



March 10, 2020

Edward A. Boling  
Associate Director for the National Environmental Policy Act  
Council on Environmental Quality  
730 Jackson Place N.W.  
Washington, DC 20503

Submitted electronically via <http://www.regulations.gov>

RE: Docket Number CEQ-2019-0003

Dear Mr. Boling:

The American Public Power Association appreciated the opportunity to submit the following comments in response to the Council on Environmental Quality's (CEQ) proposed rule, "*Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA)*." APPA agrees the NEPA review process needs to be revised, modernized and streamlined. We appreciate that CEQ's proposed revisions will focus limited Agency resources on the most pertinent environmental issues while also reducing duplication and providing parties with more certainty. We welcome the opportunity to work cooperatively with CEQ. Should you have any questions about these comments, please contact Ms. Carolyn Slaughter ([CSlaughter@PublicPower.org](mailto:CSlaughter@PublicPower.org) or (202) 467-2900).

Sincerely,

A handwritten signature in black ink that reads "Carolyn Slaughter". The signature is written in a cursive, flowing style.

Carolyn Slaughter  
Director, Environmental Policy



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THE AMERICAN PUBLIC POWER ASSOCIATION'S COMMENTS ON  
THE COUNCIL ON ENVIRONMENTAL QUALITY'S PROPOSED REGULATIONS  
IMPLEMENTING THE PROCEDURAL PROVISIONS OF THE NATIONAL  
ENVIRONMENTAL POLICY ACT

85 Fed. Reg. 1,684 (January 10, 2020)

Docket No. CEQ-2019-0003

March 10, 2020

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## I. INTRODUCTION

The American Public Power Association (APPA or Association) appreciates the opportunity to submit the following comments in response to the Council on Environmental Quality's (CEQ or Agency) proposed rule entitled "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA)," commonly referred to as the NEPA Rules or NEPA implementing regulations.<sup>1</sup> 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 93,000 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. APPA participates on behalf of its members collectively in various rulemakings and proceedings that affect public power utilities. For these reasons, APPA has a clear interest in this proposed rulemaking, as well as other environmentally related rulemakings.

## II. EXECUTIVE SUMMARY

The National Environmental Policy Act (NEPA or Act) was enacted in 1969 to establish a national policy for the environment, provide for the establishment of the CEQ, and other purposes.<sup>2</sup> In general, NEPA requires federal agencies to consider the environmental impacts of proposed actions as part of the agency's decision-making process. The CEQ issued the first guidelines for implementing NEPA in 1970, issued updated guidelines in 1973, and promulgated

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<sup>1</sup> 85 Fed. Reg. 1684 (January 10, 2020) or "Proposed Rule".

<sup>2</sup> 42 U.S.C. § 4321, *et seq.*

the NEPA implementing regulations (NEPA regulations) in 1978.<sup>3</sup> CEQ noted that the goals of the NEPA regulations were to reduce paperwork and delays, as well as promote better decisions that are consistent with the national environmental policy established by the Act. Since the initial NEPA regulations were promulgated, there have been numerous guidance documents issued by CEQ to assist with compliance of NEPA and its regulations, and courts have issued various decisions interpreting NEPA and its regulations. CEQ has only substantively amended its NEPA regulations once.<sup>4</sup>

Even with the implementing regulations and various guidance documents issued by CEQ throughout the years, the NEPA process remains a very lengthy and costly one. To help improve agency coordination for infrastructure projects requiring an environmental impact statement (EIS) and permits or other federal authorizations, as well as to improve the timeliness of the environmental review process, the CEQ and Office of Management and Budget (OMB) issued a memorandum in 2018 titled, “One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects under E.O. 13807” (OFD Framework Guidance).<sup>5</sup> Federal agencies then signed a Memorandum of Understanding (MOU) committing to implement the OFD Framework Guidance for major infrastructure projects which requires committing to the establishment of a joint schedule for projects, preparation of a single

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<sup>3</sup> See 35 Fed. Reg. 7391 (May 12, 1970) (interim guidelines); 36 Fed. Reg. 7724 (April 23, 1971) (final guidelines); 38 Fed. Reg. 10856 (May 2, 1973) (proposed revisions to guidelines); 38 Fed. Reg. 20550 (Aug. 1, 1973) (revised guidelines); 43 Fed. Reg. 25230 (June 9, 1978) (proposed rule).

<sup>4</sup> See 40 CFR 1501 et seq.; 51 Fed. Reg. 15618 (April 25, 1986).

<sup>5</sup> M-18-13 (Mar. 20, 2018).

