S.C. § 4336(b)(2). The environmental assessment must "set forth the basis of such agency's finding of no significant impact or determination that an environmental impact statement is necessary." *Id.*

58. CEQ promulgates regulations to implement the purposes of the NEPA statute. The history and current status of those regulations is recited below at ⁋⁋ 145-220.

59. CEQ's regulations are binding on all federal agencies. 40 C.F.R. §§ 1500.2, 1500.3. Each Federal agency may develop its own regulations to implement CEQ's regulations for the purposes of their particular agency. 40 C.F.R. § 1507.3. These agency-specific regulations act in tandem with the CEQ regulations.

Administrative Procedure Act

60. The APA, 5 U.S.C. § 551 *et seq.*, governs the procedural requirements for federal agency decisionmaking. The APA provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.* § 702.

61. Congress enacted the APA to ensure stability in agency action by mandating reasoned decisionmaking and to guard against agencies' pursuit of a political agenda without adherence to legal process. *See N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring) (noting the APA prohibits policy change based on "political winds and currents" without adherence to "law and legal process"); *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950) (describing the APA as "a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices," which "create[s] safeguards even narrower than the constitutional ones [] against arbitrary" agency action).

62. The APA directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of the procedure required by law." 5 U.S.C.

§ 706(2)(A), (C), (D). The APA further directs a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1).

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

64. When reversing a prior policy that "has engendered serious reliance interests," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). This requires a "reasoned explanation . . . for disregarding the facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 516. Agencies are "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy interests." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 33 (2020) (citations omitted).

65. The Service's Final EA and Finding of No Significant Impact is a final agency action within the meaning of the APA and accordingly is judicially reviewable under § 704 of the APA. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020–23 (D.C. Cir.2000).

66. The Service's approval of an experimental toxic algaecide treatment at Lake Mattamuskeet, without completing a compatibility determination, is an agency action that is arbitrary and capricious and not in accordance with law, or that is unlawfully withheld, within

the meaning of the APA. Accordingly, the Service's action is judicially reviewable under § 704 of the APA.

67. The NEPA rule issued by CEQ in 2020 was a final agency action within the meaning of the APA and accordingly is judicially reviewable under § 704 of the APA.

FACTUAL BACKGROUND

Mattamuskeet National Wildlife Refuge

68. Mattamuskeet National Wildlife Refuge in eastern North Carolina was established in 1934 to serve as a sanctuary for migratory birds.

69. Lake Mattamuskeet is the heart of the Refuge. The lake is the largest natural lake in North Carolina, spanning more than 40,000 acres.

70. Mattamuskeet National Wildlife Refuge provides important habitat for a variety of bird species. More than 250 different bird species use the Refuge as residents or regular seasonal visitors. Hundreds of thousands of ducks, geese, and swans flock to the lake in the winter.

71. The Refuge and its surrounding waters are also inhabited by a variety of other wildlife, including 48 species of fish, at least 48 species of reptiles and amphibians, and 40 species of mammals.

72. Since 1991, submerged aquatic vegetation in Lake Mattamuskeet has significantly decreased for several reasons, including the introduction and proliferation of invasive common carp to the lake's ecosystem. Common carp uproot established submerged aquatic vegetation beds during feeding and in turn re-suspend sediments, increase turbidity, and limit the establishment of new submerged aquatic vegetation.

73. Runoff and nutrient pollution have also impaired water quality in Lake Mattamuskeet, including by increasing turbidity levels.

74. As a consequence of Lake Mattamuskeet's poor water quality, blooms of blue-green algae, also known as cyanobacteria, have increased in recent years.

75. In recognition of the need to restore Lake Mattamuskeet's water quality and submerged aquatic vegetation, Hyde County, the North Carolina Wildlife Resources Commission, and the Service partnered in 2017 and contracted the North Carolina Coastal Federation to create the Lake Mattamuskeet Watershed Restoration Plan. The Plan was finalized in November 2018 and formally approved by the North Carolina Department of Environmental Quality in 2019.

76. As explained by the Service, the plan "identified as priority actions necessary for successful restoration of the lake: a reduction in carp biomass and a reduction in external nutrient loading from runoff." U.S. Fish & Wildlife Serv., *Lake Mattamuskeet Aquatic Grass Restoration*, https://www.fws.gov/project/lake-mattamuskeet-aquatic-grass-restoration#latest-news, (last visited May 17, 2024).

77. None of the Lake Mattamuskeet Watershed Restoration Plan's Objectives or underlying actions include algaecide treatments.

78. The Lake Mattamuskeet Watershed Restoration Plan stakeholder group meets regularly to advance the goals of the plan.

79. In 2020, the Mattamuskeet Technical Working Group—a group comprised of staff from the Service and North Carolina Wildlife Resources Commission—received a $1 million grant to be awarded in Fiscal Year 2023 for the removal of carp from Lake Mattamuskeet.

80. A bid solicitation for the award was posted in May of 2023, and a contract award was made September 22, 2023. The contract was for the removal of approximately 1 million pounds of carp from Lake Mattamuskeet. The contractor began removing carp in January 2024.

81. In May 2023, the Service announced that $27.5 million in funding under the Inflation Reduction Act had been allocated for projects to restore the Albemarle-Pamlico Sound region. In April 2024, the Service identified that the funding would support, among other projects, efforts "focus[ed] on improving Lake Mattamuskeet water quality and water management capability by re-directing water runoff."

82. In October 2023, the North Carolina Coastal Federation received more than $16 million to implement actions to enhance water quality of Lake Mattamuskeet and the surrounding estuary over the next five years.

83. The Comprehensive Conservation Plan for Mattamuskeet National Wildlife Refuge does not include blue-green algae treatment as a goal, objective, or strategy of the Plan.

84. The Habitat Management Plan for Mattamuskeet National Wildlife Refuge does not identify blue-green algae treatment as a management goal, objective, or strategy.

Experimental Toxic Algaecide Plans

85. BlueGreen Water Technologies ("BlueGreen") was incorporated in 2014 and manufactures three different "Lake Guard" products—Lake Guard Blue (a copper sulfate-based algaecide), Lake Guard Oxy (a sodium percarbonate-based algaecide), and Lake Guard Dew (an aluminum sulfate-based flocculant).

86. BlueGreen's products are formulated with a propriety encapsulating agent that allows them to float and time-release their active ingredient at the surface of the water, distinguishing them from similar algaecides on the market.

87. BlueGreen describes Lake Guard Oxy, the product that will be used at Lake Mattamuskeet, as being composed of "98% (w/w) sodium percarbonate granules that releases hydrogen peroxide (H2O2) as its active ingredient, and 2% (w/w) of an inert, food-grade, biodegradable encapsulating agent."

88. Like other sodium percarbonate-based algaecides, the Environmental Protection Agency label for Lake Guard Oxy warns that the product is "toxic to birds."

89. Two other sodium percarbonate-based algaecides on the market carry labels warning about the corrosive effects of the products on bird beaks. Phycomycin SCP's label warns that "undissolved particles of this product may be corrosive to the beaks of birds," and Pak 27 warns that "[u]ndissolved particles of sodium carbonate peroxyhydrate may be corrosive to beaks of birds."

90. Upon information and belief, since at least 2019, BlueGreen has retained registered lobbyists in one or more U.S. states, including Florida and North Carolina.

91. In 2020, the Florida legislature appropriated $10 million in funding for "innovative solutions" to harmful algal blooms, of which $1.7 million was awarded as a grant to evaluate the application of Lake Guard Oxy to prevent and treat algal blooms in Lake Minneola. Lake Minneola received 14 treatments of Lake Guard Oxy during the study, which concluded in May 2021.

92. Florida then awarded a second contract of nearly $1 million to BlueGreen to apply Lake Guard Oxy to any discharges of blue-green algae from Lake Okeechobee to the St. Lucie and Caloosahatchee estuaries.

93. Despite applying six tons of Lake Guard Oxy to the Caloosahatchee River in 2021 under this state-funded project, cyanobacteria toxins remained so high that the local health

department urged people and their pets to stay out of the river. Lake Okeechobee and the Caloosahatchee still struggle with severe algal blooms years later.

