AMERICAN PUBLIC POWER ASSOCIATION
Powering Strong Communities

2451 Crystal Drive
Suite 1000
Arlington, VA 22202-4804
202 467-2900
www.PublicPower.org

September 29, 2023

Honorable Brenda Mallory
Chair
Council of Environmental Quality
730 Jackson Place N.W.,
Washington, D.C. 20503

Submitted electronically via www.regulations.gov

**RE: Comments of the American Public Power Association on the National Environmental Policy Act Implementing Regulations Revisions Phase 2; 88 Fed. Reg. 49,924 (July 13, 2023); Docket Id. No. CEQ-2023-0003**

## 1. Introduction

The American Public Power Association (APPA or Association) appreciates the opportunity to submit comments in response to the White House Council of Environmental Quality (CEQ) proposed National Environmental Policy Act Implementing Regulations Revisions Phase 2 (Phase 2 NEPA Proposal or Proposed Rule).[1]

APPA is the national service organization representing the interests of more than 2,000 not-for-profit community- and state-owned electric utilities that together provide electricity to approximately 49 million Americans and employ approximately 96,000 people. The Association advocates and advises on electricity policy, technology, trends, training, and operations. Association members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

The power sector is undergoing a rapid and unprecedented transition to lower and non-emitting generation resources. As a result, public power utilities own and operate an increasing share of renewable generation, such as wind, solar, and hydropower, as well as conventional fossil fuel-fired generation, such as coal, natural gas, and nuclear. The diverse generation portfolio requires building, operating, and maintaining the transmission and distribution facilities to bring electricity to customers and a wide range of entities that depend on resilient and reliable energy infrastructure, all while meeting an obligation to provide reliable, affordable, and sustainable power. NEPA reviews should smooth the progress of this transition and not add undue burdens on project proponents or responsible federal agencies.

Public power utilities support energy infrastructure permitting reforms to streamline federal permitting and sitting processes and eliminate excessive regulatory barriers to ensure predictable and timely decisions from relevant federal agencies. As public power utilities pursue diverse

[1] 88 Fed. Reg. at 49,924 (July 13, 2023).

energy infrastructure projects and upgrade the grid, the need for streamlined and efficient reviews is critical. In our members' experiences, preparing a NEPA review can add significant time and costs to a project, thereby delaying energy infrastructure projects that will be needed to deliver power from renewable energy sources or by adding costs to a transmission line repair. These costs are borne directly by public power utility customers. Public power utilities are not-for-profit entities of state and local government that do not have shareholders, and all costs are passed on to customers.

NEPA's goals are achieved when environmental reviews are appropriately focused on issues under the control and jurisdiction of the responsible federal agency. NEPA reviews that are overly broad add significant costs, delay projects, increase potential litigation, and stifle economic development.

### 2. Implementation of the Fiscal Responsibility Act Amendments to NEPA

The Proposed Rule seeks to implement the NEPA amendments included in the 2023 Fiscal Responsibility Act (FRA), which included several significant amendments to the procedural requirements for environmental reviews under NEPA. The FRA amendments limit the definition of "major federal action" and the scope of alternatives to be considered; provide details on when environmental assessments are required and the appropriate level of review; include time and page limits for environmental impact statements (EISs) and environmental assessments (EAs) and a new mechanism to seek judicial review where an agency fails to comply with the deadlines for an EIS or EA; and improve agency coordination by designating a lead agency and relevant roles/procedures for unified federal reviews. The Proposed Rule appears to simply include the general language to incorporate the text of the FRA amendments. However, the Proposed Rule doesn't adequately explain how the Proposed Rule implements the amendments made by the FRA. APPA recommends that CEQ provide more details on the implementation and applicability of the FRA amendments through future rulemaking or guidance.

