

**CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA**

**NEIL L. BRADLEY**  
EXECUTIVE VICE PRESIDENT &  
CHIEF POLICY OFFICER

1615 H STREET, NW  
WASHINGTON, DC 20062  
(202) 463-5310

August 20, 2018

**VIA ELECTRONIC FILING**

Mr. Edward Boling  
Council on Environmental Quality  
730 Jackson Place, N.W.  
Washington, D.C. 20503

**RE: Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 32,071 (July 11, 2018); Docket No. CEQ-2018-0001**

Dear Mr. Boling,

The U.S. Chamber of Commerce (“the Chamber”) appreciates the opportunity to comment on the Council of Environmental Quality’s (“CEQ”) advance notice of proposed rulemaking (“ANPR”)<sup>1</sup> as CEQ considers revising its regulations concerning the National Environmental Policy Act (“NEPA”).

The Chamber supports CEQ’s interest in revising the NEPA regulations to ensure a more efficient, timely, and effective process consistent with NEPA’s important purpose and mission. In the 40 years since CEQ promulgated its NEPA regulations,<sup>2</sup> there has been a tremendous transformation in how agencies review projects and how information is developed, shared, and analyzed in support of agency NEPA decisions. The Chamber’s comments focus on revising the regulations to bolster the efficiency and efficacy of NEPA reviews.

Environmental reviews and authorizations – including NEPA reviews – often become untethered to the scope and requirements for review and instead serve as unnecessary barriers to important projects. Environmental review statements can run several thousand pages,<sup>3</sup> take over a

---

<sup>1</sup> Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591 (June 20, 2018) (“ANPR”).

<sup>2</sup> Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 43 Fed. Reg. 55,978 (Nov. 29, 1978).

<sup>3</sup> The Bayonne Bridge elevation project – an infrastructure improvement project that was considered to have minimal impacts as compared to the alternative of building a new bridge – resulted in 20,000 pages of analysis and exhibits and at a cost of millions of dollars. Sam Roberts, High Above the Water, but Awash in Red Tape: Long Review of Bayonne

decade to complete,<sup>4</sup> prevent the rebuilding and expanding of infrastructure, and are an unnecessary drain on the economy.<sup>5</sup> The Chamber encourages improvements to the federal permitting process to improve transparency and predictability, and encourages coordination among federal agencies.

## **I. CEQ's Revisions Should Reflect Core Principles That Re-Focus Agency Analysis on Information That Is Meaningful and Significant**

In revisiting its NEPA regulations, CEQ should advance revisions that re-focus agency analysis on information that is significant and meaningful. Such direction will help realign NEPA reviews with the purpose of the statute to provide meaningful insight to agencies and the public while reducing unnecessary information gathering and analysis.

### **A. NEPA Review Should Focus on Information that is Meaningful to the Agency<sup>6</sup>**

CEQ should pursue revisions that direct agencies in gathering and analyzing information that is meaningful to carrying out their decisions.

NEPA's purpose is to impose a framework by which federal agencies can understand the environmental impacts of their decisions, allowing them to consider actions that might mitigate such impacts.<sup>7</sup> Agencies can only achieve this purpose if the information considered meaningfully informs the agency's action. An analysis is only meaningful if the information is relevant to the agency's decision-making discretion within the bounds of the action statute. The action statute authorizes the major federal action that triggers the NEPA review.

The action statute prescribes the parameters for agency decision-making and thus limits the agency's discretion to act. NEPA "imposes only procedural requirements" to ensure that agencies are well informed under the action statute.<sup>8</sup> NEPA does not expand the parameters of the agency's decision-making beyond consideration of information the agency has the discretion to act on. CEQ's regulations should reflect this limitation.

---

Bridge Project Is Assailed, The New York Times, Jan. 2, 2014, <https://www.nytimes.com/2014/01/03/nyregion/long-review-of-bayonne-bridge-project-is-assailed.html>.