94. On November 18, 2021, the North Carolina General Assembly directed an appropriation of funds for a selected vendor to conduct an experimental in situ treatment "to remediate and prevent cyanobacterial harmful algal blooms in the lakes and reservoirs of North Carolina." The bill directed the North Carolina Policy Collaboratory at the University of North Carolina at Chapel Hill ("Collaboratory") to "evaluate the effectiveness and efficacy" of the approved treatment and report its results back to the legislature. 139 Session Law 2021-180, Senate Bill 105, at Part II, Section 8.18.

95. The bill specified that the vendor selected to conduct the experimental treatment should meet eleven criteria. These criteria included specific requirements that "preference must be given to products that float on the surface of the water and do not sink immediately to the bottom of the water column," "preference must be given to products that are distributed autonomously across the water body after a localized application," and " preference must be given to products with a time release mechanism that applies constant and prolonged oxidative stress of the cyanobacteria triggered by the programmed cell death signaling cascade resulting in their collapse." *Id.*

96. On April 1, 2022, the Collaboratory issued an invitation for algaecide vendors to bid on the contract to conduct the algal treatment study, with bids due by May 2, 2022.

97. BlueGreen and one other company—SePro—both submitted bids for the contract. SePro manufactures PAK 27 (USEPA registration number 68660-9-67690) and Phycomycin SCA (USEPA registration number 67690-105), which are sodium percarbonate-based algaecides

that share their active ingredient with Lake Guard Oxy but lack BlueGreen's encapsulating agent.

98. SePro proposed to treat cyanobacteria blooms in the Chowan River with PAK 27 at an estimated cost of $159.04 per treatment acre (25 pounds of product) or about $160,000 total.

99. BlueGreen proposed to provide 45 tons of Lake Guard Oxy at a total cost of $1,197,00 as part of a nearly $4.5 million bid.

100. In July 2022, the Collaboratory awarded a contract of $5 million for the study, with BlueGreen as the selected vendor. The Collaboratory ranked SePro's bid lower than BlueGreen's bid in its fulfillment of the specific preferred criteria that products: (1) float on the surface of the water, (2) are distributed autonomously across the waterbody after localized application, and (3) have a time release mechanism that applies constant and prolonged oxidative stress to cyanobacteria.

101. After BlueGreen received the contract in North Carolina in July 2022, BlueGreen and the Collaboratory began discussions of where the pilot project should take place. As soon as August 2022, the parties honed in on Lake Mattamuskeet as a potential study site, despite initial emails stating that the ideal site would be 100 to 1,000 acres in size and not heavily recreated or fished.

102. By September 1, 2022, researchers from the Collaboratory had contacted the Mattamuskeet Refuge Manager and Refuge Biologist about the proposed project.

103. Upon information and belief, Lake Guard Oxy has never been used on a National Wildlife Refuge.

104. The Service issued a Special Use Permit, Permit No. R23-001, to BlueGreen on December 9, 2022, for the deployment of water quality sensors and monitoring to occur in preparation for applying the algaecide project, with a permit term of December 12, 2022 to December 31, 2024.

105. In January 2023, BlueGreen Water Technologies and the UNC Collaboratory deployed 38 water quality sensors at Lake Mattamuskeet to collect background water quality data against which the impacts of Lake Guard Oxy will be measured. The Service and BlueGreen referred to this monitoring phase as "Phase 1" of the algaecide treatment project.

106. Monitoring data from the water quality sensors will be used to inform the algaecide treatments that occur during "Phase 2"—the treatment phase—of the project.

107. In January 2023, the Service submitted its required Pesticide Use Proposal, an internal Service requirement prior to using a pesticide, to authorize the Refuge to use Lake Guard Oxy at Mattamuskeet National Wildlife Refuge.

108. The Service also completed its Endangered Species Act Section 7 consultation reviewing the effects of the proposed pesticide use on endangered or threatened species in January 2023 in connection with the Pesticide Use Proposal. The consultation paperwork asked for consultation for the time period of 2023 through 2026 "during which the described chemical usage is not expected to change," and explained "we plan to use the pesticide Lake Guard Oxy . . . in Lake Mattamuskeet."

109. On February 8, 2023, the Service issued a Special Use Permit, Permit No. R23-003, to the UNC researchers involved with monitoring and evaluating the project for the purpose of "assess[ing] the efficacy of treatments by Bluegreen Water Technologies to reduce levels of

harmful cyanobacteria in Lake Mattamuskeet" during the covered time period of February 2023 to December 2024.

The Service's Toxic Algaecide NEPA Process

110. The Service initiated its NEPA review process according to the NEPA regulations in effect in 2023, which consisted of CEQ's 2020 Rule, slightly modified by a 2022 rulemaking.

111. On September 13, 2023, the Service issued a Draft Environmental Assessment ("Draft EA") "proposing to conduct a trial treatment of cyanobacteria, also known as blue-green algae, using a sodium-percarbonate-based algaecide, Lake Guard® Oxy, in Lake Mattamuskeet." Draft EA at 3.

112. The Draft EA included a broad stated purpose "to treat cyanobacteria (i.e., trigger a population collapse of cyanobacteria)" and need "to evaluate the effectiveness of a cyanobacteria treatment and the role it may play in restoring the ecosystem integrity of the lake."

113. The Draft EA contained only two alternatives: Alternative A, as the no action alternative, and Alternative B, which consisted of a trial treatment of cyanobacteria using Lake Guard Oxy in locations where the water sensors had been deployed by BlueGreen and the UNC researchers.

114. The Draft EA did not include any other alternatives considered by the Service.

115. The Draft EA included in its description of Alternative B "extensive monitoring efforts via 38 autonomous probes to capture" water quality data which "would be used to create a BlueGreen Intelligence Map, a proprietary mapping tool from BlueGreen." Using those "monitoring efforts, the treatment would be customized to fit Lake Mattamuskeet's unique characteristics . . . ." Draft EA at 8.

116. Under Alternative B, "the experimental treatment would occur in four bays," and "[e]ach of the bays would have another similar bay to act as a control." Draft EA at 8.

117. The Draft EA did not specify the timing or method of application of the experimental treatment.

118. The Draft EA noted that the Environmental Protection Agency-required label for Lake Guard Oxy states that the product is toxic to birds. Draft EA 11−12.

119. The Southern Environmental Law Center commented on behalf of the Conservation Groups that the Draft EA put forth an unreasonably limited range of alternatives, contained a faulty impacts analysis that failed to use the best scientific information, and constituted predetermined decisionmaking. The comments urged the Service to prepare a full EIS to adequately analyze these and other impacts, as required by NEPA.

120. More than 2,000 Sierra Club supporters and members provided individual comments on the Draft EA.

121. The Service did not consider the individual Sierra Club supporters' and members' comments as received prior to the close of the public comment period. As a result, Sierra Club, through counsel, furnished the collected comments to the Fish and Wildlife Service via email on December 15, 2023.

The Service's Finding of No Significant Impact and Final EA

122. On March 28, 2024, relying on the 2020 NEPA regulations as slightly modified by a 2022 rulemaking, the Service issued a Final EA and Finding of No Significant Impact regarding the experimental algaecide treatment at Mattamuskeet National Wildlife Refuge.

123. The Service declined to issue a full EIS to study the full impact of the project and to analyze alternative solutions.

124. Like the Draft EA, the Final EA includes only a no action alternative and the proposed action of treatment in four bays of Lake Mattamuskeet using Lake Guard Oxy.

125. The Final EA modifies the proposed action by specifying a treatment window of April 1 through October 31 during a 19-month period, stating that monitoring will be conducted by the Service during daylight hours until the product is dissolved. The Final EA also states that the Service would haze—or disturb to the point of leaving the area—any birds or other wildlife that move into an area where undissolved product is present.

126. The Final EA explains that the UNC researchers "will be responsible for monitoring the lake's water quality and effects of the proposed treatment," including several water quality parameters to assess the effectiveness of the algaecide in controlling blue-green algae.