#### a. Revisions to Purpose and Policy (§§1500.1 and 1500.2)

NEPA establishes a process to inform decision-making and public participation. NEPA outlines the procedures federal agencies must follow when considering the environmental impacts of a proposed major federal action. NEPA is not designed to dictate substantive outcomes when an agency exercises its authority. However, CEQ proposes to delete language from its NEPA regulations, acknowledging the statute's procedural nature, claiming it is not necessary to repeatedly emphasize NEPA's procedural nature for concern that it may suggest that NEPA merely requires a "rote paperwork exercise."[2] CEQ acknowledges in the preamble that "a NEPA analysis does not dictate a particular outcome by the decision maker," it asserts that "Congress

[2] 40 C.F.R §1500.1.

established the NEPA process to provide for better informed federal decision-making and improve environmental outcomes" and removes any acknowledgment of the procedural nature of the statue in the regulatory language.[3]

The Proposed Rule changes several provisions that move NEPA beyond procedure and mandate substantive results. The proposed revisions to §§1500.1 and 1500.2 shift NEPA's procedural requirements into "action-forcing" provisions, focusing on certain policy determinations. For example, the Proposed Rule would expand the responsibilities of federal agencies, including "to use all practicable means, consistent with other essential consideration of national policy to…attain the widest range of beneficial uses of the environment without degradation…."[4] The shift in regulatory text is inconsistent with case law that interprets NEPA as procedural in nature. The Supreme Court confirmed in *Department of Transportation v. Public Citizen, 541 U.S. 752 (2004)* that "NEPA imposes only procedural requirements on federal agencies with a focus on requiring agencies to undertake analyses of the environmental impact of their proposed actions."[5] The FRA amendments do not authorize this shift from a procedural statute to an action-forcing statutory interpretation. The FRA is intended to streamline NEPA reviews, not broaden or expand their purpose.

The proposed shift in the policy and purpose section could be misinterpreted by the courts or by the public to suggest the agencies have an obligation to select the least impactful alternatives and or to avoid actions that will have environmental impacts; a reinterpretation would be incorrect, and inconsistent with the statute and lead to difficulties in defending environmental reviews under NEPA. Therefore, APPA recommends maintaining the 2020 NEPA regulatory test or returning to the 1978 regulatory text without the proposed language.

**b. Environmental Documents Should be Concise and Informative (§1500.4)**

The Proposed Rule emphasizes the importance of concise and informative NEPA reviews by encouraging agencies to briefly discuss unimportant issues, develop plainly written environmental documents, and reduce the emphasis on background materials.[6] These proposed changes are intended to align the regulations with NEPA's intent to allow the public to provide input and increase transparency. CEQ's original NEPA regulations and guidance contemplated simple environmental reviews that were completed with one year for an EIS and three months for an EA. However, these reviews have become more complex, lengthier, and costly than CEQ project proponents (or Congress) intended. APPA supports the Proposed Rule's efforts to promote concise environmental documents and should improve efficiency. APPA recommends

[3] 88 Fed. Reg. at 49,930.
[4] 88 Fed. Reg at 49,931.
[5] *Public Citizen*, 541 U.S. 752, 756-77 (2004).
[6] 88 Fed. Reg. at 49,932.

these principles should be included in any final rule to guide the development of environmental documents and reaffirm that these principles must be incorporated into any new requirements.

### 3. The Appropriate Level of NEPA Review Should Not Be Overly Broad (§1501.3)

CEQ proposes "substantive revisions" that the process agencies should use to determine the appropriate level of NEPA review, including addressing the threshold question of whether NEPA applies to a proposed agency activity or decision.[7] If NEPA applies, then the agency shall consider the scope of the proposed action and its potential effects and the appropriate level of review. APPA is concerned that these proposed changes may require a higher level of NEPA review and may result in longer reviews.

NEPA applies if a proposed activity or decision is a major federal action. The FAR amendments have redefined this term to mean an action the agency carrying out the project "determines is subject to substantial federal control and responsibility."[8] Under the prior definition, an action was a "major federal action" – and therefore subject to NEPA– if it was "potentially subject to federal control and responsibility" and excluded non-federal projects over which the government has no or minimal involvement and where it cannot control the outcome of the project. The new definition appears narrower, as it considers whether a project is subject to federal control, not whether it is *potentially* subject to such control.

