February 1, 2023

Ann C. Petros
Vice President of Regulatory Affairs
National Association of Federally-Insured Credit Unions
3138 10th Street North
Arlington, VA 22201-2149

Dear Ms. Petros-

Green banks and credit unions have long worked together to support clean energy finance solutions. For instance Michigan Saves works with six local credit unions to support its residential clean energy financing program. As another example, DC Green Bank, Montgomery County Green Bank, and the Maryland Clean Energy Center all work with the Clean Energy Credit Union to support the Clean Energy Advantage program, which finances clean energy upgrades in DC and Maryland for homeowners.

The Coalition for Green Capital ("CGC") is committed to continuing and growing this partnership on a national level. Even before Congress passed the Inflation Reduction Act, CGC invited leadership from credit union and CDFI organizations and associations to work together to develop a joint proposal that would harness the different strengths green banks, credit unions, and CDFIs can bring to the table, while at the same time minimizing the impact of statutory or other limitations that would make it more difficult for any one entity to fulfill the purposes of the GHGRF on its own.

In the fall, under the auspices of the American Green Bank Consortium, CGC hosted a two-day "Green Bank Summit" where representatives from green banks, credit union advocacy organizations, CDFIs, and CDFI intermediaries presented the results of their collaboration on six workgroups on topics like Community Initiatives, Intermediaries, Products, and Secondary Markets. CGC is proud to have brought together a wide range of organizations and representatives from a diverse list of finance providers and to have created a forum in which organizations could collaborate on a shared goal. CGC has continued to reach out to credit unions, CDFIs, and their advocates with the goal of building strong partnerships. We would like to meet with National Association of Federally-Insured Credit Unions ("NAFCU") to discuss potential partnerships with you and your members that can advance the goals of the Greenhouse Gas Reduction Fund.

Finally, while the purpose of this letter is highlight how green banks and credit unions can work together, our counsel did review the legal memorandum from Van Ness Feldman that was attached to your recent letter to EPA Administrator Michael S. Regan, and a copy of that review is attached.

Sincerely,

Eli Hopson
Chief Operating Officer & Executive Director
Coalition for Green Capital / American Green Bank Consortium

Encl.
cc: Hon. Michael S. Regan

ALSTON & BIRD

TO: Eli Hopson
Chief Operating Officer & Executive Director
Coalition for Green Capital

FROM: Kevin S. Minoli

DATE: February 1, 2023

RE: Review of Van Ness Feldman Memorandum entitled "Legal Assessment of EPA's Authority to Design and Implement a Greenhouse Gas Reduction Fund Under Section 134 of the Clean Air Act"

On January 10, 2023, the National Association of Federally-Insured Credit Unions ("NAFCU") wrote to the Hon. Michael S. Regan, Administrator of the United States Environmental Protection Agency ("EPA") to explain the organization's view of the scope of EPA's authority under Section 134 of the Clean Air Act, 42 U.S.C. § 7434 ("Section 134"). Ann C. Petros, Vice President of Regulatory Affairs, National Association of Federally-Insured Credit Unions, to Michael S. Regan, Administrator, United States Environmental Protection Agency (January 10, 2023) ("NAFCU Letter"). The NAFCU letter explained why NAFCU believes credit unions are the best way for funds awarded under the Greenhouse Gas Reduction Fund ("GHGRF") to reach disadvantaged communities, advocated for an interpretation of Section 134 that would allow credit unions to receive the maximum amount of funding possible as indirect recipients or through one or more newly-created non-profit organizations, and argued against the qualifications of its competitors and any interpretation of the statute that favored those competitors.

In addition to the three-page Letter, NAFCU also attached an 18-page unsigned, unaddressed memorandum, printed under the letterhead of the Washington, DC office of the law firm of Van Ness Feldman, LLP, and entitled "Legal Assessment of EPA's Authority to Design and Implement a Greenhouse Gas Reduction Fund Under Section 134 of the Clean Air Act" ("Van Ness Feldman Memorandum" or "Memorandum"). The Memorandum attached an eight-page Appendix, seven pages of which are comprised of quotations taken from comments submitted to EPA by, or on behalf of, the Coalition for Green Capital ("CGC"). Much like the NAFCU Letter to which it is attached did on behalf of credit unions, in the quotations the Van Ness Feldman Memorandum amplifies, CGC explains why it believes a national "green bank" is the best way for funds awarded under the GHGRF to reach disadvantaged communities, advocates for an interpretation of Section 134 that would allow EPA to award the maximum amount of funding possible to an eligible recipient, and argues against any interpretation of the statute that favors its competitors. In addition, the CGC quotations include several that discuss the fact that Section 134 requires an eligible recipient of GHGRF funding under (a)(2) and (a)(3) to use that money, in part, to "provide funding and technical assistance to establish new or support existing public, quasi-public, not-for-profit, or non-profit entities," which CGC refers to as the "Big Green Tent" of indirect recipients.