EIS and joint record of decision (ROD), elevation of delays and dispute resolution, and setting a goal of completing environmental reviews within two years.<sup>6</sup>

In addition to the OFD Framework Guidance and MOU, the CEQ and OMB issued an Advance Notice of Proposed Rulemaking (ANPRM) on June 20, 2018, requesting public comment on how CEQ could ensure a more efficient, timely, and effective process consistent with the Act's national environmental policy.<sup>7</sup> Many of those who provided comments to the ANPRM, including APPA, argued that the regulations needed to be amended to address the issues related to overly lengthy documents and time required for the NEPA process.

In response to the comments CEQ received on the ANPRM, CEQ has issued this Proposed Rule to “revise and modernize its NEPA regulations to facilitate more efficient, effective, and timely NEPA reviews by federal agencies.”<sup>8</sup> As APPA stated in its comments on the ANPRM, APPA agrees that the NEPA review process needs to be revised, modernized, and streamlined. APPA appreciates that CEQ's proposed revisions will focus limited Agency resources on the most pertinent environmental issues while also reducing duplication and providing parties with more certainty. In turn, this will allow APPA's members to provide more cost-effective and reliable sources of electricity nationwide. In general, APPA agrees with the proposed NEPA rules but offers edits and suggestions identified below that the Agency should make to ensure that the final rule achieves the goal of streamlining and modernizing the process, while maintaining compliance with NEPA's mandate.

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<sup>6</sup> See Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (2018) found at: <https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf>.

<sup>7</sup> See “Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act,” Docket No. CEQ-2018-001, 83 Fed. Reg. 28591 (June 20, 2018).

<sup>8</sup> 85 Fed. Reg. at 1691.

- NEPA is a procedural statute but the current regulations lead to cumbersome, duplicative, and time-consuming tasks in order for the Agency to issue an EIS or ROD. APPA generally supports the Agency's efforts to streamline this process, but it could go even further to reduce the time and cost to all parties involved.
- APPA generally supports the proposed revisions to section 1501.5 regarding environmental assessments (EAs) to ensure that the document is more streamlined than an EIS by reiterating that an EA need not include a detailed discussion on each alternative, it should be tailored to relevant effects, include public involvement, and have a reasonable page limit.
- APPA supports the expanded use of categorical exclusions where appropriate.
- APPA supports the codification of One Federal Decision.
- APPA supports the presumptive time limits as proposed in section 1501.10. However, APPA notes that CEQ has in the past stated that an EA should take no more than three months. Given this, APPA would support an even shorter time limit than what is currently proposed.
- APPA supports the proposed changes to sections 1501.11 and 1501.12 regarding tiering and incorporation by reference, as they will reduce inefficiencies in the current NEPA process.
- Of the proposed revisions to the key definitions and terms in section 1508, APPA provides comments and support regarding the meaning of "effects" and "major federal action" and "reasonable alternatives."
- APPA supports the Proposed Rule's approach to allowing greater applicant and contractor participation. This will reduce burdens on the agencies, while ensuring that critical timelines are met.

### **III. PROCEDURAL NATURE OF NEPA**

The Association's members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

In the course of providing essential electricity services, Association members engage in activities that might involve federal agency action. For example, some members may perform work in wetlands and other waters of the United States and must obtain Clean Water Act (CWA)

permits under Section 404, or the Rivers and Harbors Act Section 10 requiring the issuance of a permit by the U.S. Army Corps of Engineers (Corps), or an Incidental Take Permit under Section 10 of the Endangered Species Act or a take permit under the Bald and Golden Eagle Act. A permit under any statute is a federal action subject to review under NEPA. Association members undertake other activities that involve actions by other federal agencies that are subject to NEPA. Therefore, the implementation of NEPA is important to public power utility customers that rely on cost-effective and reliable electricity supply. APPA's member utilities are committed to meeting the environmental requirements under NEPA and recognize that the Proposed Rule does not alter compliance requirements they face under other applicable environmental statutes (e.g., CWA, ESA).

As CEQ points out in the Proposed Rule, NEPA is a procedural statute which serves to ensure that agencies consider the significant environmental consequences of their proposed actions as well as inform the public about their decision making.<sup>9</sup> The Supreme Court, when discussing the role of NEPA in an agency's decision-making process, said that, "Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations."<sup>10</sup> The changes proposed by CEQ should eliminate unnecessary burdens, remove procedural obstacles, harmonize processes across the federal government, and promote one lead federal agency, concurrent reviews, tiering and other mechanisms to streamline the NEPA review process.