#### a. Scope of Effects Analysis Should Be Tailored to the Agency Action Under Review

APPA believes CEQ's regulations should tailor the scope of the effects analysis to ensure NEPA reviews are effective and efficient and best inform the agency's review of a proposed and final action. The scope of review should include those effects that are caused by the proposed action and subject to the jurisdiction and regulatory control of the agency pursuing the action. Further, any alternatives to the proposed action must be available, achievable, and realistic.

CEQ recognizes that the required effects analysis must be limited to reasonably foreseeable environmental effects from the proposed agency action. Consistent with the relevant case law, the regulations define "effects" to mean "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and include direct effects, indirect effects, and cumulative effects."[9] CEQ defines "reasonably foreseeable" as "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision."[10]

[7] 88 Fed. Reg. at 49,934.
[8] Fiscal Responsibility Act, Public Law No.118-5, 137 Stat. 45 (2023).
[9] 40 C.F.R §1508.1(g).
[10] 40 C.F.R §1508.1 (gg).

APPA supports CEQ's recognition that the required effects analysis must be limited to reasonably foreseeable environmental effects and properly recognizes that an agency should evaluate those impacts that are both reasonably foreseeable and caused by the agency action under review.[11] Nevertheless, we are concerned that CEQ proposes to include certain types of future environmental conditions with no ability to demonstrate a causation link.

"NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause."[12] APPA recommends that while an agency may consider a broader range of effects for context or other purposes, it should not improperly attribute effects to the action as direct, indirect, or cumulative effects if the agency action does not actually cause those effects or are beyond the agency's regulatory control or jurisdiction. APPA believes that by focusing NEPA reviews on issues under the control and jurisdiction of the federal agency (e.g., the Army Corp of Engineers) that can directly benefit from the agency action (such as wetland impacts authorized by a Clean Water Act (CWA) § 404 permit and related conditions designed to offset and, in many cases, improve wetland functions and values), environmental outcomes can be improved.

The Supreme Court has held that a "rule of reason" limits an agency's obligation to analyze effects under NEPA to those effects caused by the agency action.[13] The scope of a federal agency's analysis under NEPA is determined by the precise nature of the federal action, which in turn depends upon the activities subject to the agency's control and responsibility. In particular, NEPA does not require an agency to consider effects beyond its regulatory control or jurisdiction. Thus, an agency need not evaluate an environmental effect where "it has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[14]

In any final rule, CEQ should clarify that NEPA reviews should only include the effects of the agency action if those effects are caused by the agency action, which is consistent with the definition of the effect in the regulations. Furthermore, CEQ should confirm that federal agencies should not consider speculative effects under NEPA. Courts have reaffirmed agency decisions to exclude consideration of speculative future events.[15] The U.S. Court of Appeals in the Firth Circuit in *Gulf Restoration Network v. Dep't of Transp* affirmed the action agency's decision to exclude from its cumulative impact analysis of a proposed liquified natural gas facility the

[11] §1508.1(g).
[12] *Public Citizen*, 541 U.S. 752, 767 (2004).
[13] *Id.* at 767-770.
[14] *Id*. at 770.
[15] See, e.g., *City of Riverview v. Surface Transportation. Bd*, 398 F. 3d 434 (6th Cir. 2005).

potential environmental effects of other proposed federal projects for which a draft EIS had not yet been prepared.[16]

The Proposed Rule seeks to restore language from the 1978 regulations requiring agencies to analyze the significance of the effects for purposes of determining the appropriate level of NEPA review by examining context and intensity to determine whether effects are "significant" and provides some examples of contexts for consideration in more detail.[17] APPA has concerns that the proposed revisions seem to make it more likely that projects will be deemed to have significant impacts and, therefore, require an EIS rather than an EA.