127. As in the Draft EA, the Final EA states that BlueGreen would monitor the blue-green algal blooms using the previously deployed water sensors and use information from those water sensors to inform its treatment plans.

128. The Final EA states that "Service staff [will] be primarily responsible for monitoring wildlife response during and immediately following treatment," and ensuring "no unreasonable harm to wildlife." The Final EA also states that a total of only five Service staff will be available for monitoring activities and project guidance, and the Final EA does not explain how these limited Service staff will monitor 400 acres of treatment area and implement the hazing activities mentioned above.

129. The Final EA does not discuss how effective the wildlife monitoring and hazing efforts will be to prevent harm to birds from the toxic algaecide treatment.

130. The Final EA does not disclose any negative effects of hazing on birds or other wildlife.

131. The Final EA does not discuss the species of birds likely to be present during the treatment period or the potential impacts to those birds.

132. For example, several wading bird species such as herons and egrets commonly inhabit the refuge during the April to October timeframe. Some species of birds such as Canada geese and wood ducks breed on the Refuge and raise their young during that timeframe.

133. The Final EA references recent acute oral toxicity testing completed on mallards and bobwhite quail, noting that the tests on mallards had to be suspended because the mallards regurgitated the product.

134. The Final EA does not explain what effects the Service expects Lake Guard Oxy may have on any of the many duck and other similar species that use Lake Mattamuskeet if they come into contact with or ingest the product.

135. The Final EA reports that the acute oral toxicity testing on Lake Guard Oxy found a median lethal dose for northern bobwhite quail to be 2472 milligrams active ingredient per kilogram of body weight. The Final EA states that this translates to approximately 539 milligrams—less than a gram—of the active ingredient of Lake Guard Oxy being lethal to an average-sized northern bobwhite quail.

136. The Final EA did not discuss how this lethal dose level translates to lethal doses for species of birds present at Lake Mattamuskeet.

137. The Final EA did not disclose any sublethal effects observed in the toxicity testing.

138. The Final EA states that the Service would limit the application rate to 50 pounds of product per acre, which would equate to a rate of approximately 510 mg per square foot—just below the median lethal dose rate for bobwhite quail in the toxicity testing.

139. The Final EA states that a "treatment event is defined as 2 weeks in duration" and the maximum number of treatments could be two per month, for a total possible maximum of 14 treatments between April and October 2024.

140. The Final EA also inconsistently discusses potential benefits beyond the geographic or temporal scope of the pilot project. Without any analysis, the Final EA makes the conclusory assumption that the pilot project will be effective and provide long-term benefits to Lake Matatmuskeet, while acknowledging elsewhere that "the efficacy of the algaecide is typically short-term."

141. The Final EA also acknowledges the Service's limited involvement and control in the development of the proposed action, stating "[s]ome details of the proposed pilot study, such as the product to be used, were determined by the project team or through contracting procedures prior to the Services' involvement."

142. The Final EA states that only 230 comments were received.

143. The Final EA did not count or consider the more than 2,000 comments submitted by individual Sierra Club members.

144. In its responses to comments about the deficiencies in the NEPA process, the Final EA cites to specific provisions of the 2020 Rule, including 40 C.F.R. § 1501.3 regarding when an agency should complete an EIS.

The 2020 CEQ NEPA Rulemaking

145. The NEPA analysis for Lake Mattamuskeet was conducted pursuant to the NEPA regulations that were operative at the time. These consisted of regulations promulgated by CEQ in 2020 (the 2020 Rule) modified slightly by changes in 2022. A history of the rulemaking that led to that Rule and details of its content follows.

History of NEPA

146. In 1969, Congress passed the National Environmental Policy Act, which created "action-forcing procedures" that "direct[] all agencies to assure consideration of the environmental impact of their actions in decision-making." 115 Cong. Rec. 40416 (1969). The explicit purpose of NEPA is to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man . . . ." 42 U.S.C. § 4321. Then, as now, NEPA represents a commitment by the federal government that it "will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth." *Id.*

147. NEPA effectuates this action-forcing purpose and commitment through procedural requirements that ensure fully informed federal decisions and provide transparency to the public regarding the federal decisionmaking process. *See* 42 U.S.C. § 4332.

148. In 1978, CEQ promulgated regulations that implemented NEPA's provisions and were binding on other agencies. Implementation of Procedural Provisions, 43 Fed. Reg. 55,978, 55,978 (Nov. 29, 1978). This was done in response to the "inconsistent agency practices and interpretations of the law" that had sprung up with the "lack of a uniform, government-wide approach to implementing NEPA." *Id*. There was a "broad consensus" and great "degree of unanimity" that the NEPA process needed reform. *Id*. at 55,980. CEQ was tasked with the development of regulations to make the NEPA process "more useful to decisionmakers and the

public" and to require that impact statements be "supported by evidence that agencies have made the necessary environmental analyses." Exec. Order No. 11991, 42 Fed. Reg. 26,967 (1977).

149. Individual federal agencies can promulgate their own NEPA regulations that can add detail on particular procedures. But CEQ's regulations in force at the time of an agency's action are binding on that agency, irrespective of whether it has its own additional regulations. For example, the Department of the Interior's NEPA regulations, 43 C.F.R. §§ 46.10–.450, establish procedures "to use for compliance with . . . [t]he Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA." *Id.* § 46.10(a).

150. Until 2020, CEQ made only one narrow amendment to the 1978 regulations. National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 Fed. Reg. 15,618, 15,619 (April 25, 1986). In making the single narrow change in 1986, CEQ noted that there was "no broad support for [further] amendment to the regulations." *Id*. at 15,619.

Advance Notice of 2020 NEPA Rulemaking

151. Despite the statute's importance and acceptance as a key safeguard for good government decisionmaking, when the Trump Administration came into office in 2017, it began to call for major cuts to the budgets of agencies that oversee and implement NEPA. The Administration implemented multiple steps to dismantle the statute, including, most significantly, a rulemaking to completely overhaul the longstanding regulations.

152. On June 20, 2018, CEQ issued an Advance Notice of Proposed Rulemaking, signaling its intent to completely rewrite the NEPA regulations. Advance Notice of Proposed Rulemaking: Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591 (June 20, 2018) ("ANPRM").

153. CEQ received over 12,500 comments in response to the ANPRM—the majority of which supported leaving the existing regulations largely intact. Notice of Proposed Rulemaking: Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684, 1,691 (Jan. 10, 2020) ("NPRM").

154. Defenders of Wildlife, Sierra Club, and their counsel submitted substantial comments in response to this ANPRM. These comments addressed a range of concerns and engaged with CEQ's questions. First and foremost, the comments noted the efficacy—but ultimate underutilization—of the existing framework and emphasized the unnecessary harms that would result from a complete rewrite of the NEPA regulations. The comments noted that CEQ already had the necessary mechanisms to bring about its desired outcomes without changing the regulations—namely by following through on the agency's own recommendations such as strengthening the alternatives analysis and involving the public earlier in the process. In light of the viable and more effective alternative of refocusing CEQ oversight on the existing NEPA process, the Conservation Groups and their counsel insisted that CEQ provide data and analysis to justify any changes to the regulations.

Notice of Proposed 2020 NEPA Rulemaking

155. On January 10, 2020, CEQ issued a Notice of Proposed Rulemaking ("NPRM") for the new NEPA regulations. 85 Fed. Reg. 1,684 (Jan. 10, 2020). In the NPRM, CEQ unveiled its proposal to rewrite the long-standing NEPA regulations. *Id.* at 1,712–30.

156. In the preamble to the draft regulations, CEQ failed to meaningfully address the comments that it received in response to the ANPRM. While CEQ repeatedly referenced comments that supported the agency's deregulatory agenda, the agency did not justify its proposal in light of the substantive comments submitted in opposition to a regulatory overhaul,

such as those submitted by the Conservation Groups and their counsel. For example, CEQ did not respond to commenters' contention that drastic regulatory changes would cause delay and increase costs by unsettling decades' worth of law and practice. Instead, the agency selectively responded to the comments that supported its position and failed to address the serious concerns raised.