Environmental reviews and authorizations that involve multiple federal, state and local agencies are common. However, historically they have not been resourced sufficiently to support

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<sup>9</sup> 85 Fed. Reg. 1686, *citing* *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

<sup>10</sup> 85 Fed. Reg. 1686, *quoting* *Balt. Gas & Elec. Co.*, 462 U.S. at 97.



timely interagency consultation or garnering 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. Frequently, federal, state, and local agencies have complimentary and/or different authorization and permitting requirements that can complicate the NEPA process. With the lack of interagency coordination, these differences in agencies' permitting requirements can result in similar analyses being required or even repeated for each agency's use. Early and continuous coordination between federal, state, and local agencies, as well as the public, is particularly important for NEPA analysis because of its potential to impact the interests of those parties to varying degrees. For example, an APPA member conducted a NEPA review for a new water delivery project. This member incurred approximately \$17 million in costs to complete studies and hire consultants and contractors. A streamlined NEPA review is essential to ensuring these costs are not ultimately borne by utility customers.

The electric utility industry is amid a transition to low- and non-emitting generation resources, such as wind and solar. Developing these types of resources often requires adding new transmission lines to connect to the grid. Simultaneously, utilities must maintain and upgrade existing lines to ensure reliability. Public power utilities undertake numerous activities and spend millions annually to study, avoid impacts to, preserve, and enhance environmental resources.

APPA generally supports the Agency's efforts to streamline and modernize the NEPA process through the Proposed Rule. However, CEQ should continually look for ways to lessen the burden on agencies, applicants, contractors, and public participants so that environmental analyses can be completed in a timely fashion and the results applied succinctly to the proposed actions.

#### **IV. SPECIFIC COMMENTS ON REVISIONS TO PART 1501**

CEQ is proposing numerous revisions to 40 C.F.R Part 1501, including consolidating and clarifying provisions regarding EAs, provisions on tiering and incorporation by reference, setting presumptive time limits for completion of NEPA reviews, and clarifying the roles of lead and cooperating agencies — all to “further the OFD policy and encourage more efficient and timely NEPA reviews.”<sup>11</sup> APPA believes many of these changes are necessary but offers specific comments and suggested changes below.

##### **A. APPA Supports the Proposed Changes to Section 1501.5 Regarding Environmental Assessments**

Currently, the NEPA regulations direct that when a proposed action is not categorically excluded, the agency prepares an EA to document its effects analysis. If the EA demonstrates that the action’s effects would not be significant, the agency prepares a Finding of No Significant Impacts (FONSI), which ends the NEPA process. However, if there is no FONSI, then the agency must prepare a full EIS.

CEQ is proposing various changes to section 1501.5 regarding EAs. As CEQ notes, the current regulations define an EA as a “concise public document” that agencies may use to comply with NEPA and determine whether to prepare an EIS or FONSI.<sup>12</sup> Section 1508.9 sets forth the requirements for an EA’s contents and section 1501.4(b) provides the public involvement requirements for EAs. CEQ is now proposing to consolidate these into a single section to improve readability. APPA supports this consolidation.

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<sup>11</sup> 85 Fed. Reg. at 1695.

<sup>12</sup> 40 CFR § 1508.9; 85 Fed. Reg. at 1696.

## 1. APPA Supports a More Streamlined EA

CEQ is proposing to clarify that an agency must prepare an EA when necessary to determine whether a proposed action would have a significant effect or the significance of the effects is unknown, unless a categorical exclusion (CE) applies to the proposed action or the agency determines that an EIS is necessary. The proposed regulations would continue to direct that the requirements for documenting a proposed action and its alternatives in an EA would be more limited than an EIS. The proposed regulations would continue to require agencies to briefly describe the proposed action and any alternatives, but for actions without unresolved conflicts concerning alternative uses of available resources, CEQ is expecting agencies to examine a narrower range of alternatives. However, CEQ is proposing that agencies need not include a detailed discussion of each alternative in an EA, nor do they need to include a detailed discussion of those alternatives that have been eliminated.

While CEQ agrees that agencies have discretion to include more information in their EAs than is required to prepare an EIS or FONSI, CEQ cautions that the agency should “carefully consider their reasons and have a clear rationale for doing so.”<sup>13</sup> CEQ advises that agencies should “focus on analyzing material effects and alternatives, rather than marginal detail that may unnecessarily delay the environmental review process.”<sup>14</sup> CEQ notes that the EA should focus on whether the proposed action would “significantly” affect the quality of the human environment and tailor the length of the discussion to the relevant effects.

APPA supports CEQ’s efforts to make the EA process less burdensome. However, APPA suggests that CEQ further highlight examples of possible ways to streamline the process

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<sup>13</sup> 85 Fed. Reg. at 1697.