EPA proposes that agencies should consider the characteristics of the relevant geographic area, such as proximity to unique or sensitive resources or vulnerable communities; potential global, national, regional, and local contexts; and the duration, including long-term effects.[18] Sensitive resources may include historic or cultural resources, Tribal sacred sites, and various types of ecologically sensitive areas.[19] According to the proposal, the action agencies are to assess the intensity of the effects of action and provide a list of factors, some or all of which may apply to any given action, for agencies to consider in relation to one another, returning to the approach from 1978.[20] The Proposed Rule's requirements to consider a broader range of factors and context in making a significance determination is problematic and could be misinterpreted to mean an action agency may look beyond the scope of the action to determine significance, which would be inconsistent with case law and NEPA's statutory language. The U.S. Court of Appeals for the Sixth Circuit in *Kentuckians for Commonwealth v. U.S. Army Corps of Eng're* recognized that "[t]he context of the federal agency's action should be considered in determining the scope of its relevant effects: significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole."[21]

The goals of NEPA to provide a process for efficient and timely reviews may be circumvented by requiring the consideration of potential global, national, regional, and local contexts in analyzing the intensity of effects of a broader range of factors. Rather, more proposed actions could be found to have significant effects, requiring an EIA. APPA recommends that CEQ should maintain its current regulatory approach and not revise §1501.3(d)

---

[16] *Gulf Restoration Network v. Department of Transportation*, 452 F.3d 362, 370 (5th Cir. 2006).
[17] 88 Fed. Reg at 49,935.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Kentuckians for Commonwealth v. U.S. Army Corps of Eng're,*746 F.3d698,707 (6th Cir. 2014*).*

### 4. APPA Supports the Use of Categorical Exclusions (§1501.4)

The Proposed Rule provides new flexibilities for establishing categorical exclusions (CATEXs) using additional mechanisms and flexibilities to promote the efficient and transparent development of categorical exclusions that may be tailored to specific environments, contexts, or project types.[22] CATEX should be used for actions that would not normally have a significant effect.[23] CEQ also proposes allowing agencies to jointly establish CATEXs. More diligent identification, promulgation, and application of categorical exclusions by federal agencies would eliminate the need to prepare EAs where no significant impact issues exist. APPA supports the greater use of CATEXs as this practice is consistent with the CEQ's original NEPA regulations and guidance. Still, more importantly, greater use of CATEX will expedite permitting for "low-impact" projects with no significant environmental effects. Expanding the use of CATEXs will conserve agency resources for actions that are otherwise more complex and require further environmental review.

### 5. APPA Supports Setting Page and Time Limitations for EA and EIS and Schedule for Completing Environmental Reviews (§§§1502.5, 1502.7, 1501.10)

The FRA amendments codify the page limits and deadlines in existing CEQ NEPA implementing regulations. EISs shall not exceed 150 pages (excluding appendices and citations), unless the action is extraordinarily complex. EAs shall not exceed 75 pages, and no statutory exception is provided. Regarding timing, EIS must be completed within two years and one year to complete an EA. If the lead agency cannot meet the statutory deadline for an EIS, it may extend the deadline in consultation with the applicant. However, the new deadline can only provide enough time to complete the EIS. APPA supports the codification of time and page limits, which provide needed predictability and help set expectations about the level of NEPA review that can be expected. The Proposed Rule also requires that the lead agency establish a schedule for completion of EIA and EAs, as well as any authorizations required to carry out the action.[24] APPA supports the development of a schedule as it increases regulatory certainty and enhances agency accountability.

Current NEPA reviews have involved lengthy timelines, with some members reporting NEPA scoping lasting over four and half years from the notice of intent (NOI) to the issuance of the record of decision (ROD). This lengthy timeframe causes expensive environmental studies to be ongoing, increases the cost of producing the EIS, increases staff and legal costs, and delays electric grid modernization projects. APPA supports the FRA amendments to codify the timelines to prepare EIA and EAs. However, CEQ should provide further guidance or

[22] 88 Fed. Reg at 49,937.
[23] 40 C.F.R §1501.4 (a)-(b).
[24] §1501.10(c ).

explanation of how any deadline extension request would be handled in consultation with the applicant. It is unclear how the agency would handle disputes in situations where the agency seeks an extension, but the applicant does not agree with the amount of time requested. Without a clear process, efficient environmental review could be hampered.