<sup>4</sup> The environmental review for the Port of Savannah took 14 years. Philip K. Howard, Common Good, Two Years Not Ten Years, Redesigning Infrastructure Approvals, September 2015, [https://commongood.3cdn.net/c613b4cfda258a5fcb\\_e8m6b5t3x.pdf](https://commongood.3cdn.net/c613b4cfda258a5fcb_e8m6b5t3x.pdf).

<sup>5</sup> *See, id.*

<sup>6</sup> ANPR at 28591 (Question 5)

<sup>7</sup> *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (citing 42 U.S.C. § 4321) (NEPA "was intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States.").

<sup>8</sup> *Id.* at 756.

## **B. NEPA Review Should Focus on Significant Environmental Impacts<sup>9</sup>**

NEPA recognizes the value in focusing agency resources and requires agencies to consider “detailed information concerning significant environmental impacts.”<sup>10</sup> However, agencies and the public have increasingly come to expect project applicants to provide comprehensive and detailed analyses of all issues, without regard to significance. NEPA inappropriately becomes a statute that generates insignificant or irrelevant information, rather than aids agency decision-making. CEQ should advance revisions that bring the agencies back to assessments of significance.

Not all environmental impacts are significant. The comprehensiveness of the NEPA analysis should depend on the significance of the potential impact.<sup>11</sup> However, agencies feel constant pressure to provide comprehensive analysis of all impacts, regardless of significance or relevance.<sup>12</sup> Refocusing agencies towards significant environmental impacts will narrow information requests and streamline the NEPA process.

To achieve this focus, the revisions to the regulations should promote flexible information collection methods. Agencies should rely on available information that is sufficient to be informative of significance, rather than require new project-specific information in all instances. For example, agencies can leverage information generated from prior surveys in similar circumstances as the proposed project to inform the extent of the agency’s information gathering. CEQ’s regulations should encourage or mandate reuse of relevant analysis and data.

In addition, the regulations should accommodate the use of advanced technologies such as remote sensing to replace more costly and labor-intensive work. For example, data analytics and aerial review efficiently and effectively provide information to agencies of potential impacts.

## **II. CEQ’s Revisions Should Focus On Issues That Are Frequently Litigated to Improve Predictability and Efficiency in NEPA Reviews**

NEPA’s central role in agency decision-making has made it a preferred vehicle for challenging those decisions. Courts adjudicating these challenges seldom provide broadly applicable legal standards, often applying Supreme Court precedent on key issues in ways that invite further legal challenges. The constant threat of litigation encourages agencies to increase the amount of information considered, as a defensive measure.

The Chamber encourages CEQ to focus on revisions to the regulations that address frequently litigated issues and make regulatory improvements consistent with the key principles identified above.

---

<sup>9</sup> ANPR at 28591 (Questions 2, 5, and 15)

<sup>10</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

<sup>11</sup> 40 C.F.R. § 1502.2(b).

<sup>12</sup> See e.g., *Protect Our Communities Foundation 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).

### **A. Adherence to Interagency Coordination<sup>13</sup>**

The existing NEPA regulations encourage interagency coordination early in the process. However, without accountability or metrics for measuring coordination, breakdowns are common and can significantly delay reviews.

The Administration has recognized that interagency coordination is a critical component in ensuring transparent and efficient review of infrastructure projects. Executive Order 13807 requires that federal agencies implement a unified environmental review and authorization process for major infrastructure projects.<sup>14</sup> Referred to as “One Federal Decision,” a single lead agency directs this unified process to navigate the project through all federal authorizations.

In support of the One Federal Decision concept, the Administration recently released a Memorandum of Understanding (“MOU”) providing guidance to agencies on carrying out their One Federal Decision responsibilities.<sup>15</sup> The MOU clarifies agency roles and procedures with the goal of timely NEPA process coordination and implementation. To promote the coordination of agencies, CEQ should consider incorporating the following elements into its revisions:

- **Lead and Cooperating Agencies:** The MOU provides expanded guidance on the roles and responsibilities of lead and cooperating agencies to ensure efficient coordination among parties.<sup>16</sup>
- **Project Timeline:** Preparing a multi-agency project timeline improves the likelihood of a more timely process.<sup>17</sup>
- **Scoping and Concurrence Points:** The requirements that agencies sign off on scoping and concurrence points ensures early and continued coordination at key points.<sup>18</sup>

---

<sup>13</sup> ANPR at 28591-92 (Questions 1, 3, and 16).