157. CEQ later admitted that it did not respond to comments on the ANPRM, stating that it was "under no obligation to do so." As with the ANPRM, the NPRM provided for inadequate public involvement in the next steps of the rulemaking process. CEQ granted the public just 60 days to comment on the radically rewritten draft regulations. 85 Fed. Reg. at 1,684 (Jan. 10, 2020). CEQ failed to respond to comments from the public interest community seeking an extension.

158. Once again, the public responded with an overwhelming show of interest and concern, despite CEQ's limited allowances for public participation. In the two-month comment window, CEQ received more than 1.1 million responses from the public. 14 U.S. senators sent a letter to CEQ commenting on the substance of the NPRM. These senators raised concerns that the proposal would severely undercut NEPA's bipartisan aims—ultimately harming the environment, human health, and the economy. The senators also voiced the common sentiment that undertaking this regulatory overhaul would be counterproductive as it would unsettle and ignore 40 years of case law.

159. Among the public commenters on the NPRM were Defenders of Wildlife, Sierra Club, and their counsel who collectively submitted five detailed letters with numerous attachments. One comment letter was written by counsel for the Conservation Groups on behalf of almost 100 environmental organizations; another letter was written on behalf of 328

environmental groups from across the country. These letters extensively detailed the flaws of the proposed rule, provided examples of where NEPA had been working well, discussed the ways that NEPA was being relied upon, and proposed alternative, less extreme pathways to modernization. In addition, Defenders submitted their own comments detailing the impact the proposed rule would have on wildlife. Sierra Club signed two additional letters, one of which focused on the impact the rule would have on environmental justice, and the second of which focused on impacts specific to the ocean environment.

160. The comment letters all began by emphasizing the specific importance of NEPA as a disclosure and action-forcing tool and the unique harms that would accompany the proposed rewrite of the NEPA regulations. The comments pointed out the many flaws with the proposed rulemaking—both procedural and substantive. Regarding the procedural flaws, the comments specifically drew attention to the lack of public participation, especially when compared to the original consensus-building approach used by CEQ in promulgating the initial 1978 regulations. Specifically of concern were the vague questions presented by the ANPRM, the inadequate length of the comment periods, CEQ's failure to respond in a timely manner to public requests for an extension of the NPRM public comment period, and ineffectual public hearings.

161. Further, the comments made substantive critiques, pointing to the lack of legitimate justification for the proposed rules. As the comments explained, the proffered reasoning for the regulations—minimizing delays and improving efficiency—did not support the proposed rules, which looked set to create chaos and more project delay, not less.

162. The comments pointed to specific reports from the Congressional Research Service, which concluded that NEPA is not a primary or major cause of project delay. Further, the comments provided extensive details on specific projects, establishing that the NEPA process

worked well in those cases and any delays were not due to NEPA. The comments explained that efficiency and timeliness would actually be hindered by the proposed rules, due in large part to the uncertainty that would inevitably follow from unsettling such a long-established legal framework.

163. The comments further provided examples and evidence showing that the existing NEPA regulations have led to measurable environmental, economic and societal improvements, where the information produced or informed public comments received during the NEPA process have persuaded the decisionmaker to modify or abandon harmful proposals, or pick better, more resilient alternatives.

164. Concerned about the effects that a wholesale repeal and replacement would have on the stability and efficiency of the NEPA process, the comments suggested a series of less drastic, yet more effective, alternatives. Specifically, commenters suggested that CEQ should review and effectively implement the wealth of guidance documents it had issued in the preceding decades. These existing guidance documents directly address all the concerns purportedly motivating CEQ's rulemaking. Thus, instead of promulgating entirely new regulations, commenters urged CEQ to utilize its oversight of the NEPA process by taking advantage of the existing framework.

165. Similarly, commenters suggested that CEQ provide more updated guidance to agencies, again pointing out that updating the guidance while leaving the regulations in place would result in a more efficient and effective system.

166. Indeed, either of these options—increasing oversight and funding to implement the existing framework and/or issuing new guidance documents—would have been entirely consistent with CEQ's stated justification for the rulemaking, Executive Order 13807. All that

Executive Order 13807 called for was "an initial list of actions" to "enhance and modernize" environmental review, including "issuing such regulations, guidance, and directives as CEQ may deem necessary . . . ." Exec. Order 13807, 82 Fed. Reg. 40,463, 40,467 (Aug. 24, 2017). Thus, the Executive Order did not sufficiently justify CEQ's dismissal of non-regulatory options, and it left ample room for CEQ to adopt the more efficient and effective alternatives suggested in the comments. Similarly, recommending that funding for NEPA staff be increased would have been consistent with CEQ's responsibility to make policy recommendations to the President. 42 U.S.C. § 4344. CEQ, however, failed to address these suggested alternatives in any form.

167. The comments also pointed out that many parties relied on the vast and largely consistent body of case law that developed around the 1978 NEPA regulations. Federal agencies and private applicants relied on the stable interpretations created in order to confidently plan and undertake projects. Moreover, federal agencies tasked with assembling NEPA documents developed effective practices for reviewing environmental impacts based on the prior regulations. Concerned citizens and environmental advocates, including members of the Conservation Groups, relied on the prior regulations to provide government transparency, a wealth of data, and an opportunity to make their voices heard, and to help them in their missions to prevent environmental harm. States had long relied on the prior regulations to craft their own state environmental policy acts. Without the federal backstop, there was the potential that these state regulatory schemes would be impaired and incomplete. CEQ did not study or consider these reliance interests.

168. The comments also critiqued specific sections of the proposed rules, noting both their illegality and negative practical effects. The comments specified how the proposed rules were inconsistent with both the plain language and intent of the underlying statute. For example:

Context and Intensity Factors

169. Commenters explained that the proposal to eliminate the longstanding context and intensity factors that have long been used to determine "significance" and thus the need for an Environmental Impact Statement, would lead to uncertainty, confusion and less robust environmental review. Specifically, commenters stated that if the goal of the rulemaking "includes efficiency, these proposed changes are about the most unproductive measures imaginable."

170. Commenters noted that "[t]he question of whether a proposed action has 'significant impacts' is the single most common inquiry in the context of NEPA compliance. Commenters noted that CEQ's proposal to remove clear direction via context and intensity factors and substitute poorly drafted, inadequate text was irresponsible. They further noted that agencies at all levels of government and the public at large had relied on the longstanding context and intensity factors to assess significance and used them systematically as a roadmap to evaluate a proposed action.

171. Commenters noted that in its preamble, CEQ failed to even recognize, let alone justify, this massive departure from common practice.

172. Commenters further noted that the removal of the context and intensity factors would likely lead agencies to fail to study and disclose impacts to wildlife and habitat.

Alternatives Analysis

173. Commenters discussed at length how changes to the alternatives analysis would result in less informed, less thoughtful decisionmaking. The commenters provided examples of where a robust review and disclosure of different alternative options had allowed the public to advocate at different levels of government for alternatives that were less environmentally

harmful. Such alternatives were generally also less expensive and thus saved significant taxpayer money.

174. Specifically, commenters discussed how changes to remove the alternatives analysis as the "heart" of the environmental impact statement, and changes which removed the requirement that agencies study "*all* reasonable" alternatives, including alternative outside of the jurisdiction of the lead agency, would lead to a less robust review of alternatives and would be at odds with the NEPA statute.

175. Commenters noted how the proposed expansion of activities that can permissibly take place prior to the conclusion of the NEPA process would encourage predetermined decisionmaking and undermine NEPA as an action-forcing scheme.

Scientific Accuracy

176. Commenters also noted that the proposed regulation's new mandate that agencies would no longer be required to "undertake new scientific and technical research to inform their analyses," as well as changes that excuse agencies from obtaining information where they deem the cost to be "unreasonable," would be inconsistent with the NEPA statute's focus on informed decisionmaking. Commenters also noted that changes to this provision would lead to environmentally harmful outcomes, including a less robust study of the impacts to wildlife.

