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November 22, 2021

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

Submitted electronically via http://www.*regulations.gov*

RE: Docket Number CEQ-2021-0002

Chair Mallory:

The American Public Power Association (APPA) appreciates the opportunity to submit the following comments in response to the Council on Environmental Quality's (CEQ) proposed rule, "*National Environmental Policy Act Implementing Regulations Revisions*."

APPA supports a streamlined NEPA process that focuses on the most pertinent environmental issues while reducing duplication and providing parties with more certainty. We welcome the opportunity to work cooperatively with CEQ toward achieving this goal.

Should you have any questions about these comments, please contact Mr. Karl Kalbacher at KKalbacher@PublicPower.org or call (202) 467-2974.

Sincerely,

Carolyn Slaughter

Carolyn Slaughter
Director, Environmental Policy

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Comments of the American Public Power Association on the Council for Environmental Quality's Proposed National Environmental Policy Act Implementing Regulations Revisions

Docket No. CEQ-2021-0002
86 Fed. Reg. 55,757 (October 7, 2021)

November 22, 2021

1. Introduction

The American Public Power Association (APPA or Association) offers the following comments in response to the Council of Environmental Quality's (CEQ) proposed revisions to its regulations implementing the National Environmental Policy Act (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.

APPA participates on behalf of its members collectively in various rulemakings and proceedings that affect public power utilities. APPA members engage in activities that involve federal agency action under the National Environmental Policy Act (NEPA). Some members may perform work in wetlands and other waters of the United States (WOTUS) and must obtain Clean Water Act (CWA) permits under Section 404, or the Rivers and Harbors Act Section 10 which requires 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 (ESA) 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.

In comments submitted to CEQ during the 2020 rulemaking proceeding,[2] APPA expressed support for revising, modernizing, and streamlining the NEPA review process, and endorsed certain aspects of the 2020 NEPA regulatory changes.[3]

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[1] 86 Fed. Reg. 55,757 (October 7, 2021) National Environmental Policy Act Implementing Regulations Revisions, (Proposed Rule).
[2] 85 Fed. Reg. 43,304 (July 16, 2020), Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Final Rule (2020 NEPA Regulations).
[3] Comments of the American Public Power Association on the Council for Environmental Quality's Proposed Regulations Implementing the Procedural Provisions of the National Environmental Quality Act, CEQ-2019-0003-170729.

2. Certain Principles Should Guide NEPA Rulemakings

a. NEPA is a procedural statute and does not give agencies substantive authority to amend the agencies' action statutes.

APPA believes that an overarching goal for amending NEPA implementing regulations should be grounded on the following principles and limitations. We believe if these principals are adhered to that CEQ and federal agencies will fulfill Section 101 of NEPA, which sets forth a national policy "to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[4]

Furthermore, Section 101 incorporates notions of practicability and "other essential considerations of national policy…"[5] NEPA's policies are "supplementary" to agency authorities which reflect those "other essential considerations."[6] Since NEPA's enactment, numerous court decisions have recognized, NEPA exists to inform an agency about proposed actions and requests authorizations, but it does not alter the limits of an agency's "delegated authority" from Congress.[7]

b. Environmental analysis should be concise, understandable to the public, and useful to the decisionmaker.

In 1978, CEQ recognized the need for boundaries. Two intentions drove the first rulemaking: reducing paperwork and focusing agencies on "real environmental issues and alternatives."[8] The 1978 regulations discourage the "accumulation of extraneous background data" and put in place mechanisms to reduce paperwork and delay, directed attention to "significant issues," and set page limits, amongst other provisions intended to focus the agencies.[9]

Despite these clear goals, agencies have always faced constant pressure to increase the amount of information generated, regardless of whether that information is meaningful to the ultimate decision or the public understanding of the environmental impacts.[10] CEQ found that on average