<sup>14</sup> *Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects* (signed Aug. 15, 2017), 82 Fed. Reg. 40463 (Aug. 24, 2017).

<sup>15</sup> Memorandum for Heads of Federal Departments and Agencies from Mick Mulvaney, Director, Office of Management and Budget and Mary Neumayr, Chief of Staff, Council on Environmental Quality, March 20, 2018 at Attachment A (“MOU”).

<sup>16</sup> *Id.* at A-6 – A-8.

<sup>17</sup> *Id.* at A-5-A-6.

<sup>18</sup> *Id.* at A-9 – A-11

- Delays and Dispute Resolution: Providing a mechanism for resolving inter-agency disagreements encourages resolution of disputes in a timely and consistent manner.<sup>19</sup>

#### **B. Tailor the Purpose and Need Statement to the Decision Before the Agency**

The framework that NEPA provides to federal agencies to understand the environmental outcomes of their decisions imposes requirements on agencies, but it does not define the analytical parameters. The substantive criteria of the agency's analysis must reflect the purpose and need of the decision for the analysis to effectively inform the agency.

Broadly defining “purpose and need” under NEPA is a frequent challenge in NEPA implementation. This often transforms NEPA from a decision-making tool into an obstacle that delays those decisions. CEQ should consider revisions to the regulations that require agencies to tailor the purpose and need to the decision the agency is considering.<sup>20</sup>

#### **C. Consideration of Environmental Impacts Must be Within NEPA's Boundaries of Foreseeability and Causation**

Agencies must consider the direct, indirect, and cumulative effects of a proposed action.<sup>21</sup> The scope of review is limited to “reasonably foreseeable” effects of a proposed action.<sup>22</sup> NEPA further requires a “reasonably close causal relationship” between the proposed action and the indirect and cumulative effects to warrant the agency's consideration.<sup>23</sup> The connection between the federal action and the impact should be proximate.<sup>24</sup> This framework must limit consideration of broad environmental impacts – including greenhouse gas emissions and climate change.

As CEQ considers revisions to its regulations, it should retain NEPA's flexible analytical framework centered on foreseeability, causation, and the availability of probative information.

---

<sup>19</sup> *Id.* at A-11 – A-12

<sup>20</sup> In the case where multiple federal agencies have authorization authority over a project under different statutes, CEQ should again look to the MOU, which requires that the lead federal agency develop the purpose and need to support a single, coordinated NEPA review among agencies. *See* MOU at A-7.

<sup>21</sup> 40 C.F.R. §§ 1508.7-1508.8.

<sup>22</sup> *Id.* § 1508.8

<sup>23</sup> *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 754 (2004) (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

<sup>24</sup> *Id.*

**D. Connect the Alternatives Analysis to the Purpose and Need<sup>25</sup>**

The breadth and depth of alternatives analyses that agencies routinely consider demonstrates that the analysis has become untethered from the purpose of NEPA. Agencies must tailor alternative analysis to the purpose of the proposal; otherwise, it leads to excessive analysis of irrelevant or infeasible projects that the agency is not reviewing.

NEPA does not require agencies to consider an endless number of alternatives. Instead, the statute limits such analysis to a reasonable number of alternatives that meet the purpose and need of the agency's decision.<sup>26</sup> When this is tailored to the agency's decision, agencies ensure that the analysis generates information that is meaningful. The breadth of the analyses has increased to analyze an unreasonable number of unnecessarily detailed alternatives. Clear standards that reasonably limit the scope of the alternative analyses would benefit agencies.