Final 2020 Rule

177. Despite the mountain of detailed comments and concerns offered by a wide range of groups and individuals, CEQ rushed ahead and finalized the 2020 Rule less than four months after the close of the comment period on July 15, 2020.

178. The 2020 Rule included very few changes from the proposed rule, and it was clear from both the Rule, CEQ's Regulatory Impact Analysis, and CEQ's response to comments,

that CEQ had failed to address, or even thoughtfully consider, the concerns raised by the 1.1 million comments.

179. For example, CEQ brushed aside all concerns noting that the changes would have negative environmental effects by noting that the rule does not include changes to "substantive environmental laws, such as the Clean Air Act, Clean Water Act, or ESA," thus asserting that NEPA has no role in setting up processes and procedures that will lead government to less environmentally harmful decisions.

180. CEQ's most frequent response to comments raising concerns about rollbacks to the scope of NEPA review was to note that NEPA is subject to a "rule of reason" and cite *Public Citizen, Inc. v. F.A.A.*, 988 F.2d 186 (D.C. Cir. 1993). This response misstated what was meant by "rule of reason" in *Public Citizen*. Moreover, it failed to address and respond to the highlighted substantive concerns.

181. In response to concerns that more limited NEPA application would result in less opportunity for public comment, as well as concerns that the rule would make commenting more onerous, CEQ simply stated without justification that "[t]he 2020 Rule substantially expands opportunities for public participation."

182. In response to many detailed objections that the Rule would cause confusion, chaos, more litigation, and likely project delays, CEQ made only the conclusory assertion that the "2020 Rule will modernize the CEQ regulations to facilitate more efficient, effective, and timely NEPA reviews by simplifying and clarifying regulatory requirements." CEQ took no steps to address the detailed comments showing that, in fact, the reverse is true.

183. Moreover, CEQ failed entirely to respond to comments noting, with reference to extensive studies, that NEPA is not the primary cause of project delay. Rather than addressing

the comments and considering the true causes of project delay, CEQ simply stated that some NEPA review takes a long time and explained that the 2020 Rule requires adherence to a schedule. CEQ did not address how the mere imposition of a schedule will allow agencies conducting NEPA reviews to work faster with the same level of resources.

184. CEQ failed entirely to address how the widescale changes would affect the reliance interests of conservation organizations, private applicants, state, federal and local regulators, or anyone else who had long relied on the 40-year-old regulatory scheme.

185. CEQ provided no response to detailed concerns about changes to the longstanding context and intensity factors that were established to assist agencies in determining when an EIS is required; instead, CEQ just made the conclusory statement that the revision provides "greater clarity." CEQ's explanations did not address the relevant implications of the changes: their detrimental effect on environmental outcomes.

186. CEQ failed to address concerns about changes that would limit when agencies conduct research and studies to determine environmental impacts of alternatives. Despite lengthy comments from the Conservation Groups and others supported by detailed examples of where additional study has been important to the NEPA process, CEQ brushed aside the concerns by merely restating the language of the 2020 Rule and noting only that "nothing in th[e] section is intended to prohibit agencies from complying with the requirements of other statutes pertaining to scientific and technical research."

187. CEQ likewise brushed aside concerns about changes that would allow more predetermined decisionmaking.

188. CEQ failed to address how changes stating that agencies no longer need to conduct or consider new research or ensure the accuracy of their analysis would lead to worse environmental outcomes and less disclosure of the environmental impacts.

189. With comments disregarded, the 2020 Rule then was largely unchanged from the proposed rule. The Rule removed NEPA protections and undercut the statutory goals of providing for informed federal decisionmakers and engaged citizens and serving as an action-forcing device to improve environmental outcomes.

190. The 2020 Rule made changes to the entirety of the NEPA regulations. The changes most relevant to this litigation are listed below.

191. The 2020 Rule eliminated the longstanding context and intensity factors that agencies used to determine when a project is significant and an EIS is required. The factors were replaced with a vague and ambiguous test. 40 C.F.R. § 1501.3 (2020).

192. The 2020 Rule altered the requirements for reviewing alternatives in a number of ways, including by removing the requirement that agencies "rigorously explore and objectively" evaluate "all" reasonable alternatives and removing the requirement that environmental impact statements "include reasonable alternatives not within the jurisdiction of the lead agency." CEQ also expressly removed language that called the alternatives analysis "the heart" of the NEPA process. 40 C.F.R. § 1508.1(z) (2020); *see also* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,330 (July 16, 2020).

193. The 2020 Rule allowed applicants to expend resources before concluding the NEPA process, thus further undercutting a legitimate analysis of alternatives. 40 C.F.R. § 1506.1(b) (2020).

194. The 2020 Rule placed demanding requirements on the specificity of comments from the public. *Id*. § 1503.3 (2020). All comments, including those coming from the public, must "be as specific as possible" and "provide as much detail as necessary to meaningfully participate and fully inform the agency of the commenter's position." *Id.* § 1503.3(a) (2020). In order to meet this vague bar, comments "should[, among other things,] propose specific changes to [specific] parts of the [DEIS], where possible, and include or describe the data sources and methodologies supporting the proposed changes." *Id.*

195. Finally, the regulations place an exhaustion requirement on comments, stating that "comments or objections of any kind not submitted . . . shall be deemed forfeited as unexhausted," *id.* § 1500.3(b)(3) (2020), and comments on alternatives "not provided within the comment period shall be considered unexhausted and forfeited . . . ." *Id.* § 1503.3(b) (2020).

196. The 2020 Rule stated expressly that agencies are not required to undertake new scientific and technical research to inform their analyses but may rely on existing documents, no matter how outdated. *Id*. § 1502.24 (2020). And changes to 40 C.F.R. § 1502.22 reduced agencies' responsibility to disclose when a decision is based on incomplete information, and allowed them to disregard information if they deem the cost of obtaining it to be "unreasonable."

197. CEQ provided a Regulatory Impact Analysis ("RIA") alongside the 2020 Rule. The RIA echoes CEQ's justification for the 2020 Rule, stating that it "facilitate[s] more efficient, effective, and timely NEPA reviews," but notes explicitly that CEQ has no actual justification for the 2020 Rule from a cost-benefit perspective. RIA at 2 (recognizing that "little quantifiable information exists on the costs and benefits of completing NEPA analyses").

198. Throughout the RIA, CEQ noted that the purpose and justification for the 2020 Rule was to reduce the amount of time spent in NEPA review, and loosely connected the length

of time spent on NEPA review to the overall cost of infrastructure projects. To support this justification, CEQ relied on an inaccurate and unsupported claim about infrastructure costs and a missing report from a conservative think tank.

199. The analyses include a number of speculative, conclusory, and internally contradictory statements. Regarding the cost savings to the Federal Government, CEQ stated that "[i]f CEQ's new regulations shorten the time to complete an EIS, as expected, Federal agencies should incur substantial savings." RIA at 8. Yet, in the very same paragraph, CEQ acknowledged that "[t]he amount of time required to prepare an EIS does not necessarily correlate with the total cost." RIA at 9.

200. To support an assertion that the 2020 Rule would provide indirect benefits to the economy CEQ relied solely on "anecdotal[]" estimates for the cost of infrastructure delay. *Id*. The analysis did not explain how the new rule will eliminate such delay. Moreover, the analysis noted "the effect of uncertainty on investment," without addressing the fact that CEQ is adding uncertainty by rewriting 40 years of established precedent and procedure. RIA at 9–10. CEQ's only analysis of the environmental impact of the proposed rule was simply to state in conclusory fashion that it had determined that, using a baseline of the statutory requirements of NEPA and Supreme Court case law, there would be no adverse environmental impacts (see Appendix). RIA at 10. The referenced Appendix was equally unhelpful, as it simply repeated that "CEQ does not anticipate the changes to result in . . . environmental impacts." RIA at 12–32.

201. Despite the significant harm that would arise for parties that have long relied on the previous NEPA regulations, CEQ failed to acknowledge or consider them. CEQ likewise failed to consider a range of less harmful alternative solutions, or to balance the benefit that will

arise from the 2020 Rule against the negative impacts to those who have long relied upon the 1978 regulations.

