



March 10, 2020

The Honorable Mary B. Neumayr  
Chair  
Council on Environmental Quality  
730 Jackson Place, N.W.  
Washington, D.C. 20503

Re: CEQ's Proposed Revisions to the NEPA Implementing Regulations Act

Dear Chair Neumayr,

The Energy Infrastructure Council ("EIC") appreciates the opportunity to provide feedback on the Council on Environmental Quality's ("CEQ") proposal to modernize the implementation of the National Environmental Policy Act ("NEPA") (the "Proposed Rule").<sup>1</sup>

EIC is a non-profit trade association dedicated to advancing the interests of companies that develop and operate energy infrastructure. EIC addresses core public policy issues critical to investment in America's energy infrastructure. Our membership is comprised of traditional and renewable energy infrastructure companies, as well as non-energy master limited partnerships, service providers and other businesses and individuals supporting the industry.

Energy infrastructure is the backbone of our economy. It serves to deliver the energy to markets that fuel our entire economy. Building, modernizing, and maintaining our energy infrastructure is critical to ensuring reliable access to energy and supporting opportunities for economic growth. These efforts require a predictable and transparent permitting process.

EIC recognizes the important role that NEPA plays in both informing agency decisions and the public on the potential environmental impacts of federal actions. However, since the existing regulations were promulgated in 1978, there have been significant advancements in technology that have transformed the environmental review process. Moreover, the NEPA process can be unpredictable and impose significant delays, in particular where the review expands beyond what is truly informative to the agency's action. Not only do such broad reviews not serve NEPA's purpose, they discourage investment as well as delay and sometimes prevent much needed energy infrastructure.

CEQ's proposed revisions provide much needed clarity and direction to federal agencies implementing the NEPA process. Based on forty years of experience implementing NEPA, CEQ's proposed revisions build on existing practices and bedrock judicial principles to provide a modernized and focused approach for agencies implementing NEPA. CEQ's Proposed Rule will encourage federal

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<sup>1</sup> 85 Fed. Reg. 1,684 (Jan. 10, 2020) ("Proposed Rule").

actions that are more informed of significant environmental impacts, public involvement that is more meaningful, and investment in energy infrastructure. EIC appreciates CEQ's much needed efforts and offers the following supportive comments.

## **I. CEQ's Proposed Rule Encourages More Informed Agency Actions**

CEQ's proposed revisions focus federal agencies on information that is meaningful and informative to the agency's action and supports NEPA's fundamental purpose of achieving more informed agency decisions.

### **A. The Revised Effects Analysis Provides Proper Boundaries for Agencies**

NEPA requires that agencies consider the effects of their actions on the human environment.<sup>2</sup> The existing regulatory scheme—which subdivides effects into categories of direct, indirect, and cumulative effects—has not provided agencies with sufficient direction or clarity on the appropriate bounds of the effects that must be considered under NEPA. Over the last forty years, the existing definition has led to a misplaced focus on the type of effects being considered. In the absence of regulatory clarity, courts have gone to great lengths to explain these terms.<sup>3</sup> CEQ's Proposed Rule seeks to refocus agencies on the statutory obligation to consider the effects of their action on the environment.

CEQ's NEPA regulations provide a framework through which agencies consider the environmental effects of their decisions. The existing categories of effects do not exist in the statute. By eliminating the categories of effects, CEQ's proposed definition provides agencies with a simpler definition that refocuses the agency's attention on the statutory requirement to consider the effects of their actions, rather than categorizing which effects fall within which category.<sup>4</sup>

In order for the NEPA analysis to be meaningful, the information must inform the agency's decision under the action statute—that is, the statute that provides the agency with the authority to take the action that triggers NEPA. CEQ's proposed revisions recognize these limits and provide clarity on the bounds of the effects that must be considered. By excluding those effects “that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action,”<sup>5</sup> the proposed revisions focus agencies on information that is informative to the action at hand and aligns with NEPA's statutory purpose to foster informed agency actions.

CEQ's proposed definition also provides important (and previously missing) regulatory instruction on the degree of causation between the federal action and the effect that NEPA

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<sup>2</sup> 42 U.S.C. § 4332(2)(C).

<sup>3</sup> National Petroleum Council, *Dynamic Delivery: America's Evolving Oil and Natural Gas Transportation Infrastructure*, Chapter 3, 20 (Dec. 2019) (citing a Clear View Energy Partners' study that found between 2012 and 2019 NEPA was the most used statute to bring judicial challenges against natural gas or liquids (crude oil, NGLs or products) pipelines).

<sup>4</sup> *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (agency authority to abandon a longstanding interpretation).