**E. Limit Cumulative Impacts Analysis to Those Impacts That Are Reasonably Foreseeable and Provide Meaningful Insight<sup>27</sup>**

The cumulative impact analysis seeks to ensure that an agency considers how the effects of its own actions interact with other impacts. Existing regulations and guidance instruct agencies on the appropriate bounds of the cumulative impacts analysis.<sup>28</sup> Despite existing regulations and guidance, the cumulative impact analysis has become a target for those seeking to expand the scope of NEPA. Clear and practical limits on the scope of the cumulative impacts analysis in the regulations would help head off some of this litigation and advocacy:

- First, the agency identifies the resources, geographic area, and the timeframe over which a decision is likely to create effects.<sup>29</sup>
- Next, the agency identifies other expected actions affecting the resources within the identified geographic area and timeframe. What the agency knows and can reasonably foresee as well as what is significant to the environment limits this second step.<sup>30</sup>

---

<sup>25</sup> ANPR at 28,592 (Question 13).

<sup>26</sup> *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 869 (D.C. Cir. 1999) (stating that “a reasonable alternative is defined by reference to a project's objectives.”) (citation omitted).

<sup>27</sup> ANPR at 28,592 (Question 17).

<sup>28</sup> 40 C.F.R. § 1508.7; Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* (Jan. 1997) (“CEQ Guidance”), available at [https://ceq.doe.gov/publications/cumulative\\_effects.html](https://ceq.doe.gov/publications/cumulative_effects.html).

<sup>29</sup> CEQ Guidance at 15.

<sup>30</sup> 40 C.F.R. § 1508.7.

Employing this analytical framework focuses the agency's cumulative impacts analysis on information meaningful to its decision. Incorporating this framework into the regulations can provide agencies with clear and practical analytical limits.

#### **F. Set Clear Timing and Page Length Expectations<sup>31</sup>**

The preparation time and length of documents for Environmental Assessments and Environmental Impact Statements has grown longer. In 2016, the average length of time to prepare a Final EIS across all federal agencies was 5.1 years – the highest since 1997.<sup>32</sup> The Department of Energy took over 4 years for an average NEPA review.<sup>33</sup> NEPA documents routinely exceed the regulatory expectations on page limits<sup>34</sup> – EISs should normally be less than 150 pages, up to 300 pages for proposals of unusual scope or complexity.<sup>35</sup> Even when agencies find no significant impact, those documents can be over a thousand pages.<sup>36</sup> Although the vast majority of projects do not require such lengthy and prolonged analysis,<sup>37</sup> large-scale infrastructure (such as energy projects) are subject to review by multiple agencies are often disproportionately long.<sup>38</sup>

If CEQ adheres to the principles above and focuses on critical issues that are significant and likely to provide meaningful input to the agency, they can achieve brevity and focus in the review

---

<sup>31</sup> ANPR at 28591 (Questions 4 and 10).

<sup>32</sup> National Association of Environmental Professionals, Annual NEPA Report 2016 at 12.

<sup>33</sup> United States Department of Energy, Lessons Learned Quarterly Report, Mar. 2016, <http://energy.gov/nepa/downloads/lessonslearned-quarterly-report-march-2016>.

<sup>34</sup> As of August 14, 2018, the last eight Final EIS documents contained in the U.S. Environmental Protection Agency's EIS database averaged 560 pages. Although these pages numbers reflect the Final EIS documents in their entirety (excluding appendices), it appears that only one comes close to complying with the 300 page limit for the text of EIS documents. See EPA EIS Database, July 20, 2018-August 3, 2018, <https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/search/search?searchCriteria.endCommentLetterDate=&d-446779-p=1&searchCriteria.title=&searchRecords=Search&searchCriteria.primaryStates=&searchCriteria.endFRDate=08%2F14%2F2018&searchCriteria.startCommentLetterDate=&searchCriteria.startFRDate=07%2F20%2F2018#results>.

<sup>35</sup> 40 C.F.R. § 1502.7.