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[4] 42 U.S.C.§ 4331(a). Congressional declaration of national environmental policy.
[5] 42 U.S.C § 4431(b).
[6] 42 U.S.C § 4335.
[7] *Sierra Club v. Fed. Energy Regl. Comm'n*, 867 F.3d 1357, 1373 (D.C. Cir. 2017(quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Inc. Co., 463 U.S. 2943 (1983)) and concluding that NEPA is limited by the statutory authority delegated to agencies).
[8] 40 C.F.R §1500.2 (b) (2019); see also 43 Fed. Reg. 55978 (November 29, 1978).
[9] 40 C.F.R §§ 1500.2 (b), 1500.4, 1501.7,1502.7 (2019).
[10] See e.g., Protect Our Communities Found. v. Jewell, 825 F.3d 571, 583 (9th Cir. 2016) (rejecting argument that the Bureau of Land Management was required to comprehensively review the effects of noise on birds at all stages of life); Sierra Club v. United States Dep't of Energy, 867 F.3d 189, 200 (D.C. Cir. 2017) ("The purpose of NEPA is not to 'generate . . . excellent paperwork,' but rather to 'foster excellent action' through informed decision making.") (quoting 40 C.F.R. § 1500.1(c)).

environmental impact statements (EIS) issued between 2013 to 2017, the document size had grown to more than 1,700 pages on average, including appendices.[11]

Any rulemaking should ensure that NEPA review requirements do not generate needless and useless paperwork that neither informs the public nor the decisionmaker.

c. NEPA review is focused on the proposed federal action.

NEPA applies to federal actions and not to private sector activity.[12] Of course, federal actions include actions necessary for nonfederal activities, such as the issuance of permits, grants of rights-of-way, the issuance of leases, and grants of funding.[13] However, it has been settled law for decades that nonfederal projects do not become "federalized" for NEPA purposes in all cases where some federal action is needed for those projects. CEQ first codified this concept in 1978, and expanded upon it in 2020, instructing that nonfederal projects must be reviewed in their entirety under NEPA *only* if they are "potentially subject to federal control and responsibility."[14] Agencies codified this same principle many years ago in their NEPA regulations.[15]

3. A Streamlined NEPA Process Helps Facilitate the Electric Industry's Transition to Cleaner Generation

APPA supports proposed revisions to NEPA regulations that 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.

The electric utility industry is in the midst of 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 of dollars annually to study, avoid impacts to, preserve, and enhance environmental resources. In 2020, the US electric sector added 36,238 megawatts (MW) of electric generating capacity with non-emitting sources accounting for 78 percent of the generation.[16] Non-emitting generation is the number one source of new capacity in California, the Midwest Plains, the Mountain West, Northwest, and Texas.[17]

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[11] Council on Environmental Quality, Length of Environmental Impact Statements (2013-2018) (June 12, 2020), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Length_Report_2020-6-12.pdf.
[12] 42 U.S.C. § 4332(C).
[13] 40 C.F.R. § 1508.18 (2019); 40 C.F.R. § 1508.1(q) (2020).
[14] 40 C.F.R. § 1508.18 (2019); 40 C.F.R. § 1508.1(q) (2020).
[15] See, e.g., 33 C.F.R. Part 325, App. B (USACE), 43 C.F.R. § 46.100 (DOI), 46.30 (DOI); 23 C.F.R. § 771.109(a)(1) (FHWA).
[16] US Energy Information Agency, Electricity Data Browswr, "Net Generation, Other Renewables, United States, Monthly",
[17] Source: National Renewal Energy Laboratory, H2 2020 Solar Industry Update, NREL/PR-7A40-79758.

In order to continue to advance clean energy generation projects, electric utilities must have greater regulatory certainty that supports efforts to continue to transform the power industry to a cleaner and more resilient service provider to consumers.

Even with the implementing regulations and various guidance documents issued by CEQ throughout the years, the NEPA process remains very lengthy and costly. Environmental reviews and authorizations that involve multiple federal, state, and local agencies are common. However, historically the reviews have not been resourced sufficiently to support timely interagency consultation or garner consensus regarding important NEPA elements, such as cumulative and indirect effects. Environmental reviews often result in a lengthy NEPA process with multiple setbacks and avoidable delays. Frequently, federal, state, and local agencies have complementary and/or different authorization and permitting requirements that can complicate the NEPA process. Due to the lack of interagency coordination, these differences in agencies' permitting requirements often result in similar analyses being required or even repeated for each agency's use. Early and continuous coordination between federal, state, and local agencies and the public is particularly important for NEPA analysis because of its potential to impact the interests of those parties to varying degrees.

a. Example of a NEPA project that took too long to complete and/or cost more than expected

APPA offers the following example of a public power utility that has experienced significant delays in completing the NEPA process for a critical water infrastructure project.
Colorado Springs Utilities (CSU) recently constructed a water supply project called the Southern Delivery System (SDS). The SDS project was an $825 million regional project to bring water from Pueblo Reservoir to Colorado Springs and their partner communities of Fountain, Security, and Pueblo West.