<sup>14</sup> *Id.*

to include that agencies need not include a detailed discussion of each alternative. Moreover, CEQ should emphasize that EAs should be tailored to the relevant facts and need not include expansive discussions of background details, regulatory history, scoping scenarios, or lengthy studies that are only marginally relevant.

## **2. APPA Supports the Changes Regarding Public Involvement**

The current regulations state that the agency should list the “agencies, applicants, and the public” involved in preparing the EA to document agency compliance with the requirement to “involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments.”<sup>15</sup> CEQ is proposing to move the public involvement requirements for EAs from section 1501.4(b) to the newly proposed section 1501.5(d) and to change the word “environmental” to “relevant” when referring to agencies so as to include all agencies that may have information that is relevant to the development of an EA. CEQ is proposing to retain the current standard that does not require the publication of a draft EA for public comment. However, the Proposed Rule would continue to require that the lead agency involve relevant agencies, the applicant, and the public prior to the completion of an EA. CEQ is not proposing to set specific requirements for public involvement but is simply advising that, while there is no single, correct approach for public involvement, agencies should involve the public to the extent practicable. This could include considering all relevant circumstances and give the agency discretion on how to conduct public involvement. Agencies could choose to hold public meetings, provide detailed scoping notices, or any other means that the agency feels is necessary.

APPA supports the Proposed Rule’s admonition to agencies that they should continue to involve other relevant agencies, the applicant, and the public in the EA process. Various parties

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<sup>15</sup> 40 CFR 1501.4(b); 85 Fed. Reg. 1697.

often have differing interests, perspectives, and analysis that agencies should not only be aware of, but which the agencies should absolutely take into consideration in preparing an EA. Further, CEQ should consider removing from section 1501.5(d) the phrase “to the extent practicable” when referring to whether the lead agency needs to involve relevant agencies, applicants, and the public in the EA preparation process. This qualifying phrase (without further descriptive examples of appropriate uses) could be used by agencies to exclude those parties from the EA process without any explanation – except that it was deemed not “practicable” to involve them. Should CEQ leave the phrasing as is, it should include some examples of how agencies should utilize their discretion to invoke this provision so agencies do not simply undertake the EA process on their own or “cherry pick” among those entities it wants to involve and exclude others that it does not wish to hear from.

### **3. APPA Supports a More Reasonable Page Limit**

CEQ is proposing section 1501.5(e) that would establish a presumptive 75-page limit for EAs. However, the rule would allow for a senior agency official to approve a longer length. CEQ notes that in order to achieve the 75-page limit, agencies should refrain from providing extensive background material and instead focus on emphasizing important impact analyses and relevant information for those analyses. CEQ further advises that an EA should offer clear and concise conclusions and incorporate by reference relevant data, survey results, inventories, and other information relevant to support the EA’s conclusions.

APPA agrees with the proposed 75-page presumptive limit for EAs. APPA echoes CEQ’s sentiments that a 75-page limit will promote a more readable document as well as allow the relevant agencies the flexibility they may need to prepare longer documents when necessary. This is consistent with CEQ guidance on EAs and ensures that agencies identify and focus on

relevant issues and significant environmental impacts, which will better inform decision-makers and the public. EAs are intended to be concise and to contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, as well as a list of agencies and persons consulted. CEQ has, in the past, advised agencies that EAs should be no more than 10-15 pages. In addition, the Army Corps of Engineers has also provided the same 10-15-page guideline.

Limiting the length of EAs and EISs will ensure that the documents contain only the information that is relevant to the decision-making process. However, because some projects may need a more robust review, allowing a senior agency official the discretion to approve a longer length will ensure that the NEPA analysis is sufficient.

**B. APPA Supports the Proposed Changes to Section 1501.4 Regarding Categorical Exclusions**

CEQ's Proposed Rule recognizes that categorical exclusions (CEs) are underutilized and typically require little to no documentation.<sup>16</sup> Further, CEs are not addressed in any meaningful way in the current regulations. CEQ notes that federal agencies have developed and documented more than 2,000 CEs and apply CEs to approximately 100,000 federal agency actions per year, which require little or no documentation.<sup>17</sup>

APPA supports CEQ's efforts to provide greater clarity around the process an agency considers when determining whether a proposed action is categorically excluded under NEPA.<sup>18</sup> Maximizing the use of CEs is consistent with CEQ's original regulations and guidance, which

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<sup>16</sup> 85 Fed. Reg. at 1696.

<sup>17</sup> 85 Fed. Reg. at 1696.