### 6. Lead Agency and Cooperating Agency Coordination (§§1501.7 and 1501.8)

Environmental reviews and authorizations that involve multiple federal, state, and local agencies are common---however, historically, they have not been resourced sufficiently to support timely interagency consultation or garner consensus regarding important NEPA elements, such as cumulative and indirect effects. This often results in a lengthy NEPA process with multiple setbacks and avoidable delays. CEQ proposes to clarify and improve agency coordination by designating a lead agency and clarifying that participating federal agencies may designate federal, state, tribal, or local agencies as joint lead agencies.[25] CEQ also proposes an addition to §1501.8 to clarify the meaning of the phrase ''special expertise.'' The proposed change would allow a lead agency to request an agency with special expertise, such as indigenous knowledge, to serve as a cooperating agency.[26] APPA supports the designation of a lead federal agency in developing a single environmental review document to reduce duplicative efforts by multiple federal agencies reviewing the same project.

APPA supports CEQ's proposed changes to clearly define the roles and responsibilities of the lead agency, and cooperating agencies.[27] The proposed approach should enhance the communication and coordination in the NEPA process and the issuance of a single decision within a reasonable period of time. As discussed in previous comments, an APPA member incurred $17 million in costs due to delays in completing an NEPA process to construct a critical water infrastructure project.[28] The project took eight years to complete and involved multiple federal, state, and local agencies.

In addition, CEQ proposes to change a provision allowing for joint lead agencies.[29] CEQ should not adopt this proposed change, as it may cause delay, duplication of efforts, and present challenges for federal, state, tribal, and location agencies with conflicting perspectives on the proposed action based on the constituency they represent. The proposal's requirement that joint lead agencies fill the role of a lead agency may be complicated and difficult to implement. APPA recommends that CEQ maintain the approach in the current regulations at §1501.7(b).

---

[25] 88 Fed. Reg. at 49,940.
[26] 88 Fed. Reg. at 49,941.
[27] Proposed sections 1501.7, 1501.8 and 1501.10
[28] American Public Power Association Comments on NEPA Phase One Proposed Rule https://www.regulations.gov/comment/CEQ-2021-0002-39350 at 4.
[29] 88 Fed. Reg. at 49,971.

### 7. Mitigation Measures (§1501.6)

Under longstanding case law, NEPA does not provide federal agencies with the authority to impose substantive mitigation requirements.[30] NEPA is a procedural statute only; it mandates that federal agencies follow certain procedures, but it does not impose substantive standards on the decision-making process.[31] Thus, NEPA does not require federal agencies to adopt or enforce mitigation measures discussed in NEPA documents.[32]

The Proposed Rule seeks to restore select language about mitigation from the pre-2020 version of the NEPA regulations, but in doing so, CEQ proposes to substantively expand project proponents' mitigation obligations. Previously, if a cooperating agency objected to or expressed reservations about the environmental impacts of a proposal, the regulations directed the cooperating agency to identify mitigation measures it would suggest as necessary to allow the lead agency to proceed. CEQ now proposes to direct cooperating agencies to specify mitigation measures in all circumstances. Similarly, the pre-2020 version directed the agency to adopt a monitoring and enforcement program for mitigation where applicable, recognizing that agencies may not always have the authority to require mitigation. The Proposed Rule directs agencies to make all mitigation enforceable, with accompanying monitoring and compliance plans, whenever agencies consider such mitigation in their analysis of the reasonably foreseeable environmental effects of an action.[33] This approach fails to account for agencies with limited statutory authority to require mitigation, and it ignores circumstances when an agency may reasonably foresee the implementation of mitigation measures, even though no lead or cooperating agency has jurisdiction to enforce mitigation requirements.

While mitigation plays a crucial role and may lessen or avoid potentially significant environmental effects to both advance environmental goals and make the NEPA review process more efficient, project proponents often present proposals to agencies that include measures to lessen or avoid potentially significant environmental effects of proposed actions that would otherwise need to be analyzed in an EIS.[34] CEQ should affirm that a federal agency *may* adopt binding mitigation measures only if, and to the extent, the agency's statute authorizes such measures.

---

[30] *Robertson v. Methow Valley Citizens, 490 U.S. 332*, at 352-53 (1989).
[31] Id. at 350, 353.
[32] Nat'l Parks & Conservation Ass'n v. Dep't of Transp., 222 F.3d 677, 681 n.4 (9th Cir. 2000)
[33] Proposed sections 1505.2(c) and 1503.3(c)).
[34] COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT, A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 19 (Jan. 1997) (noting that "mitigated FONSIs" are on the rise).