<sup>5</sup> Proposed Rule, 85 Fed. Reg. at 1728-29 (Proposed § 1508.1(g)(2)).

requires. In the absence of regulatory clarity, the Supreme Court has explained that ““but for” causation is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.”<sup>6</sup> Instead, NEPA requires a “reasonably close causal relationship between a change in the physical environment and the effect at issue,” which is akin to the doctrine of proximate cause from tort law.<sup>7</sup> Despite this clear U.S. Supreme Court precedent, courts have been challenged to consistently and appropriately apply it to agency effects analyses. The EIC supports CEQ’s codification of this principle in the definition of effects.

CEQ has also recognized that the cumulative effects analysis required by the existing regulations has been difficult to prepare and has not always provided a meaningful analysis for the agency’s consideration. The Proposed Rule would eliminate the obligation for agencies to consider cumulative effects. Where an agency’s NEPA analysis considers the current and future condition of the affected environment, including what is reasonably foreseeable to the agency at the time of its decision, there is no longer a need to complete a separate cumulative impact analysis and agencies can instead tailor their analysis to information informative of their decision.

EIC supports CEQ’s efforts to incorporate these concepts into the regulatory definition of effects and provide agencies with clear guidance and direction on the appropriate bounds of the NEPA effects analysis.

## **B. The Purpose and Need and Alternatives Analysis Should Be Aligned With the Agency’s Authority and the Goals of the Applicant**

The purpose and need of the NEPA analysis explains why the action is being considered and scopes the NEPA analysis. Where an agency has appropriately defined the purpose and need, alternatives that meet the purpose and need can be identified, and those that do not can be excluded. Over time, the alternatives analysis has increased both in the scope of alternatives considered and the depth of the analysis for each alternative. When this occurs, the result can be an alternatives analysis that is not meaningful to the agency’s decision, does not support the applicant’s goals, and diverts agency and private sector resources away from informative analyses.

CEQ’s proposed revisions recognize that an appropriately-defined purpose and need is critical to an informative and efficient NEPA review. By bounding the requirements for purpose and need by the agency’s authority under the action statute and, where agency action is triggered by a private applicant, the goals of the applicant, CEQ’s proposed revisions define a scope of agency analysis that is meaningful to the agency’s decision. In particular, EIC agrees that where the agency action is to “review an application for authorization, the agency shall base the purpose and need on the goals of the applicant and the agency’s authority.”<sup>8</sup> Considering the

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<sup>6</sup> *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 754.

<sup>7</sup> *Metropolitan Edison v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983); *see also, Dep’t of Transp.*, 541 U.S. at 767 (“NEPA requires a reasonably close causal relationship akin to proximate cause in tort law.”) (internal citations omitted).

<sup>8</sup> Proposed Rule, 85 Fed. Reg. at 1720 (Proposed § 1502.13).

goals of the applicant in the purpose and need ensures that the scope of the NEPA analysis informs the decision before the agency.

CEQ's proposed revisions provide meaningful limitations on the scope of the alternatives analysis. By limiting the alternatives analysis to alternatives that are reasonable<sup>9</sup> and that achieve the purpose and need of the action, CEQ has focused an agency's NEPA review on relevant and feasible alternatives that can inform agency decision-making. EIC appreciates CEQ's clarification that an agency does not need to consider "all" alternatives, which only serves to encourage a broader alternatives analysis untethered to whether such analysis would provide any value. EIC also supports CEQ's removal of the existing requirement to "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency."<sup>10</sup> Because the agency, by definition, has no authority over whether these alternatives could occur they do not serve NEPA's purpose in informing agency decision-making. EIC appreciates CEQ's proposed revisions, which will further tailor the alternatives analysis to focus the agency on a reasonable and informative range of alternatives.

## **II. Predictable and Coordinated Agency Reviews are Critical to Support Energy Infrastructure**

The development and maintenance of energy infrastructure requires a predictable and timely permitting process. EIC appreciates CEQ's proposed revisions to create a more streamlined, efficient, and orderly permitting process.

### **A. Codification of "One Federal Decision" Concepts Will Improve Multi-Agency Coordination**

Energy infrastructure projects that require federal authorizations are often subject to broad review under NEPA by multiple federal agencies. Breakdowns in agency coordination can significantly delay the NEPA process and inject uncertainty into the process.

EIC supports CEQ's efforts to improve interagency coordination through the codification of key elements of its "One Federal Decision" framework.<sup>11</sup> In particular, the development of a joint schedule and identification of milestones for environmental reviews will encourage a more transparent and efficient NEPA process.<sup>12</sup> Obligations for cooperating agencies to consult with the lead agency, meet the joint schedule, and identify issues that may affect the agency's ability to meet the joint schedule will promote agency coordination and communication that can facilitate reviews.<sup>13</sup> Incorporation of these elements into the NEPA regulations, and extending

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<sup>9</sup> Proposed Rule, 85 Fed. Reg. at 1730 (Proposed § 1508.1(z)).