<sup>18</sup> 85 Fed. Reg. at 1696.

highlighted many actions that could be categorically excluded from individual review under NEPA. Specifically, the Proposed Rule clarifies that CEs can be developed for actions that normally would not have a significant effect, even where “extraordinary circumstances” are present that might otherwise preclude reliance on the CE, and the agency can rely on the CE if mitigating circumstances are sufficient to avoid significant effects.<sup>19</sup> Expanding the use of CEs will conserve agency resources for actions that are otherwise more complex and require further environmental review.

### **C. APPA Supports the Proposed Changes to Sections 1501.7 and 1501.8 Regarding the Codification of One Federal Decision**

The 1978 regulations created the roles of lead agency and cooperating agencies for NEPA reviews.<sup>20</sup> Throughout the years, CEQ, as well as Congress, have attempted to establish a more streamlined approach for multi-agency NEPA reviews. One such attempt has been the OFD policy issued by CEQ in 2018. CEQ is now proposing modifications to section 1501.7 and 1501.8 regarding lead agencies and cooperating agencies,<sup>21</sup> in an attempt to “improve interagency coordination, make development of NEPA documents more efficient, and facilitate implementation of the OFD policy.” Specifically, CEQ is proposing to apply sections 1501.7 and 1501.8 to EAs as well as EISs. In addition, CEQ is proposing to codify its OFD policy by adding section 1501.7(g), which would require agencies to evaluate proposals involving multiple federal agencies in a single EIS and issue a joint ROD or a single EA and joint FONSI.

CEQ is also proposing to move language from the current cooperating agencies section, section 1501.6(a), which addresses the lead agency’s responsibilities with respect to those

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<sup>19</sup> *Id.*

<sup>20</sup> 40 CFR §§ 1501.5 and 1501.6.

<sup>21</sup> 85 Fed. Reg. at 1698.

cooperating agencies, to proposed section 1507.7(h) so that all of the lead agency's responsibilities are in one section. CEQ is also proposing to clarify that the lead agency is responsible for determining the purpose and need as well as alternatives in consultation with any cooperating agencies by amending paragraph (h)(4) so that it is consistent with the OFD policy.

CEQ is proposing modifications that would require the development and adherence to a schedule for the environmental review and any authorizations required for a proposed action as well as clarifying that a lead agency may invite state, tribal, and local agencies to serve as a cooperating agency. For this, CEQ is proposing to change "federal agency" to "agency" and move the operative language from the definition of "cooperating agency." Finally, CEQ is proposing to allow a federal agency the right to appeal to CEQ a lead agency's denial of a request to serve as a cooperating agency, thus furthering the goal of the OFD policy of a more efficient and timelier NEPA review process.

APPA generally supports the proposed changes to sections 1501.7 and 1501.8 that codify the One Federal Decision and believes CEQ's NEPA regulations should be revised to facilitate interagency coordination of environmental reviews and authorization decisions. As APPA noted in its comments on the ANPRM, at least twelve federal agencies have already taken initial steps to implement the OFD processes, by signing an agreement to establish cooperative relationships to timely processing of environmental reviews and authorization decisions for proposed major infrastructure project. The designation of a lead federal agency for the development of a single environmental review document will facilitate a cooperative relationship for the timely processing of environmental reviews and authorizations.

APPA member Missouri River Energy Services (MRES) supports CEQ's suggestion in the Proposed Rule that would require federal agencies with discretionary decision-making



authority for a proposed project to coordinate on scheduling and, where practicable, on the completion of a single environmental document that can be relied upon for the issuance of each agency's permitting or authorization decision. In particular, the approach set forth in the Proposed Rule to establish a concurrent review process for projects involving multiple federal agencies would greatly improve communication and coordination in the NEPA process, reduce duplicative efforts by federal agencies reviewing the same project, and promote the timely and efficient processing of any required authorizations.

In addition, such streamlining of the NEPA review process will allow project proponents like MRES to plan with greater certainty, thereby reducing costs and delays that have hindered projects in the past. MRES has been involved in generation and transmission infrastructure projects, such as the Red Rock Hydroelectric Project, that require permits and authorizations from multiple federal regulatory agencies. The NEPA process is only one of many federal and state regulatory processes that may be required for any particular project. From MRES' experience, multiple, sequential permitting can contribute to an unwieldy and unnecessarily lengthy and costly process, which can threaten the viability of a project that may be critical for the reliability of the electric grid or, in the case of the Red Rock Hydroelectric Project, that will increase renewable generation in our country.