### 8. Public and Governmental Engagement (§1501.9)

Public Power utilities strongly support early engagement with the public to identify concerns early in the NEPA process. As entities of state and local government, our members are wholly responsible to the community in which they serve. Further, as part of public power's business model, frequent communication with the community is integral to project planning and implementation. CEQ states it is proposing updates to public and governmental requirements to continue to provide agencies with the flexibility to tailor their engagement specific to their program and actions and emphasizes meaningful public engagement with environmental justice communities, communities of color, low-income communities, indigenous communities, and tribal communities.[35] The proposed changes to the public and governmental engagement provision should, at a minimum, clarify the process and best practices agencies should follow to engage with members of the local communities to ensure appropriate notice is provided.

### 9. Programmatic Environment Documents and Tiering §1501.11

CEQ has encouraged agencies to engage in environmental review for board federal actions through the NEPA process. This continues to be the best practice for addressing broad actions.[36] CEQ proposes to add a new requirement for programmatic environmental documents, which will generally require a reevaluation every five years.[37]

APPA supports programmatic reviews where the agency approves several similar actions or projects in a region or nationwide (e.g., large-scale utility corridor project) or a suite of ongoing, proposed, or reasonably foreseeable actions that share a common geography or timing, such as multiple actives with a defined boundary. Doing so will reduce delays caused by insufficient federal staffing and the need to prepare and review redundant documents.

### 10. Agency Responsibility for Environmental Documents (§1506.5)

CEQ is proposing modifications and additions to clarify the requirements related to the federal agency's role in preparing EAs and EIS.[38] The FRA amendments provide that the lead agency allow the project sponsor to prepare EAs and EISs on behalf of the agency, under agency supervision, and to independently evaluate and take responsibility for the documents.[39] Applicants applying for authorization from a federal agency should be involved in both drafting EAs and EISs. Applicants are often in the best position to provide information about the project

[35] 88 Fed. Reg. at 49,941.
[36] 88 Fed. Reg. at 49,943.
[37] 88 Fed. Reg. at 49,944.
[38] 88 Fed. Reg. at 49,956.
[39] 88 Fed. Reg. at 49,956.

and its potential effects. Under the appropriate supervision and oversight, allowing an applicant to draft NEPA documents can reduce the burden on the federal agency and ensure timelines are met. However, APPA recommends that CEQ provide more guidance and further clarification on allowing applicants and third parties to participate in developing NEPA documents.
APPA recommends that where third-party contractors are used, the acting agency, any cooperating agencies, the third-party contractor, and the project proponent or applicant enter into a memorandum of understanding addressing the relative roles and responsibilities of the third-party contractor, the agencies and the proponent or applicant in the development, review, and comment on the environmental document.

### 11. Alternatives Analysis (§§1502.13 and 1502.14)

CEQ proposes to require EIS to include a summary of the purpose and need of the proposed agency action to promote the "rigorous analysis and consideration of alternatives" by reintroducing language from the 1978 regulations that the alternative analysis "is the heart of the environmental impact statement."[40] The FRA amendments confirm that an agency should evaluate "a reasonable range of alternatives…. that is technically and economically feasible and meets the purpose and need of the proposal."[41] The agency should identify the "reasonable foreseeable environmental effects" of the proposed action and the alternatives based on the information presented in the affected environment and environmental consequences sections. CEQ also proposes to add language clarifying that the agency "need not consider every conceivable alternative to the proposed action but rather must consider a reasonable range of alternatives…."[42] However, CEQ also proposes to allow agencies to consider a "reasonable range of alternatives not within the jurisdiction of the lead agency." This approach seems to exceed the agency's authority. It is not clear how the agencies would have the authority to identify and analyze alternatives outside their jurisdiction. For example, a permitting agency evaluated an alternative transmission line route for a transmission line project undertaken by an APPA member even though the route was not identified as an available alternative by the applicant. This alternative would have presented several challenges. First, it would have added substantial costs to the project that consumers would have borne. Second, the agency had no jurisdiction or ability to implement the route. Finally, approvals from other agencies would have been required. Nonetheless, the agency included a detailed analysis of the alternative route in its final EIS, confusing the issues and providing project opponents with a separate basis for challenging the project. APPA recommends that CEQ remove this provision that would allow consideration of alternatives outside the agency's jurisdiction.