<sup>10</sup> Proposed Rule, 85 Fed. Reg. at 1720 (Proposed § 1502.14 eliminating the requirement codified at 40 C.F.R. § 1502.14(c)).

<sup>11</sup> See Exec. Order. No. 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, 82 Fed. Reg. 40,463 (Aug. 24, 2017); Memorandum for Heads of Federal Departments and Agencies from Mick Mulvaney, Director, Office of Management and Budget and Mary Neumayr, Chief of Staff, Council on Environmental Quality, M-18-13, (Mar. 20, 2018).

<sup>12</sup> Proposed Rule, 85 Fed. Reg. at 1716 (Proposed § 1501.7(i)).

<sup>13</sup> Proposed Rule, 85 Fed. Reg. at 1716 (Proposed § 1501.8(b)(6)).

their applicability to Environmental Assessments (“EA”), will create meaningful improvements for interagency coordination.

## **B. Page and Time Limits Will Focus Agency Reviews**

Over time, the NEPA review has transformed into an extraordinarily comprehensive and detailed analyses of potential impacts, reflected in the length of time and number of pages it takes to complete a NEPA review.<sup>14</sup> Voluminous and lengthy reviews do not serve to meaningfully inform agencies nor the public. CEQ’s proposed revisions make great strides to refocus agency NEPA reviews on that information that is truly meaningful to the agency. CEQ’s presumptive page limits (75 pages for EAs; 300 pages for Environmental Impact Statements (“EIS”)) and time limits (one year for EAs; and two years for EISs) reinforce CEQ’s goals and will help agencies focus on analyzing relevant and meaningful information.<sup>15</sup>

## **C. Agencies Should Rely Upon Existing Information**

“NEPA’s purpose is not to generate paperwork.”<sup>16</sup> CEQ’s proposed revisions provide agencies with additional direction and guidance to evaluate existing data and analyses for use in their consideration of the impacts of their actions. These revisions are a critical step towards “facilitating more efficient, effective, and timely NEPA reviews by Federal agencies.”<sup>17</sup>

EIC supports CEQ’s proposed revisions that require greater reliance on existing data sets and analysis.<sup>18</sup> Reliance on existing data and resources recognizes that certain agencies often have expertise to undertake analyses of effects that are often included in NEPA reviews and reduces duplicative analyses across agencies. EIC appreciates CEQ’s validation of remotely gathered data, which increasingly allow applicants to gather detailed and reliable data in an efficient manner.

CEQ’s proposed revisions also shift the standard to obtain “unavailable” information from “not exorbitant” to “not unreasonable.”<sup>19</sup> EIC appreciates this revision and encourages CEQ to instruct agencies to balance the cost of obtaining the information (in terms of monetary, resource, and time costs) against the value of the information to the agency.

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<sup>14</sup> In 2018, the average preparation time for final environmental impact statements by agency ranged from 371 days (U.S. Department of Health & Human Services) to 4,032 days (Federal Transit Administration, U.S. Department of Transportation). National Association of Environmental Professionals, 2018 Annual NEPA Report 16 (November 2019).

<sup>15</sup> Proposed Rule, 85 Fed. Reg. at 1717 (Proposed § 1501.10) (prescribing presumptive time limits of one year for EAs and two years for EISs); *id.* at 1715 (Proposed § 1501.5(e)) (prescribing a presumptive page limit of 75 pages for EAs); *id.* at 1719 (Proposed § 1502.7) (prescribing a presumptive page limit of 300 pages for EISs).

<sup>16</sup> 40 C.F.R. § 1500.1(c).

<sup>17</sup> Proposed Rule, 85 Fed. Reg. at 1685.

<sup>18</sup> Proposed Rule 85 Fed. Reg. at 1721 (Proposed § 1502.24).

<sup>19</sup> Proposed Rule 85 Fed. Reg. at 1721 (Proposed § 1502.2(b)).

### **III. Conclusion**

EIC supports CEQ's goal to modernize the NEPA review process. The proposed revisions provide the necessary clarity to focus agencies on information of significance and to implement NEPA in a coordinated and predictable manner.

We appreciate the opportunity to submit comments. We would be happy to discuss our comments or any other matters that you believe would be helpful. Please contact me at (202) 747-6570 or [lori@eic.energy](mailto:lori@eic.energy) if you have questions or wish to discuss our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lori E. L. Ziebart', with a long horizontal line extending to the right.

Lori E. L. Ziebart  
President & CEO  
Energy Infrastructure Council