Consistent with CGC's continued commitment to building a Big Green Tent that is open to any interested green bank, credit union, or CDFI, the purpose of this memorandum is not to attack, discredit, demean, or undermine credit unions or the important role that they can play in implementing the GHGRF. Rather,

the purpose of this memorandum is to explain the fundamental flaws in the legal theories advanced in the Van Ness Feldman Memorandum.[1]

1) EPA is not prohibited from making an award to an entity that will implement the GHGRF as a "national green bank."

The Van Ness Feldman Memorandum advances two bases – the National Bank Act and the Byrd Rule – for its argument that EPA is prohibited from awarding funds under the GHGRF to an eligible recipient that would use the funds to implement the GHGRF as a "national green bank." The former, however, would require one to ignore the text of that statute and to misrepresent what is meant by a "national green bank," while the latter would convert a procedural rule adopted by one house of Congress into a binding cannon of statutory construction that could trump the actual text of a statute. There is no precedent for either, nor is there a rationale for adopting them for the first time here in order to limit EPA's authority to make awards under the GHGRF.

a) The National Bank Act does not limit EPA's authority to implement the GHGRF.

By its own terms, the National Bank Act only applies to entities that *choose* to apply for and receive a national bank charter. There is no requirement in the National Bank Act or anywhere in federal banking law, however, that an entity that provides financial services (other than deposit-taking services) be chartered and operate as a national bank. Simply put, there is no legal foundation for the argument that a single-entity recipient of funds under Section 134 would have to be chartered and regulated as a national bank. In fact, the Van Ness Feldman Memorandum admits that the National Bank Act would not apply to a nonprofit entity that will not engage in regulated banking activities, such as CGC. "We recognize that a nonprofit entity could seek to work around this federal limitation by not calling itself a 'national green bank' and instead organizing itself as a lending intermediary that does not itself engage in regulated banking activities." Van Ness Feldman Memorandum at n.5.

Similarly, there is no factual foundation for the argument that a "national green bank" will constitute a "national bank" as that term is used in the National Bank Act. Despite including seven pages of quotes from CGC's comments, the Van Ness Feldman Memorandum cannot point to a single one that states an intent to operate as an actual bank. In fact, one could not point to a single green bank in the United States that takes deposits from the public or that engages in banking activity to the degree that it would be considered a national bank.

Without any statement of intent to operate as a bank by CGC or a single example of a green bank that operates as a national bank, the Van Ness Feldman Memorandum is left only with the fact that the term "national green bank" contains the words "national" and "bank" to support its argument. Simply referring to an entity as a "green bank," however, does not make that thing a "bank" under the National Bank Act any more than it would for the Capital Area Food Bank or EPA's Leave Bank.

b) The "Byrd Rule" has no bearing on how a law is interpreted.

The Van Ness Feldman Memorandum takes the position that a rule governing the *process* one of the two houses of Congress uses when passing a budget reconciliation bill also limits the *substance* of any

[1] Because the Van Ness Feldman Memorandum was unsigned, it was not possible to contact the attorney or attorneys who drafted the Memorandum prior to finalization of this Report.

bill signed into law that followed that process – regardless of the text of the law. The Memorandum argues that EPA is "absolutely barred" from awarding funds from the GHGRF to a single national green bank because doing so would "conflict with clear limitations imposed by the budget reconciliation process." Van Ness Feldman Memorandum, at 9. That argument either misunderstands or mischaracterizes the text of the "Byrd Rule" and its relevance to a bill once signed into law – and fails either way.

The Byrd Rule, now codified into law as Section 313 of the Congressional Budget Act, controls the process the Senate will follow when considering a reconciliation bill – not the substance of such a bill. To be sure, the Byrd Rule is intended to limit the number of "Extraneous Provisions" that are included in a reconciliation bill by streamlining the process for removing such provisions from a bill or preventing them from being added to a bill, but it does not "prohibit Congress" from adopting anything. First, the Byrd Rule is not automatic – it requires a Senator to raise a point of order against allegedly extraneous material. Second, even if a point of order is sustained and the material is stricken from a bill, it can be restored into the legislation with the support of 60 Senators. We agree with the Van Ness Feldman Memorandum that it is notable that no points of order were made against any provision related to the GHGRF, but only because one cannot draw any conclusions about the text of the GHGRF from the absence of a point of order.

