

CLEARPATH



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U.S. Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Subject: ClearPath Comments on Proposed Rule, “National Environmental Policy Act Implementing Regulations Revisions” [Docket Number CEQ-2021-0002]

Dear Council on Environmental Quality Staff:

Thank you for the opportunity to provide comments on the Council on Environmental Quality’s (CEQ) Notice of Proposed Rulemaking (NPR) titled, “National Environmental Policy Act Implementing Regulations Revisions.”

ClearPath is a 501(c)(3) organization whose mission is to develop and advance policies that accelerate breakthrough innovations that reduce emissions in the energy and industrial sectors. ClearPath develops cutting-edge policy solutions on clean energy and industrial innovation, and collaborates with public and private sector stakeholders on innovations in nuclear energy, carbon capture, hydropower, natural gas, geothermal, energy storage, and heavy industry to enable private-sector deployment of critical technologies. ClearPath is supported by philanthropy, not industry, which gives us the flexibility to focus on policies that can support the commercialization of these technologies.

Background

The buildout of lower carbon energy infrastructure, including long distance transmission lines, cleaner power plants, and pipelines for low carbon fuels will require unprecedented construction rates if we are to avoid the worst impacts of climate change. Right now, the ability of the United States to build new clean energy projects and reduce carbon emissions is limited by how fast we can responsibly and efficiently permit decarbonization projects. Modernizing the federal permitting process is one of the most significant actions regulators can take to support the transition to cleaner energy sources. Unfortunately, the most impactful and important infrastructure and energy projects often are the most overburdened and slowed by inefficient permitting requirements, delaying the realization of the associated environmental and economic benefits that improve Americans’ quality of life. Therefore, removing unnecessary barriers to clean energy is essential to meeting U.S. national security objectives, reliable electricity needs, and global emissions reduction objectives.

ClearPath recognizes the need for a rigorous permitting process to understand environmental and socioeconomic impacts of projects. However, we are concerned with CEQ's proposed rulemaking to restore the 1978 National Environmental Policy Act (NEPA) regulations. CEQ's proposed rulemaking restores regulatory provisions from the pre-2020 NEPA regulations in the following three areas: broadening the purpose and need statement of a proposed action, mandating that CEQ regulations will be the floor instead of the ceiling for Agency procedures, and restoring the expanded definition of effects. These changes will open the door to more litigation, create interagency conflict, and cause undue delays and costs to critical clean energy projects. ClearPath recommends that CEQ focus its efforts on making the permitting process more efficient for stewardship of taxpayer resources and for scaling clean energy rapidly.

We are particularly concerned about the proposal to revert to the 1978 NEPA rule definition of "effects" to include direct, indirect, and cumulative effects as we think this has the most potential to slow project development and impede the energy transition. This reversal to the 1978 definition has the potential to mandate reviews that consider a wide range of potential effects and in the process making NEPA reviews longer and more complex.

Because neither the 1978 nor the 2020 NEPA rule definition of effects fully supports the goal to speed up the energy transition while promoting sound, science-based and inclusive permitting, we recommend CEQ address the definition of effects in Phase 2 of its rulemaking. This would allow additional time to receive public input and to develop a definition that is both precise yet sufficiently inclusive of direct, indirect, and cumulative effects. Given the importance of this particular definition, it would be appropriate for CEQ to seek comment on alternative definitions to ensure what is finalized achieves the goal of clearly and appropriately setting the boundaries of the analysis of effects.

Challenge of Implementing the 1978 NEPA Rule Definition of Effects

The primary problem with the 1978 definition of effects is that, despite attempts to clarify it, it is seemingly without bounds, failing to unambiguously delineate what are, in fact, effects that are appropriate to analyze from those that are inappropriate or otherwise tangential. By failing to clearly define the effects or impacts of an action, it has contributed to NEPA being the most litigious federal environmental statute and generated a culture of practitioners creating "bullet proof" documents that analyze all aspects of a project regardless of the magnitude of impact. Notably, the 1978 regulations do not have a definition for the environmental baseline; namely, a proposed project's underlying environmental and socioeconomic patterns. This creates a situation where practitioners conflate baseline environmental conditions with the impacts of a project as part of the cumulative effects analysis.

Delineating and distinguishing the environmental baseline from the effects of the action is critical for improving implementation of NEPA because projects should be evaluated based on how they impact the environment. Terms and conditions for approving proposed actions should not be based on trends in the environmental baseline that remain unaffected by the proposed action. Although this explanation may seem straightforward and consistent with current practices, the lack of precision in defining effects continues to be problematic nearly 25 years after CEQ issued its guidance on cumulative effects.