Eight years and roughly $17 million were required to complete the NEPA process and related negotiations with the Bureau of Reclamation. An additional $25 million was spent on meeting other permitting mandates. Over $160 million was devoted to mostly local mitigation and permit commitments that were affected by the NEPA process and incorporated into the final EIS and record of decision.

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. CSU's experience with the SDS project demonstrates the process was not coordinated amongst federal agencies, took much longer than anticipated to complete, and was inefficient and expensive.

APPA supports conducting environmental reviews and permitting processes in a concurrent, coordinated, consistent, predictable, and timely manner sufficient to support sound decisions regarding federal agency actions, such as approving new infrastructure projects. As established by Executive Order (EO) 13807, the One Federal Decision policy provides guidance that the lead

agency with the appropriate expertise and resources is selected at the earliest possible time following contact and notification to a federal agency of a proposed action. APPA supports including the directives of (EO)13807 in the NEPA rule.

4. Purpose and Need Statements Should Focus on Applicants Goals and be Consistent with Agency Authorities

NEPA requires the preparation of EISs for "major Federal actions significantly affecting the quality of the human environment."[18] The statement of purpose and need for agency action sets the parameters for the range of reasonable alternatives an agency considers and informs the scope of effects an agency analyzes in the EIS.

CEQ proposes to eliminate language requiring agencies to base the description of the purpose and need of an agency's review of an application for agency approval on the goals of the applicant and the agency's authority, and conforming edits to the definition of "reasonable alternatives."[19]

APPA encourages CEQ to retain the purpose and need provisions in the 2020 NEPA regulations as the language provides direction to implementing agencies on the scope of review of alternatives in an EIS while not prioritizing the applicant's goals at the exclusion of other factors.[20]

This approach facilitates effective NEPA reviews of nonfederal proposals by aligning the purpose and need statement with the actual purpose of the federal agency action - *responding* to a nonfederal request for action rather than creating a project out of whole cloth. By clearly defining the purpose and need of a proposed federal action, agencies focus on "real alternatives" as anticipated by the 1978 rule.[21] Analysis that considers alternatives that do not meet an applicant's needs and that the applicant or the agency cannot implement are not meaningful to the agency's decision-making process or the public's understanding of the proposed federal action.

APPA supports a definition of "reasonable alternatives" that require alternatives to be both technically and economically feasible and meet the purpose of the proposed action. Alternatives outside an agency's jurisdiction would not be technically feasible due to a lack of jurisdiction to implement the alternative. Yet, agencies often dedicate substantial time and resources to analyze alternatives outside of their authority.

By broadening the scope of the purpose and need statement, agencies will expand the types of alternatives that agencies will be required to consider, with less regard for the project proponent's actual needs or to the limits of the agencies' statutory authorities.

[18] 42 U.S.C § 4332(2)(C).
[19] Proposed (40 C.F.R § 1502.12, 1508.1(z).
[20] 85 Fed. Reg. at 43,330.
[21] 40 C.F.R §1500.2 (b) (2019).

Inappropriate consideration of alternatives can lead to an analysis of information that is not meaningful to the agency's decision-making process, will slow down decision making, can frustrate lawful private-sector efforts, and can result in diverting agency resources from understanding relevant and feasible alternatives.

APPA encourages CEQ to ensure that the reviewing agency considers and gives substantial weight to the applicant's goals in any final rule. The applicant's goals should shape the project's purpose; this is necessary to avoid an improper definition of an applicant's purpose and an unnecessary expansion of the scope of an alternative analysis. CEQ should further confirm that the scope of reasonable alternatives is determined by reference to a project's objectives and the action agency's authority.

5. Remove Limitations on Agency NEPA Procedures

APPA supports retaining the provisions that clarify that agencies implementing regulations must be consistent with the CEQ regulations and that agencies may not impose requirements beyond the CEQ regulations.