#### **D. APPA Supports the Proposed Changes to Section 1501.10 Regarding Time Limits**

CEQ, in response to comments on the ANPRM regarding the need for meaningful time limits, is proposing to establish presumptive time limits for EAs and EISs consistent with E.O. 13807 and prior CEQ guidance. Specifically, CEQ is proposing a presumptive time limit for EAs of one year and a presumptive time limit for EISs of two years.<sup>22</sup> The Proposed Rule would

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<sup>22</sup> See Proposed Rule § 1501.10(b).

also include a provision to allow a senior agency official to approve a longer time period if necessary. The Proposed Rule defines start and end dates of the EIS or EA, which would require agencies to begin scoping and develop a schedule for timely completion prior to issuing an NOI and commit to cooperate, communicate, share information, and resolve conflicts that could prevent meeting milestones. This is all consistent with the current OFD policy.

APPA agrees with many other commenters that current NEPA reviews involve lengthy timelines, with some members reporting experiencing over four and half years from the NOI to conduct NEPA scoping to issuance of the 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 projects which were proposed to ensure electrical reliability from being built during these lengthy reviews. APPA concurs with CEQ's rationale that while some projects may entail difficult long-term planning or the gathering of data that may take additional time, leading to a lengthier process, overall, the presumptive time limit of one year for EAs and two years for EISs is reasonable. In fact, some agencies have already taken steps to address this very issue and have set even more aggressive timelines. For instance, the Department of Interior (DOI) Secretarial Order 3355 imposes a one-year limit for the completion of an EIS from the date of issuance of an NOI, except for unusually complex projects.

APPA noted in its comments on the ANPRM that the CEQ's 40 Most Asked Questions on NEPA stated that an EA should take no more than three months. While APPA agrees that an EA should take no more than three months, it supports the time limits in this Proposed Rule as they are reasonable and will allow for a timelier and more cost-effective NEPA process than the current one.

APPA would suggest that CEQ prepare a comprehensive NEPA guidebook for all agencies to use to assist those agencies in meeting not only the timelines of a NEPA review, but also other requirements of NEPA review. A guidebook would help ensure that agencies truly understand that the timelines in the Proposed Rule are enforceable, will incentivize agencies to adhere to them, and will help resolve common questions about NEPA reviews so as to not unduly delay the process. In addition, the guidebook should provide additional instruction on the preparation of NEPA documents to ensure that the process and resulting documents are consistent with NEPA and its implementing regulations.

**E. APPA Supports the Proposed Changes to Sections 1501.11 and 1501.12 Regarding Tiering and Incorporation by Reference**

CEQ proposes to move the current section 1502.21 (tiering) and section 1502.22 (incorporation by reference) to new proposed sections 1501.11 and 1501.12, respectively. In addition to relocating these sections, CEQ is proposing to clarify when agencies can use existing studies and analyses in the NEPA process and when agencies would need to supplement those studies and analyses. This would include amending section 1501.11 on tiering to make clear that site-specific analyses need not be conducted prior to an irretrievable commitment of resources, which in most cases will not be until the decision at the site-specific state.

APPA supports the proposed changes to sections 1501.11 and 1501.12 regarding tiering and incorporation by reference, as these changes would reduce inefficiencies in the NEPA process. These changes would ensure that federal agencies and applicants would not have to expend additional time and resources to prepare and submit new documents where the subject has already been sufficiently covered by documents previously created by federal, state, tribal, or local agencies. In addition, during the scoping process, agencies should be required to review

and determine whether prior analyses address the issue under review and how such information should be utilized and incorporated.

As APPA noted in its comments on the ANPRM, CEQ should broadly support programmatic reviews where the agency is approving several similar actions or projects in a region or nationwide (e.g., a 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 activities within a defined boundary (i.e., federal land or facility). Doing so will cut down on delays caused by insufficient federal staffing and the need to prepare and review redundant documents.

As an example, CEQ could easily harmonize the NEPA review process with the Endangered Species Act (ESA) section 7 biological assessment (BA) and biological evaluation (BE) processes. A BA is prepared for "major construction activities" considered to be federal actions significantly affecting the quality of the human environment as referred to in NEPA. A BE is a generic term for all other types of analyses. Although agencies are not required to prepare a BA for non-construction activities, if a listed species or critical habitat is likely to be affected, the agency must provide the Service with an evaluation on the likely effects of the action. Often this information is referred to as a BE. BAs and BEs should not be confused with EAs or EISs under NEPA. However, the BA or BE analysis can and should be incorporated into the NEPA documents. Biological assessments may be completed prior to the release of the EA or EIS and may legitimately inform its outcome or, at the least, prevent needless redundancy and expense.