Even if the Byrd Rule were relevant to how the GHGRF can be implemented, the Van Ness Feldman Memorandum cannot cite to any source as support for its position that the Rule would prohibit EPA from awarding funds to an eligible recipient that will implement the GHGRF as a green bank. Nor does the Memorandum attempt to reconcile its position with the fact that Congress included four qualifications for an entity to be considered an "eligible recipient," all of which are hallmarks of a green bank – provide and leverage capital, do not take deposits, funded by public and charitable contributions, and invest in or finance projects.

Lacking any legal support for its position, the Van Ness Feldman Memorandum relies instead on strong-sounding adjectives and adverbs in an effort to project confidence: "inherent and highly restrictive," "highly restrictive" (again), "absolutely barred," "clear limitations," "clear examples," "strict prohibitions," "strictly enforced," and "closely reviewed." Van Ness Feldman Memorandum, at 1, 9, 16, and n.29. There is little about the Byrd Rule that is clear or absolute, however, and the repeated assertions to the contrary undermine, rather than reinforce, the Memorandum's credibility.

2) The Van Ness Feldman Memorandum is replete with inaccurate quotations and indefensible interpretations.

As noted above, the purpose of this memorandum is not to debate the relative virtues of green banks and credit unions, as both types of entities can and should have an important role in implementing the GHGRF. To that end, this memorandum does not address every point of disagreement between the positions advanced by NAFCU and those advanced by CGC. Similarly, this memorandum does not attempt to identify every mistake or misunderstanding contained in the Van Ness Feldman Memorandum. Rather, this memorandum documents the numerous instances where the Van Ness Feldman Memorandum inaccurately quotes Section 134, its own Memorandum, and other documents,

and how that lack of attention to detail ultimately led to interpretations of Section 134 that are demonstrably wrong.[2]

a) The number of inaccurate quotations in the Van Ness Feldman Memorandum far exceeds what is reasonable.

Mistakes happen, and it is not uncommon for even the most careful attorney to fail to catch every typographical error or other mistake in a long document. Rarely would such a mistake warrant a response by opposing counsel. As documented in Appendix I, however, the Van Ness Feldman Memorandum failed to accurately quote the source it was attempting to quote at least 19 times, including 15 instances where the Memorandum incorrectly quotes Section 134. The volume and frequency of the 19 mistakes are so high that they undermine the credibility and reliability of the document as a whole.

[2] It is necessary to address one assertion regarding Credit Union Service Organizations ("CUSOs") that conflicts with the position of the National Credit Union Administration ("NCUA"). In support of a plan to rely on CUSOs for distributing any GHGRF funds received by credit unions, both the NAFCU Letter and the Van Ness Feldman Memorandum state that "CUSOs are authorized and regulated by federal law codified at 12 U.S.C. Part 712." NAFCU Letter, at n.3; Van Ness Feldman Memorandum, at n.38. According NCUA, however, "The NCUA has not had direct statutory authority over CUSOs or vendors for more than 20 years— during which the risks inherent to outsourcing critical financial services operations have grown and changed significantly." National Credit Union Administration, *Third Party Vendor Authority*, Mar. 2022, at 9. The General Counsel of the National Association of Credit Union Service Organizations put it even more bluntly: "CUSOs are not regulated by the National Credit Union Administration ('NCUA'). The Federal Credit Union Act provides the power to federal credit unions to invest and loan to a CUSO but does not give NCUA the power to regulate CUSOs." Guy Messick, General Counsel, National Association of Credit Union Service Organizations, *Credit Union Service Organizations ("CUSOs")*, undated, at 2. While Part 712 regulates actions of a credit union – specifically how much money a credit union can invest in a CUSO and for what purposes – it does not independently authorize or regulate CUSOs.