CEQ "proposes to revise §1507.3(a) and (b) to clarify that while agency NEPA procedures need to be consistent with CEQ regulations, agencies have the discretion and flexibility to develop procedures beyond the CEQ regulatory requirements, enabling agencies to address their specific programs and the contexts in which they operate."[22] CEQ describes the proposed changes as returning NEPA regulations to their appropriate status as "floor" regulations, suggesting that agencies may want to impose additional procedural requirements.[23]

CEQ's proposed changes may encourage a patchwork of different agency NEPA procedures and substantive requirements across the federal agencies, heightening the risk of inconsistencies, increasing delay, and further complicating review and approvals of large projects subject to multiple federal agency processes. For larger projects, one federal agency often takes the NEPA lead role, with other agencies signing on as cooperating agencies in the NEPA process. Based on APPA member experience, much of the delay associated with NEPA reviews is attributed to a lack of communication between the lead agency and other participating federal agencies. Having a lead agency tasked with developing a single environmental review document can significantly reduce duplicative efforts by multiple federal agencies reviewing the project and, in turn, simplify and expedite the overall review process. However, if each agency develops different procedures and requirements, it will become much more difficult for federal agencies to collaborate on a single environmental review document or jointly participate in one NEPA process.

The 2020 NEPA rule incorporates elements of the One Federal Decision policy, allowing tribal projects to use FAST-41's streamlined environmental review and permitting procedures and

[22] 86 Fed. Reg. at 55,761.
[23] *Id.*

emphasizing timing and transparency. This provision is intended to reduce interagency conflict on the NEPA process to support more agency consistency as opposed to less.[24,25]

APPA encourages CEQ to recognize these principles if it chooses not to maintain the clarifications outlined in the 2020 NEPA regulations. APPA supports amendments to the NEPA regulation that incorporates the roles and responsibilities of the Permitting Council in NEPA reviews.

6. Effects Analysis Should be Consistent with Case Law and Statutory Authority

APPA supports an "effects" definition and approaches that appropriately limit the description of the action and the identification of effects that should be considered in a NEPA analysis.

CEQ is proposing to incorporate the 1978 NEPA definitions of analysis of direct, indirect, or cumulative effects into the NEPA regulation. In the 1978 NEPA regulations, "direct effects" were defined in 40 C.F.R §1508.8(a) as effects caused by the federal action and that occur at the same time and place. "Indirect effects" are defined in §1508.8(b) as effects caused by the action that are later in time or farther removed in distance but are still reasonably foreseeable. "Cumulative effects" are defined in §1508.7 as effects resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of who undertakes the other actions.

The Proposed Rule would remove the language in the 2020 NEPA regulations from paragraph § 1508.8(g) that limits the definition of "effects" to those "that are reasonably foreseeable and have a reasonably close causal relationship." The Proposed Rule also would remove and replace subsection §1508.8(g)(2), which states that a "but for" causal relationship is *insufficient* to make an agency responsible for a particular effect under NEPA; generally excludes effects that are remote in time, geographically remote, or the product of a lengthy causal chain; and fully excludes effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action. The Proposed Rule also would remove and replace subsection §1508.8(g)(3), which states that an agency's analysis of effects must be consistent with the definition of "effects." Finally, CEQ proposes to repeal the definition of "cumulative impact", asserting that it creates confusion and could be read to improperly narrow the scope of environmental effects relevant to NEPA analysis, contrary to NEPA's purpose.

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[24] 40 C.F.R §1501.7(g).

[25] FAST-41 created the Federal Permitting Improvement Steering Council (Permitting Council), an interagency council of deputy secretaries with responsibility for overseeing federal agencies' implementation of the FAST-41 process, with an executive director appointed by the president. FAST-41 also required each federal agency to designate a chief environmental review and permitting officer who reports directly to a deputy secretary on all matters related to environmental reviews and authorizations, providing accountability for agency performance by giving a specific individual responsibility for overseeing an agency's compliance with FAST-41. The Permitting Council was required to use an online database (the Permitting Dashboard) to track the status of federal environmental reviews and authorizations for covered projects; issue annual recommendations for best practices in several categories related to infrastructure permitting; and publish recommended performance schedules for environmental reviews and authorizations for specific categories of infrastructure projects.