202. CEQ failed to address in any meaningful way the significant weight of evidence which confirmed that the longstanding NEPA regulations were working well, including both information submitted as part of the public comment process, as well as previous reports from CEQ itself and others.

203. For example, reports from the Congressional Research Service ("CRS") concluded that lack of funding, securing community consensus, and accommodating affected stakeholders—not NEPA—account for the vast majority of project delays. As CRS pointed out, time spent on environmental review does not directly equate to project delay. *Id.* at 11–12 ("[W]hile environmental review of a project can take a long time, delays are often due to non-environmental factors. In many cases, the cause of delay in the environmental review process is a factor external to the process.").

204. According to CRS, "there is little data available to demonstrate that NEPA currently plays a significant role in delaying federal actions," and "when environmental requirements have caused project delays, requirements established under laws other than NEPA have generally been the source."

205. CEQ also disregarded its own prior studies that demonstrate how a robust alternatives analysis started early in the planning process ultimately saves money and time. In cases where an agency engages in limited NEPA review, CEQ had previously stated that "potential cost savings are . . . lost because a full range of alternatives has not adequately been examined." CEQ had also stated that limits on public involvement ultimately "add costs and time as projects are delayed by ensuing controversy and legal challenges."

206. CEQ disregarded these findings as well as information submitted by the Conservation Groups and others which demonstrated that the prior regulations' alternatives analysis fostered efficiency by promoting innovation, forcing a second look at outdated proposals, providing for community input, utilizing the longstanding methods agencies have developed over the decades, ensure that projects are actually needed in the first place, and thus make decisionmaking more efficient.

207. CEQ announced that the 2020 Rule would officially go into effect two months after publication with an effective date of September 14, 2020.

Developments Subsequent to the 2020 Rule

208. Several facial challenges to the 2020 Rule were immediately brought in federal court. Defenders of Wildlife filed a challenge with 16 other groups in the Western District of Virginia. *Wild Va. v. Council on Env't Quality*, 56 F.4th 281, 303 (4th Cir. 2022); Sierra Club filed a challenge with eight other groups in the Southern District of New York. *Env't Just. Health All. v. Council on Env't Quality*, No. 1:20-cv-06143-JLR (S.D.N.Y. 2020).

209. When the Biden Administration took office in January 2021, CEQ ceased to defend the 2020 Rule on the merits. *See Wild Va.*, 56 F.4th at 290.

210. In a declaration filed with the United States District Court for the Western District of Virginia, CEQ Chief of Staff Matthew Lee-Ashley stated that CEQ "has substantial concerns about the effects of the 2020 Rule on public health, the nation's land, water, and air quality, communities that have been historically marginalized and overburdened by pollution, the ability of citizens to have their voices heard in federal decision-making processes, and other issues, including the process by which the 2020 Rule was promulgated and the lawfulness of aspects of the 2020 Rule." Declaration of Matthew Lee-Ashley, *Wild Va. v. Council on Env't Quality,* No.

3:20-cv-00045-JPJ-PMS (March 16, 2021); *see also Wild Va.*, 56 F.4th at 290. The Department of Justice, however, continued to oppose the facial challenges on the grounds that the litigation was not yet ripe and the plaintiffs did not yet have standing to challenge the rule in a facial context.

211. The United States District Court for the Western District of Virginia agreed with DOJ that the plaintiffs lacked jurisdiction for the facial challenge and dismissed the case. *Wild Va.*, No. 3:20CV00045, 2020 WL 5494519 at *1 (W.D. Va. Sept. 11, 2020).

212. On appeal, the Fourth Circuit affirmed the dismissal of this facial challenge but explained that "Plaintiffs will be able to challenge the 2020 Rule 'in the context of specific projects if and when a final decision that threatens actual imminent harm to [P]laintiffs or their members occurs.'" *Wild Va.,* 56 F.4th at 302 (quoting a concession from CEQ on this point).

213. While this litigation was pending, CEQ embarked on a two-phase rulemaking to address the infirmities of the 2020 Rule. CEQ described the proposed Phase 1 rulemaking as a narrow set of proposed changes to "generally restore regulatory provisions that were in effect for decades before the 2020 rule modified them for the first time." National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757, 55,757 (Oct. 7, 2021).

214. The Phase 1 rulemaking proposed three primary changes: It proposed to restore the requirement to consider indirect and cumulative effects that had been removed by the 2020 Rule. It proposed to restore flexibility for agencies to go above and beyond the baseline CEQ NEPA regulations. And it proposed to restore regulations governing the creation of a statement of purpose and need as well as corresponding changes to the alternatives analysis. *Id.*

215. In comments to CEQ regarding the draft Phase 1 proposal, the Conservation Groups welcomed the proposed changes but noted that they did not go far enough to address the

confusion and harmful environmental impact that was currently being deployed by the 2020 Rule.

216. Specifically, the Conservation Groups noted that the elimination of the context and intensity factors was causing confusion and environmental harm. The Conservation Groups noted that changes to the requirements to use up-to-date information was allowing agencies to base decisions on outdated and incomplete information, and thus proceed with decisions that were not informed by science. And the Conservation Groups noted that the substantial obstacles to public engagement were continuing to discourage participation and limit informed decisionmaking. The Conservation Groups asked that these elements be addressed in the Phase 1 rulemaking.

217. Despite the Conservation Groups' comments, the Phase 1 rule was issued in May 2022 and was nearly identical to the draft rule and thus limited only to three elements of the 2020 Rule.

218. In the preamble to the Phase 1 rule, CEQ noted that the 2020 Rule "may have the effect of limiting the scope of NEPA analysis, with negative repercussions for environmental protection and environmental quality." 86 Fed. Reg 55,757, 55,759. And that some of the 2020 Rule's changes "also may not support science-based decision making." The Phase 1 rule forecast that additional, more comprehensive rulemaking would occur in the near future to address the other problematic aspects of the 2020 Rule. *Id*.

219. Meanwhile, the NEPA analysis for the proposed experimental algaecide treatment at Mattamuskeet National Wildlife Refuge that began in 2023 continued pursuant to the 2020 Rule, modified only by the slight changes made by CEQ in its Phase 1 rulemaking.

220. Ultimately, after the Service issued its final decision allowing the experimental toxic algaecide treatment at Mattamuskeet National Wildlife Refuge, the Biden Administration finalized changes to a Phase 2 NEPA rulemaking. This rulemaking is much more extensive and corrects many of the flaws in the 2020 rule. National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35,442, 35,442 (May 1, 2024). By its express terms, however, this new rule is not required to be applied to any NEPA analyses that began before its effective date of July 1, 2024. *Id.* "The regulations in this subchapter apply to any NEPA process begun after July 1, 2024. An agency *may* apply the regulations in this subchapter to ongoing activities and environmental documents begun before July 1, 2024." *Id.* (emphasis added).

CLAIMS FOR RELIEF

Claim 1 addresses the Service's violation of the Refuge Act. Claims 2 through 4 address the Service's failure to comply with NEPA and the APA in evaluating the proposed use of an algaecide that is toxic to birds on a bird sanctuary. Claims 5 through 8 address the ways in which the NEPA regulations under which the Service acted violate the Administrative Procedure Act.

FIRST CLAIM FOR RELIEF:

Refuge Act Violation: Arbitrary and Capricious Failure to Complete Compatibility Determination

221. The Conservation Groups incorporate by reference paragraphs 1 through 220 above.

222. The Refuge Act requires the Service to determine whether a proposed use of a refuge would be "compatible with the major purposes for which such areas were established." 16 U.S.C. § 668dd(d)(1)(A).

223. To decide whether a use would be compatible, the Service must make a compatibility determination in writing. 50 C.F.R. § 25.12(a). This compatibility determination

must take into consideration, among other factors, impacts of the use on the refuge's purpose, whether the use is a priority public use, and where, when, and how the use would be conducted. *Id.* § 26.41(a)(6)(i)–(iv), (a)(8).