CUSOs have played an increasingly important role in the continued operations of credit unions, and, according to Mr. Messick, many credit unions now turn to CUSOs not just to save operating costs, but also to generate millions of dollars of business income. *Id.* at 6. CUSOs must be owned in whole or in part by one or more of the credit unions they serve; more than 70% of CUSOs are wholly owned by a single credit union and 68% of CUSOs serve only one credit union customer. Just 43 CUSOs, or less than 5%, serve 100 credit unions or more. NCUA, *Credit Union Search Organizations (CUSOs) at a Glance: 2021*, available at https://ncua.gov/analysis/cuso-economic-data/cusos-glance/cusos-glance-2021 (last visited Feb. 1, 2023). CUSOs are able to generate income for their credit union owners because CUSOs can be structured as for-profit companies. That for-profit status and the unique ownership structure is key to a CUSO's ability to generate income for a credit union, but could limit the role a CUSO could play in implementing a federal grant. Federal regulations generally require a grantee to undertake a competitive procurement process when contracting with a third party to perform work under a grant, and the regulations prohibit a grantee from entering into a contract for services with a third party in which the grantee has a financial interest.

b) Several interpretations advanced by the Van Ness Feldman Memorandum involve an inaccurate quotation or citation to Section 134.

The repeated failure to accurately quote the statute or other text is not harmless; it is central to some of the Memorandum's most indefensible interpretations of Section 134. One example is the Van Ness Feldman Memorandum's argument for why an eligible recipient is not required to engage in both direct investment under Section 134(b)(1) and indirect investment under Section 134(b)(2). Absent such an interpretation by EPA, a newly formed nonprofit institution awarded a grant as an eligible recipient could not simply disperse the money to other organizations – the entity would also be required to:

> (A) provide financial assistance to qualified projects at the national, regional, State, and local levels;
>
> (B) prioritize investment in qualified projects that would otherwise lack access to financing; and
>
> (C) retain, manage, recycle, and monetize all repayments and other revenue received from fees, interest, repaid loans, and all other types of financial assistance provided using grant funds under this section to ensure continued operability.

Section 134(b)(1)(A)-(C). Importantly, the Van Ness Feldman Memorandum concedes that if an entity must engage in direct investment, the entity must comply with all three provisions of Section 134(b)(1). Van Ness Feldman Memorandum, at 17 ("Subsection (b)(1) contains an 'and' to make clear that all of the actions enumerated in subparagraphs (A), (B), and (C) are additive and therefore must be performed to meet the direct investment requirements.").

To avoid that outcome, the Van Ness Feldman Memorandum argues that because Congress did not put the word "and" between Section 134(b)(1) and Section 134(b)(2), the obligation in Section 134(b) that an eligible recipient "shall use the grant in accordance with the following…" does not create an obligation for an eligible recipient to do both the things listed in Section 134(b)(1) and the things listed in Section 134(b)(2). The Van Ness Feldman Memorandum is focused on finding a reason to disregard the word "shall" in Section 134(b), but it overlooks the fact that the word "shall" appears in both Section 134(b)(1) and Section 134(b)(2) as well.

It is Congress's use of the word "shall" in Section 134(b)(1) and Section 134(b)(2) – not Section 134(b) – that is the reason why an eligible recipient must use grant funds for both direct investment and indirect investment. The mandate in 134(b) that the recipient "shall use the grant in accordance with the following…" limits the universe of things a recipient can do with the money, but does not require a recipient to affirmatively do any of the things listed in 134(b). The obligation to do both direct investment and indirect investment comes from the text of Section 134(b)(1) and Section 134(b)(2). Both Section 134(b)(1) and Section 134(b)(2) start with the phrase "The eligible recipient shall…," making the actions that follow mandatory for an eligible recipient. The Van Ness Feldman Memorandum offers no explanation for why it would be appropriate to ignore Congress's use of the word "shall" in both Section 134(b)(1) and Section 134(b)(2), nor does it even acknowledge that the word "shall" appears in both provisions. Whether that omission was an oversight is not clear, but it eliminates the sole basis for the Van Ness Feldman Memorandum's argument that an eligible recipient would not be required to invest directly in projects under Section 134(b)(1).

APPENDIX I

INACCURATE QUOTATIONS IN THE VAN NESS FELDMAN MEMORANDUM

	Pg	§ 134__	Van Ness Feldman Memorandum "Quote"	Actual Text of the Thing Quoted
1.	3	(c)(1)	these organizations clearly can meet the statutory criteria for qualifying as an "eligible entity," as defined in CAA section 134(c)(1)	"eligible recipient"
2.	4	(a)(1)	In the case of the ZET Grant Program, by contrast, EPA may award grants not only to eligible recipients but also to "States, municipalities, and Tribal Governments."	…to States, municipalities, Tribal governments, and eligible recipients…
3.	4	(a)(2) & (3)	In the case of the GA and LIDC Grant Programs, EPA is authorized to provide "financial assistance and technical assistance,"	…there is appropriated to the Administrator…$11,970,000,000,…to make grants,…to eligible recipients for the purposes of providing financial assistance and technical assistance in accordance with subsection (b).
4.	4	(a)(1)	while the statute is more specific for the ZET Grant Program by directing EPA to provide "grants, loans, or other forms of financial support and technical assistance, to enable low-income and disadvantaged communities to deploy or benefit from zero-emissions technologies, including distributed technologies on residential rooftops."	…there is appropriated to the Administrator…$7,000,000,000,…to make grants, on a competitive basis…
5.	4	(a)(1)	"grants, loans, or other forms of financial support and technical assistance, to enable low-income and disadvantaged communities to deploy or benefit from zero-emissions technologies, including distributed technologies on residential rooftops."	…grants, loans, or other forms of financial assistance, as well as technical assistance, to enable low-income and disadvantaged communities to deploy or benefit from…