The 2020 regulatory definition of "effects" was based on Supreme Court precedent stating that "NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause."[26] Based on case law, 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 those effects are not actually caused by the agency action 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) and that can directly benefit from the agency action (such as wetland impacts authorized by a CWA § 404 permit and related conditions designed to offset and, in many cases, improve wetland functions and values), environmental outcomes can be improved.

With respect to CEQ's proposal to incorporate the 1978 NEPA definitions of analysis of direct, indirect, or cumulative effects, APPA recommends that the focus on those effects be on actions actually caused by a proposed agency and that conform to the Supreme Court ruling in *Kleppe v. Sierra Club*.[27] In this case, the court noted that agencies must assess the impacts of a proposal on the "existing environment," which "presumably will reflect earlier proposed actions and their effects," and that effects should not be attributed to an agency action without a showing that the effects are proximately caused by that action merely because the effects are "reasonably foreseeable." Importantly, as was codified in the regulatory definition in 2020, "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA."[28] APPA is concerned that an agency's broader consideration of effects outside the temporal and geographic scope of an agency action under review could result in the agency attributing to its action environmental impacts with no relationship to the proposal or actions which it has no ability to control. Therefore, based on settled law, the effects analysis should be focused and circumscribed.

Based on the foregoing, the proposed effects definition will expand the NEPA analysis requirements to alternatives that do not have a "reasonably close causal relationship to the project at hand" and from APPA's perspective will slow down efforts to build energy infrastructure of the future. We also believe the proposed amendment will result in more litigation based on speculative indirect and cumulative effects that have no close causal relationship to the action at hand. The 2020 NEPA regulations allowed for the consideration of direct, indirect, and cumulative effects while abandoning that often-confusing terminology and clarifying the boundaries of NEPA analysis. As a result, the 2020 definition of effects allows federal agencies and project applicants to analyze and disclose effects themselves and spend less time determining whether an effect is direct, indirect, or cumulative - which are terms of art under the 1978 regulations and have no statutory mandate.

a. Use of the social cost of greenhouse gases in NEPA analysis

APPA is concerned with the potential incorporation of the social cost of greenhouse gases (SC-GHG) in the NEPA process. In the preamble of the Proposed Rule, CEQ references use of the

[26] *DOT v. Pub. Citizen,* 541 U.S. 752, 767 (2004).
[27] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20 (1976).
[28] 40 C.F.R. § 1508.1(g)(2).

SC-GHG as potentially useful in the analysis of effects for projects.[29] If the SC-GHG is significantly increased in value, it could lead to requiring the consideration of more costly project alternatives, including alternatives far afield from agencies' statutory authority that are not economically feasible, and lead to potential litigation due to a significant increase in estimated environmental impacts.

Expansion of the definition of "effects" and the application of the SC-GHG analysis could lead to requiring more EISs, rather than environmental assessments. In comments submitted by a consortium of public and private sector associations to the Office of Management and Budget on the Notice of Availability and Request for Comment on the "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990," of which APPA was a signatory to the comment letter, we noted that "inherent within SC-GHG estimates is a litany of assumptions related to both the societal costs and benefits of GHG emissions, many of them subjective and uncertain, and all of which become increasingly difficult to accurately estimate the farther they project into the future and as it relates to the consideration of individual projects."[30] We also noted that the original social cost of carbon estimates were developed for use in benefit-cost analyses for regulatory actions under EO 12866, where permissible under an agency's statutory authority. Therefore, we encouraged EPA "to limit the use of the SCC-GHG in a regulatory context as opposed to application under NEPA."[31]

7. Conclusion

APPA sincerely appreciates the opportunity to provide comments on CEQ's proposed NEPA implementation regulations. To the extent CEQ issues a final rule modifying the regulations, we encourage CEQ to follow the recommendations set forth in these comments. Please contact Karl Kalbacher at (202) 467-2974 or email KKalbacher@PublicPower.org for any questions regarding these comments.

[29] 86 Fed. Reg. at 55,763.n 25.
[30] See Comment of a Coalition of Trade Associations on the Notice of Availability and Request for Comment on the "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990," OMB-2021-0006-0087, at page 2.
[31] *Id at 25*.