224. By failing to conduct a compatibility determination before authorizing the experimental, toxic algaecide treatment to proceed, the Service violated the Refuge Act, *see* 16 U.S.C. § 668dd(d)(1)(A), and otherwise acted in a manner that is arbitrary and capricious and not in accordance with law, 5 U.S.C. § 706(1), (2)(A).

SECOND CLAIM FOR RELIEF:

NEPA Violation: Arbitrary and Capricious Alternatives Analysis

225. The Conservation Groups incorporate by reference paragraphs 1 through 220 above.

226. NEPA requires federal agencies to consider "a reasonable range of alternatives to the proposed agency action," and "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(C)(iii), (2)(F).

227. The Service predetermined the outcome of the NEPA analysis and failed to objectively evaluate a range of reasonable alternatives in several ways, including by: considering only one alternative—continuing current management practices—to its preferred plan of spreading an algaecide that is toxic to birds on a bird sanctuary; failing to evaluate as part of the current management practices the approved Restoration Plan that is in place and being implemented for Lake Mattamuskeet; failing to consider other reasonable alternatives that would meet the purpose and need; authorizing the manufacturer of the toxic algaecide to deploy sensors on Lake Mattamuskeet in preparation for its use, before the NEPA evaluation was complete; and

using that first phase of the algaecide project to define the area and locations specified in the statement of project purpose.

228. The Service's reliance on provisions of CEQ's 2020 Rule to conduct this NEPA analysis contributed to the failure to adequately analyze alternatives because the Rule provides for minimal consideration of alternatives, 40 C.F.R. § 1508.1(z) (2020); and the Rule expanded the range of activities that could be conducted prior to the completion of NEPA and thus served to encourage predetermined decisionmaking, 40 C.F.R. § 1506.1 (2020).

229. The Service's analysis of alternatives violated NEPA and was and is arbitrary, capricious, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A); 42 U.S.C. § 4332.

THIRD CLAIM FOR RELIEF:

NEPA Violation: Arbitrary & Capricious Impacts Analysis

230. The Conservation Groups incorporate by reference paragraphs 1 through 220 above.

231. NEPA requires disclosure of the reasonably foreseeable effects of the agency action, including adverse environmental effects that cannot be avoided. 42 U.S.C. § 4332(2)(C)(i)–(ii). In evaluating effects of the agency action, NEPA further requires the use of reliable data and resources and directs agencies to ensure the "scientific integrity" of such analyses. *Id.* § 4332(2)(D)–(E).

232. The Service failed to adequately assess or disclose the reasonably foreseeable effects of using a toxic-to-birds algaecide at a bird-rich wildlife refuge as required under NEPA, including but not limited to insufficient analysis of its sublethal effects, the bird species most likely to be affected and what those effects would be, water quality impacts, the means and

efficacy of planned monitoring, the impacts of hazing wildlife, and the efficacy (or lack thereof) of the proposed treatment itself.

233. The Service's reliance on provisions of CEQ's 2020 Rule to conduct this NEPA analysis contributed to its failure to analyze environmental impacts because the rule included changes which meant that the agency was no longer required to consider up-to-date, reliable data and information in assessing and disclosing effects of the proposed action and alternatives, and allowed agencies to disregard information if they deem it would be "unreasonable" to consider it. 40 C.F.R. §§ 1502.24, 1502.22 (2020).

234. The Service's inadequate analysis of effects violated NEPA and was and is arbitrary, capricious, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A); 42 U.S.C. § 4332.

FOURTH CLAIM FOR RELIEF:

NEPA Violation: Arbitrary & Capricious Failure to Prepare an Environmental Impact Statement

235. The Conservation Groups incorporate by reference paragraphs 1 through 220 above.

236. NEPA requires agencies to prepare a detailed environmental impact statement for any major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C).

237. The authorization of an algaecide that is toxic to birds and has never been used at a National Wildlife Refuge, on hundreds of acres designated as a bird sanctuary, is a major federal action significantly affecting the quality of the human environment.

238. The Service's reliance on provisions of CEQ's 2020 Rule to conduct this NEPA analysis contributed to its unlawful decision not to prepare an environmental impact statement

because the 2020 Rule made changes to 40 C.F.R § 1501.3 which eliminated the longstanding context and significance factors previously found at 40 C.F.R. § 1508.27 (1978) that agencies have long relied on to determine when an EIS is required.

239. The Service's failure to prepare an environmental impact statement violated NEPA and was and is arbitrary, capricious, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(1), (2)(A); 42 U.S.C. § 4332.

FIFTH CLAIM FOR RELIEF:

APA Violation: 2020 Rulemaking Failed to Consider an Important Aspect of the Problem

240. The Conservation Groups incorporate by reference paragraphs 1 through 220 above.

241. The 2020 Rule—the governing NEPA regulation under which the Service conducted the Mattamuskeet analysis—was promulgated by CEQ in violation of the APA because it failed to consider important aspects of the problem. *State Farm*, 463 U.S. at 43.

242. An agency must provide more than "conclusory statements" to demonstrate it "consider[ed] the [relevant] priorities." *Getty v. Fed. Savs. & Loan Ins. Corp*., 805 F.2d 1050, 1057 (D.C. Cir. 1986). Relevant factors include any "factor the agency must consider under its organic statute." *Lindeen v. SEC*, 825 F.3d 646, 657 (D.C. Cir. 2016) (quotation marks omitted).

243. An agency must ensure that the new policy is itself supported by substantial record evidence, "based upon a consideration of the relevant factors," and supported with "rational connection[s] between the facts found and the choice made," *State Farm*, 463 U.S. at 43–44 (citations and quotations omitted).

244. Throughout the promulgation of the 2020 Rule, CEQ consistently failed to consider critical factors. For example CEQ failed to consider:

a. The environmental impact of eliminating requirements to consider new information and ensure accurate scientific analysis;

b. The environmental impact of limiting the analysis of alternatives and encouraging predetermined decisionmaking;

c. The environmental impacts of reducing and eliminating environmental review requirements, including the impact to the environment from the elimination of intensity factors.

245. CEQ's Regulatory Impact Analysis stated explicitly that it considered the impact of the new regulations against a baseline of only the "statutory requirements of NEPA and Supreme Court case law," while assuming that the longstanding 1978 regulations had no benefits. In so doing, CEQ failed to consider the impact that the 2020 Rule's elimination of many important provisions in the 1978 regulations would have on environmental outcomes.

246. Likewise, CEQ disregarded hundreds of comments detailing case studies of how the 1978 regulations had led to better environmental outcomes in real-world situations. CEQ also disregarded studies showing how the longstanding regulations had improved environmental outcomes in the aggregate.

247. CEQ also violated the APA by failing to consider how the 2020 Rule would impact environmental outcomes by ignoring Congress's mandate that CEQ act as "trustee of the environment," to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings," and to avoid "undesirable or unintended consequences" from government actions. 42 U.S.C. § 4331(b).

248. The 2020 Rule is therefore arbitrary and capricious and not in compliance with law, in violation of the APA, 5 U.S.C. § 706(2).

SIXTH CLAIM FOR RELIEF:

APA violation: 2020 Rulemaking Was Contrary to Evidence Before the Agency

249. The Conservation Groups incorporate by reference paragraphs 1 through 220 above.

250. Agency rulemaking is arbitrary and capricious if the agency "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." *State Farm*, 463 U.S. at 43. The explanation cannot be pretextual or contrived to avoid legal or political accountability. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019). Courts "cannot ignore [a] disconnect between the decision made and the explanation given." *Id*. Unreasoned, contrived, or pretextual justifications are insufficient to uphold agency action. *See id*.; *State Farm*, 463 U.S. at 43.

251. CEQ's explanation of the 2020 Rule was so incongruent with the administrative record that it revealed an intent to hide the agency's genuine reasons.

252. CEQ stated that its purpose was to reduce delay, but CEQ did not provide reasons to conclude that the 2020 Rule would speed up project delivery, and ignored the ways in which the Rule may increase uncertainty and delay. As just one example, CEQ deleted the factors that have been relied on by courts and agencies to define the threshold for significant impacts, replacing them with vague language that is incapable of consistent application.