[40] 88 Fed. Reg. at 49,948.
[41] 42 U.S.C § 4332(2)(C)(iii).
[42] 88 Fed. Reg at 49,948.

Alternatives outside of an agency's jurisdiction are not reasonable because implementing those alternatives is not an option available to the agency and, therefore, should be excluded from the alternatives analysis. Further, it would be a waste of time and resources to include alternatives beyond the scope of the agency's jurisdiction. The range of alternatives to be considered is governed by a "rule of reason."[43] In light of the court decision in *Citizens Against Burlington Inc.,v. Busey,* if an alternative is inconsistent with the purpose of the federal action and otherwise "reasonable," an agency is not required to consider it in NEPA documentation.[44] Courts have held an agency need not consider alternatives that are unlikely to be implemented.[45] Similarly, alternatives that are not "capable" of achieving the "overall project purpose" are not reasonable because implementing the alternatives would defeat the purpose of the proposed project under review. Environmental reviews that appropriately limit the scope of the alternatives analysis to the agency's jurisdictional authority protect applicants and ensure the completion of reviews in a reasonable timeframe, which is critical to APPA member projects, including those designed to facilitate the energy transition and maintain and improve electric reliability. Considering this case law, CEQ eliminated the provision to "include reasonable alternatives not within the jurisdiction of the lead agency" in the 2020 NEPA revisions.[46] CEQ should not reinstate this problematic language now.

CEQ also proposes to require the identification of environmentally preferable alternatives.[47] APPA is concerned that this approach, which is subjective, will lead to increased litigation and delay as project opponents may challenge any attempt to comply with this provision. NEPA is a procedural statute, and identifying environmentally preferable alternatives is a substantive requirement. CEQ seeks to clarify that environmentally preferable alternatives may be either a proposed action, no action alternatives, or a reasonable alternative.[48] However, APPA has concerns that if an agency selects an alternative other than the environmentally preferable alternative, project opponents can and will argue the agency's decision was arbitrary and capricious, even though NEPA doesn't require selecting the "environmentally preferable" alternative. APPA recommends this requirement be removed and not finalized.

---

[43] *City of Grapevine v. Dept. of Transp*., 17 F.3d 1502, 1506 (D.C. Cir. 1994); *Citizens Against Burlington Inc.*,v. *Busey,* 938 F.2d at 195 (D.C.Cir. 1991).
[44] *Busey*, 938 F.2d at 195-96.
[45] See e.g., *HonoluluTraffic.com v. FTA*, 742 F.3d 1222, 1231 (9th Cir. 2014); See also *California ex rel. Imperial Air County Pollution Control Dist*., 767 F.3d 781, 797 (9th Cir. 2014) ("Discussing a hypothetical alternative that no one had agreed to (or would likely agree to) would have been unhelpful."); *Int'l Brotherhood of Teamsters v. U.S. Dep't of Transp.,* 724 F.3d 206, 217 (D.C. Cir. 2013) (upholding a NEPA analysis that did not analyze alternatives the agency lacked the authority to impose).
[46] 40 C.F.R. 1502.14 (c) (2019).
[47] 88 Fed. Reg. at 49,949.
[48] *Id*.

**12. Conclusion**

APPA appreciates the opportunity to comment on the Proposed Rule. APPA supports CEQ's effort to modernize and clarify its regulations to facilitate more efficient, effective, and timely NEPA reviews to reflect CEQ's significant experience in implementing the statute. APPA encourages CEQ to expeditiously complete the proposed rulemaking consistent with our recommended suggestions.

Please contact Ms. Carolyn Slaughter at 202-467-2900 or email CSlaughter@publicpublic.org, should you have any questions regarding the enclosed comments.