	Pg	§ 134__	Van Ness Feldman Memorandum "Quote"	Actual Text of the Thing Quoted
6.	4	(a)(1)	"grants…including distributed technologies on residential rooftops."	including distributed technologies on residential rooftops, and to carry out other greenhouse gas emission reduction activities, as determined appropriate by the Administrator in accordance with this section.
7.	4 n.9	(a)(4)	with another $30 million appropriated to EPA for "administrative costs necessary to carry out the activities under this section."	$30,000,000…for the administrative cost necessary to carry out activities under this section
8.	5 n.13	(a)(1)	Section 134(a)(1) of the CAA requires the grants be used to provide assistance that will "enable low-income and advantaged communities to deploy or benefit from zero-emission technologies,"	to enable low-income and disadvantaged communities to deploy or benefit from zero-emission technologies
9.	5 n.14	n/a	undertaking robust actions to mitigate climate change, while preparing for the impacts of climate change	undertaking robust actions to mitigate climate change while preparing for the impacts of climate change
10.	6	(b)(1)	The use of the funds to make "direct investments" for providing "financial assistance" to qualified projects, as provided in CAA section 134(b)(1)	Direct investment
11.	6	(b)(2)	and "indirect investments" for providing "funding and technical assistance" to qualified projects through not-for-profit and nonprofit entities, as provided in CAA section 134(b)(2).	Indirect investment
12.	6 n.15	N/A	See also White Paper, entitled "Compilation of Statements by Coalition for Green Capital on the Creation of a Single National Green Bank"	Compilation of Statements by the Coalition for Green Capital on the Creation of a Single National Green Bank
13.	7	N/A	attached white paper, entitled "Statements by Coalition for Green Capital on the Creation of a Single National Green Bank,"	Compilation of Statements by the Coalition for Green Capital on the Creation of a Single National Green Bank
14.	9-10 n.31	N/A	These regulations include specific "procedures and requirements governing OCC review and approval of an application to establish a national bank or a Federal stock or mutual savings association, including a national bank or a Federal	Note: Part 15 of Title 12 of the Code of Federal Regulations is reserved; there is no regulation at the cite 12 CFR § 15.20(b). The text of the regulation at 15 CFR § 5.20(b) reads as follows: "***Licensing requirements.*** Any person desiring to establish a national

	Pg	§ 134__	Van Ness Feldman Memorandum "Quote"	Actual Text of the Thing Quoted
			savings association with a special purpose." Id. at §15.20(b).	bank or a Federal savings association must submit an application and obtain prior OCC approval. An existing national bank or Federal savings association desiring to change the purpose of its charter must submit an application and obtain prior OCC approval."
15.	12	(c)(1)(D)	The organization must "invest in or finance projects alone or in conjunction with other investors"	invests in or finances projects alone or in conjunction with other investors
16.	15	(b)(1) & (b)(2)	use a majority of the funds for indirect investments for incentivizing the deployment of clean energy projects under section 134(b)(1) and use the smaller remaining portion of the funds for direct investments in supporting "efforts" by "communities" to deploy clean energy projects under section 134(b)(2).	(2) Indirect investment The eligible recipient shall provide funding and technical assistance to establish new or support existing public, quasi-public, not-for-profit, or nonprofit entities that provide financial assistance to qualified projects at the State, local, territorial, or Tribal level or in the District of Columbia, including community- and low-income-focused lenders and capital providers.
17.	15	(b)(1)	This framework provides guidance on how an eligible recipient may provide "direct investments" through "financial assistance to qualified projects" under subsection (b)(1)	(1) Direct investment
18.	15	(b)(2)	"indirect investments" through…under subsection (b)(2).	(2) Indirect investment
19.	15	(b)(2)	various types of "not-for-profit or nonprofit entities,"	public, quasi-public, not-for-profit, or nonprofit entities