253. The record before CEQ established that NEPA's implementation through CEQ's longstanding regulations had been a success, as documented by public comments as well as reports from CEQ itself, the Congressional Research Service, and others.

254. CEQ claimed its 2020 Rule was intended to "produce better decisions [that] further the national policy to protect and enhance the quality of the human environment," 85 Fed.

Reg. 43,304, 43,307. The record, however, established that eliminating important project effects from the scope of the analysis, limiting consideration of reasonable alternatives, and imposing other arbitrary constraints on the NEPA evaluation process would not produce better decisions. CEQ failed to address this record evidence.

255. The overall purpose and effect of the 2020 Rule was to remove actions from the procedural requirements of the prior regulations. By disregarding the successful implementation of NEPA under the prior regulations for over four decades, and the public comments, reports, and other information in the record documenting that NEPA is not a major cause of project delay and that the prior regulations' requirements provide important benefits to agencies and the public, CEQ acted arbitrarily and capriciously.

256. The 2020 Rule is arbitrary and capricious and not in compliance with law, in violation of the APA, 5 U.S.C. § 706(2).

SEVENTH CLAIM FOR RELIEF:

APA violation: 2020 Rulemaking Failed to Consider Reliance Interests

257. The Conservation Groups incorporate by reference paragraphs 1 through 220 above.

258. Where prior policy "engendered serious reliance interest[s]," agencies must address those interests and provide "more detailed justification than what would suffice for a new policy created on a blank slate." *Fox*, 556 U.S. at 515. The 1978 regulations engendered significant reliance interests for citizens, conservation groups, businesses, and industries that depend on full and complete NEPA analyses, yet CEQ's 2020 rulemaking failed to address these facts and circumstances in any way.

259. In particular, the Conservation Groups and their members have relied on the prior regulations to provide a wealth of data, government transparency, and the opportunity to make their voices heard. CEQ failed to consider these reliance interests.

260. In addition, a vast and largely consistent body of case law has developed based on the 1978 regulations, and agencies, the Conservation Groups and their members, and members of the public rely on the legal interpretation of these regulations to inform their review. CEQ failed to consider these reliance interests.

261. Agencies charged with assembling NEPA documents have developed effective ways of reviewing environmental impacts in reliance on the 1978 regulations. CEQ failed to consider these reliance interests.

262. States crafting their own state environmental policy acts routinely have relied on the longstanding application of NEPA in the 1978 regulations as a federal backstop. Advocates working with states to craft and amend and interpret these laws likewise rely on the 1978 regulations as a federal backstop. CEQ failed to consider these reliance interests.

263. CEQ failed to assess any of these reliance interests and the disruption its abandonment of 40 years of consistent policy would engender, and to appropriately weigh them against countervailing interests. CEQ failed to provide the heightened, detailed justification necessary to reverse a policy of such importance to the framework of federal decisionmaking.

264. The 2020 Rule is therefore arbitrary and capricious and not in compliance with law, in violation of the APA, 5 U.S.C. § 706(2).

EIGHTH CLAIM FOR RELIEF:

APA Violation: 2020 Rulemaking Was Inconsistent with the Governing Statute

265. The Conservation Groups incorporate by reference paragraphs 1 through 220 above.

266. To comply with the APA, an agency must demonstrate that the new policy it adopts is consistent with the governing statute. *Fox*, 556 U.S. at 514–15. CEQ violated this requirement by contradicting central requirements of NEPA in its 2020 Rule.

267. The 2020 Rule was inconsistent with the governing statute, NEPA, in at least the following ways:

Alternatives Analysis

268. The 2020 Rule unlawfully altered the requirements for reviewing alternatives by removing the requirement that agencies "rigorously explore and objectively" evaluate "all" reasonable alternatives.

269. The plain language of NEPA requires a full alternatives analysis. The statute directs agencies to prepare a "detailed statement" on alternatives "to the fullest extent possible[.]" 42 U.S.C. § 4332. This means, as CEQ has interpreted and courts have affirmed, agencies must consider all reasonable alternatives.

270. The 2020 Rule unlawfully expands the types of activities in support of an agency's preferred alternative that are allowed to proceed prior to the completion of the NEPA process. 40 C.F.R. § 1506.1(b) (2020). Such authorized activities include the "acquisition of interests in land (e.g., fee simple, rights-of-way, and conservation easements), purchase of long lead-time equipment, and purchase options made by applicants" in support of a particular course of action. *Id*.

271. Allowing a particular alternative to proceed prior to the completion of the NEPA process undermines NEPA's role as an "action-forcing" statute and forecloses the objective alternatives analysis that the statute requires for a "proposed" action, not one already underway. 42 U.S.C. § 4332(2)(C)(iii).

272. This allows applicants to predetermine many aspects of the project, going directly against legal precedent and previous CEQ guidance. *See Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (acknowledging the harm to the environment caused more by "a . . . deeply rooted human psychological instinct not to tear down projects once they are built],and the] difficulty of stopping a bureaucratic steam roller, once started"); Council on Envtl. Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years*, 11–12 (1997) ("[T]he 'NEPA process' is often triggered too late to be fully effective. . . . It is critical for top policy leaders and managers to integrate NEPA early into their policymaking and programming if their agencies are to get the full benefit of NEPA.").

273. CEQ's changes to eliminate the requirement to consider "all" reasonable alternatives and to allow actions to proceed prior to the completion of the NEPA process are inconsistent with the governing NEPA statute and are arbitrary and capricious.

Accurate Scientific Analysis

274. The 2020 Rule unlawfully allows agencies to proceed without the scientific analysis necessary to inform their decision.

275. 40 C.F.R. § 1502.24 (2020) states that "Agencies . . . are not required to undertake new scientific and technical research to inform their analyses." And 40 C.F.R. § 1502.22 reduces agencies' responsibility to disclose when a decision is based on incomplete

information, and allows them to disregard information if they deem the cost of obtaining it to be "unreasonable."

276. These changes undermine Congress's direction in NEPA that "to the fullest extent possible" the federal government will "ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment"; "ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking"; " ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document" and "make use of reliable data and resources . . . ." 42 U.S.C. § 4332.

277. CEQ's changes are thus inconsistent with the governing NEPA statute and are arbitrary and capricious and otherwise not in accordance with law, as well as in excess of statutory jurisdiction, authority, or limitations, in violation of the APA, 5 U.S.C. § 706(2)(A), (C).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Issue a declaratory judgment that:

   1. The Service has violated the Refuge Act, NEPA, and the APA in the respects set forth above;

   2. CEQ's 2020 Rule was arbitrary and capricious and not in compliance with law;

   3. In promulgating the 2020 Rule, CEQ exceeded its statutory authority;

B. Order the United States Fish and Wildlife Service to conduct a compatibility determination under the Refuge Act for the project;

C. Order that the March 2024 Final EA and FONSI be vacated and set aside;

D. Order the United States Fish and Wildlife Service to conduct a legally compliant NEPA analysis for the project that does not rely on the defective 2020 Rule;

E. Enjoin the United States Fish and Wildlife Service from allowing or facilitating the project until after it remedies its violations of the Refuge Act, the APA, and NEPA;

F. Award the Conservation Groups the costs of this action, including their reasonable attorneys' fees; and

G. Grant the Conservation Groups such further and additional relief as the Court deems just and proper.

This the 20th day of May 2024.

Respectfully submitted,

/s/ Ramona H. McGee
Ramona H. McGee
N.C. State Bar No. 47935
rmcgee@selcnc.org
Elizabeth Rasheed
N.C. State Bar No. 55635
erasheed@selcnc.org
Kimberley Hunter
N.C. State Bar No. 41333
kmeyer@selcnc.org
Nicholas S. Torrey
N.C. State Bar No. 43382
ntorrey@selcnc.org

SOUTHERN ENVIRONMENTAL LAW CENTER
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516
Telephone: (919) 967-1450
Facsimile: (919) 929-9421

Attorneys for Plaintiffs