**V. COMMENTS REGARDING REVISIONS OF KEY DEFINITIONS IN SECTION 1508**

CEQ is proposing various changes to key definitions and terms throughout section 1508 of the NEPA rules. CEQ's stated purpose for these revisions is to reduce ambiguity. While CEQ is proposing various new or revised definitions along with eliminating section numbers, for purposes of these comments, APPA is focusing on the definitions of "effects," "major federal action," and "reasonable alternatives."

**A. CEQ Should Clarify the Meaning of "Effects"**

CEQ, after hearing many concerns from commenters raised in response to the ANPRM, is proposing to simplify the definition of "effects" by consolidating it into a single paragraph and striking the specific references to direct, indirect, and cumulative effects.<sup>23</sup> CEQ aims to simplify the definition to focus agencies' consideration of effects on those that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. The definition would, in essence, mesh with the notion of proximate causation, found in tort law, which is the position taken by the U.S. Supreme Court in *Dept. of Transp. V. Public Citizen* (541 U. S. 752, 767 (2004)). CEQ appears aligned with the Supreme Court that a "but for" causal relationship is an insufficient basis upon which to hold an agency responsible for a particular effect under NEPA.<sup>24</sup>

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<sup>23</sup> See 85 Fed. Reg. 1708.

<sup>24</sup> Recently, the 11<sup>th</sup> Circuit U.S. Court of Appeals in *Center for Biological Diversity, Manasota-88 Inc. v. U.S. Army Corps of Engineers*, 941 F.3d 1288 (11<sup>th</sup> Cir. 2019), evaluated the Army Corps' issuance of an NPDES permit to a fertilizer company that engaged in, as part of its fertilizer making process, phosphate mining. Phosphogypsum is a toxic byproduct of the mining process, but the Corps concluded that it did not have to account for the environmental effects of phosphogypsum in the NPDES process because its potential environmental effects were too remote in connection to the discharge permit issue. An environmental group challenged the Corps' decision, but the 11<sup>th</sup> Circuit upheld it relying, in part, on the U.S. Supreme Court's *Public Citizen* decision that made clear indirect effects must be "proximate" and cannot include those potential effects that are insufficiently related to the agency's reason for action.

As such, CEQ is proposing to clarify that effects should not be considered significant if they are remote in time, geography, or are the result of a lengthy causal chain. CEQ intends, with this Proposed Rule, to make clear that effects do not include those that the agency has no authority to prevent or would happen even without agency action, as they would not have a sufficiently close causal connection to the proposed action.

In APPA's comments on the ANPRM, it supported definitions and approaches that appropriately limit the description of the action and the identification of effects that should be considered in a NEPA analysis. The effects analysis should be focused and circumscribed. APPA members often undertake projects where a small portion may require federal permitting for work in a water of the United States (WOTUS). CEQ's proposed changes would reinforce the proper scope of analysis established by Supreme Court and other federal court decisions, and help ensure that NEPA reviews of CWA permits focus on those effects caused by and subject to control under the permit (thus sharpening the focus on measures that can actually be required and are most likely to be environmentally beneficial).

#### **B. APPA Supports the Revised Definition of "Major Federal Action"**

In the ANPRM, CEQ received many comments seeking clarification of the term "major federal action." The current definition of "major federal action" states, in part:

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§1508.27). Actions include circumstances where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.<sup>25</sup>

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<sup>25</sup> 40 CFR § 1508.18.

In the Proposed Rule, CEQ amends the first sentence to clarify that an action meets the definition if it is subject to federal control and responsibility, and it has effects that may be significant.<sup>26</sup> CEQ is proposing to replace “major” with “significant” to align with the NEPA statute. CEQ is also proposing to strike the second sentence, referenced above, completely. CEQ’s rationale is that because the statute states, “major Federal actions significantly affecting the quality of the human environment,” the current interpretation renders the word “major” meaningless. Therefore, striking the sentence would be consistent with the principles of statutory construction whereby all words of a statute must be given meaning consistent with principles of statutory interpretation.<sup>27</sup> CEQ is also proposing to strike the third sentence regarding the failure to act and exclude activities that do not result in final agency action under the Administrative Procedure Act. Finally, CEQ is proposing to strike any reference to the State and Local Fiscal Assistance Act of 1972 to clarify that general revenue sharing funds would not meet the definition of major federal action.

In addition to the changes referenced above, CEQ is proposing to add to the definition to make clear that “major federal action” does not include non-federal projects with minimal federal funding or minimal federal involvement such that an agency has no control over the outcome of the project. CEQ’s rationale is that if an agency has no control over the outcome of a project, there is no reason for that agency to conduct a NEPA analysis.