<sup>36</sup> See James W. Coleman, Fixing the National Environmental Policy Act, U.S. House of Representatives, House Committee on Natural Resources, at 3 April 28, 2018 (identifying the “Finding of No Significant Impact” for the Dakota Access Pipeline as over one thousand pages), [https://naturalresources.house.gov/uploadedfiles/testimony\\_coleman.pdf](https://naturalresources.house.gov/uploadedfiles/testimony_coleman.pdf).

<sup>37</sup> In the past, CEQ has estimated that about 95 percent of NEPA analyses are categorical exclusions, less than 5 percent are Environmental Assessments, and less than 1 percent are EISs. U.S. Government Accountability Office, National Environmental Policy Act, Little Information Exists on NEPA Analyses, at 1 April 2014, <https://www.gao.gov/assets/670/662543.pdf>.

<sup>38</sup> Across agencies, the average length of time from notice to final EIS is 1,864 days, whereas the average length of time for projects at the U.S. Department of Energy and the Department of Transportation and the Federal Highway Administration are 2,709 days and 3,586 respectively. National Association of Environmental Professionals, Annual NEPA Report 2016 at 13.

process. CEQ should also consider revisions that achieve the Administration’s expectations for short, effective NEPA reviews.

The regulations should incorporate the recent government-wide goal of an average of two years for environmental reviews and authorization decisions.<sup>3940</sup> CEQ can accomplish this by identifying the factors that agencies should consider in developing expected decision timelines, and by encouraging default timelines for typical decisions.

The current regulations do not set universal time limits for the entire NEPA process, and instead encourage federal agencies to set limits on an individual basis.<sup>41</sup> Without a requirement to set a project-specific timetable or a mechanism to encourage compliance, NEPA reviews often languish – especially when multiple agencies are involved – leading to an unnecessarily lengthy and unpredictable process. CEQ should consider revisions requiring the development of project-specific timelines and provide mechanisms for compliance. CEQ could accomplish this by codifying concepts from the MOU on the development of permitting timetables, scoping and concurrence points, and elevation of delays and dispute resolution.<sup>42</sup>

CEQ should revise the regulations that help agencies achieve the expected page lengths. CEQ should consider identifying the factors that agencies should consider in setting appropriate benchmark lengths for typical decisions.

### **G. More Clearly Define Regulatory Terms<sup>43</sup>**

The existing definitions fail to provide the clarity critical for an effective regulatory program. Definitions omit key terms such as “alternatives,” “purpose and need,” and “reasonably foreseeable.” Definitions for defined terms often create more confusion than clarity.<sup>44</sup> In the absence of clarity, courts have attempted to provide their own interpretations, but often in conflicting or confusing ways that invite further legal challenges. A clear, simple, comprehensive set of regulatory definitions can improve NEPA implementation. CEQ should review the existing definitions and identify revisions and additions that provide this clarity.

---

<sup>39</sup> An average time period of two years for the review of infrastructure projects is aligned with other industrialized countries, and even longer than some. For example, under a proposed expansion, Canada’s reviews would be completed in 300 days. *Id.* at 2.

<sup>40</sup> Memorandum for Heads of Federal Departments and Agencies from Mick Mulvaney, Director, Office of Management and Budget and Mary Neumayr, Chief of Staff, Council on Environmental Quality, March 20, 2018 at 1.

<sup>41</sup> 40 C.F.R. § 1501.8.

<sup>42</sup> OFD MOU at A-4 – A-5.

<sup>43</sup> ANPR at 28,591-92 (Questions 7 and 8).

<sup>44</sup> For example, the definition of “Major Federal action” is lengthy, conflates Federal actions with Major Federal actions, and is circular with the meaning of “significant.” 40 C.F.R. § 1508.18.



Council on Environmental Quality

August 20, 2018

Page 9 of 9

### **III. Conclusion**

The Chamber appreciates the opportunity to comment on the ANPR. If you have any questions or need more information please do not hesitate to contact me at (202) 463-5310 or at [nbradley@uschamber.com](mailto:nbradley@uschamber.com).

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil L. Bradley", with a stylized flourish at the end.

Neil L. Bradley