APPA supports the revised definition of “major federal action” which excludes non-federal projects with minimum federal involvement where the agency cannot control the outcome of the project. APPA supports the deletion of the 10 factors in the current section

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<sup>26</sup> 85 Fed. Reg. at 1708.

<sup>27</sup> 85 Fed. Reg. at 1709.

1508.27(b) which require consideration of both context and intensity in order to determine if the action is “significant.” As APPA pointed out in its comments on the ANPRM, these factors needed to be further clarified or removed. APPA appreciates that CEQ has now removed these factors and amended the definition of major federal action, which provides clarity to applicants.

CEQ may find the Army Corps of Engineers’ NEPA regulations instructive, which set forth four factors which the Corps typically will consider when determining whether there is sufficient federal control and responsibility to expand its NEPA review beyond the activity over which the Corps has jurisdiction – the filling of waters and wetlands. Moreover, some additional, monetary limitations might be appropriate to include within the definition of “major federal action.” As APPA discussed in its comments to the ANPRM, a dollar amount that serves as a floor and a ceiling for purposes of what constitutes a “major federal action” could help further refine the definition and bring additional clarity to what actions might fall outside the proposed definition.

### **C. APPA Supports the Revised Definition of “Reasonable Alternatives”**

APPA supports CEQ’s proposed clarification related to alternatives analysis under NEPA.<sup>28</sup> CEQ’s proposed definition of “reasonable alternatives” requires alternatives to be both technically and economically feasible and meet the purpose of the proposed action.<sup>29</sup> Alternatives outside an agency’s jurisdiction would not be technically feasible due to a lack of jurisdiction to implement the alternative.<sup>30</sup> Alternatives that are beyond the jurisdiction of the federal agency are not reasonable because implementing those alternatives is not an option available to the agency. Yet, agencies often dedicate substantial time and resources to requiring

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<sup>28</sup> 40 CFR § 1502.14.

<sup>29</sup> See, e.g., *Vt. Yankee*, 435 U.S. at 551.

<sup>30</sup> 85 Fed. Reg. at 1702.



an analysis of alternatives outside of 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, would have added substantial costs to the project that would have been borne by consumers, the agency had no jurisdiction or ability to implement the route, and approvals from other agencies would have been required. The agency nonetheless included a detailed analysis of the alternative route in its final EIS, confusing the issues and providing project opponents a separate basis for challenging the project.

NEPA does not require agencies to consider alternatives that achieve similar outcomes as the action before the agency through means that lie outside of the agency's authority. These alternatives fail to protect applicants from the cost burdens of analyzing alternatives that are unrelated or beyond the agency's ability to implement.

## **VI. COMMENTS REGARDING CHANGES TO SECTION 1506.5**

CEQ, in response to comments received to the ANPRM, is proposing to update section 1506.5 regarding agency responsibility in order to give agencies more flexibility with respect to the preparation of environmental documents. While the proposed changes will give greater flexibility to agencies, it will continue to require agencies to independently evaluate and take responsibility for the environmental documents. Specifically, CEQ is proposing to amend, in part, this section to allow, “. . . the lead agency, a contractor or applicant under the direction of the lead agency, or a cooperating agency, where appropriate (§1501.8(b)) . . .” to prepare an EIS.

APPA supports the proposed changes to section 1506.5. As APPA pointed out in its comments on the ANPRM, allowing non-federal applicants and their contractors to participate in the development of NEPA documents, subject to the supervision of the agency, is critical to

improving communication between the parties as well as improving the quality of the documents and the efficiency of the entire NEPA process. APPA believes that private entities applying for authorization from a federal agency should be involved in drafting both EAs and EISs, provided the federal agency exercises appropriate oversight, control, and responsibility over the final document. The applicant is in the best position to provide information about the project and its potential effects. Allowing applicants to undertake drafting of NEPA documents can reduce burdens on the agencies, while ensuring that critical timelines are met. APPA is particularly pleased to see the proposed revisions to section 1506.5(c) which allows a contractor or applicant, under the direction of the lead agency, to prepare an EIS.

## **VII. CONCLUSION**

APPA appreciates the opportunity to provide these comments regarding the final NEPA Rule for CEQ's consideration. The suggested revisions will help ensure that the final NEPA Rule will provide a smoother and less burdensome NEPA process that can be achievable for all affected parties. Should you have any questions regarding these comments, please contact Ms. Carolyn Slaughter, Director of Environmental Policy, at [CSlaughter@PublicPower.org](mailto:CSlaughter@PublicPower.org) or (202) 467-2900.