CEQ proposes to revert to the 1978 definition including the requirement that federal agencies evaluate the “direct,” “indirect,” and “cumulative” impacts of a proposed decision. Whereas, the 2020 Rule defined effects in general as those that are “reasonably foreseeable and have a

Page 2

reasonably close causal relationship to the proposed action or alternatives” and applying a “but for” causation standard. In reverting to the 1978 definition in its Phase 1 proposal, CEQ has discarded this approach. It’s stated reasoning is that “agencies have indicated confusion about how to apply the ‘close causation’ and ‘but for’ limitations in the current definition of effects and are concerned that the 2020 Rule may preclude them from considering the same range of effects as the 1978 Regulations.”¹ These effects include evaluation of the full range of climate change impacts and consequences of releasing additional pollution in potentially impacted communities.

As explained in the 2020 Rule, the definition of effects has generated considerable uncertainty, leading CEQ in 1997 to issue its Cumulative Effects Guidance – nearly 100 pages of guidance to practitioners on specifically how to identify and characterize those effects that are “cumulative.” In its 2020 Rule, CEQ stated, “Despite over 20 years of experience with Federal agencies implementing the [NEPA], public comments on the [Advanced Notice of Proposed Rulemaking] and proposed rule noted inconsistent interpretation by the courts and Federal agencies, further demonstrating that CEQ has not successfully addressed the concerns regarding consistent and clear interpretation and application of the concept.” Reverting to the 1978 definition simply because the 2020 Rule is similarly confusing does not remedy the underlying problem associated with this important definition.

An Efficient NEPA Process is Essential for the Energy Transition

There is a legitimate need to improve regulatory certainty in the NEPA process. The purpose of the 2020 NEPA revision was to enhance the efficiency of the permitting process and remove unnecessary and burdensome delays that have hampered infrastructure and other important projects.² Under the 2020 NEPA revisions, the U.S. still has one of the most stringent regulatory environments in the world. NEPA forms the framework for a project to identify, coordinate, and demonstrate compliance with other environmental requirements, but it does not require compliance with them.³ For this reason, streamlining the NEPA process will not undermine other environmental protections. A report issued by CEQ in June 2020 showed that the average environmental impact statement (EIS) took 4.5 years to complete, with one quarter taking upwards of 6 years.⁴

Dozens of major U.S. companies and 16 states have announced ambitious 100% clean energy targets by 2050 or sooner. NEPA’s current lengthy review process is of concern if those decarbonization goals, some of which are binding requirements, are to be met. Some of the energy technologies facing the most troubling NEPA timelines include geothermal energy, offshore wind, nuclear energy, and interstate transmission infrastructure, all of which are likely to play a strong role in realizing a net-zero emissions energy system. Developing geothermal energy on Bureau of Land Management Land, where 90% of known geothermal resources that can be utilized by conventional hydrothermal technologies are located, requires going through a NEPA process up to six times, resulting in an average development timeline of eight years.⁵ Meanwhile, Vineyard Wind, a large offshore wind project near Massachusetts, had to wait six

¹ 86 FR55767

² <https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf>

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https://www.everycrsreport.com/files/20110110_RL33152_69b27c980f2b1121fd078e3982ac47e9c48d7111.pdf ⁴ https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf

⁵ <https://clearpath.org/tech-101/regulatory-reform-could-unlock-gigawatts-of-zero-emission-geothermal/>

years between winning its lease auction and actually receiving its final EIS, facing significant financing and regulatory challenges during that period.⁶

Recommendation

Because neither the 1978 nor the 2020 NEPA rule definition of effects fully supports the goal to speed up the energy transition while promoting sound, science-based and inclusive permitting, we recommend CEQ address the definition of effects in Phase 2 of its rulemaking. This would allow additional time to receive public input and develop a definition that is both precise yet sufficiently inclusive of direct, indirect, and cumulative effects. Given the importance of this particular definition, it would be appropriate for CEQ to seek comment on alternative definitions to ensure what is finalized achieves the goal of clearly and appropriately setting the boundaries of the analysis of effects.

In addition, we recommend CEQ consider ways to accelerate and streamline NEPA reviews in its rulemaking. Recently, a group of policymakers, experts, and practitioners convened by the Aspen Institute released a report, "[Building Cleaner, Faster](#)," which addresses the need to streamline current environmental review and permitting processes to enable the buildout of decarbonization infrastructure with the scale, speed, and predictability required.⁷ CEQ should strongly consider the results of this report to update the NEPA regulations. The report endorsed four critical paths to success:

1. Immediate approvals for qualifying critical projects with well-documented net environmental benefits
2. Accelerated approvals for projects with less documented impacts by establishing categories of climate-beneficial projects at the outset, and then supplementing with an accelerated review focusing on uniquely local conditions
3. Accelerated adjudications for permitting disputes to enable quicker review and certainty for critical clean energy projects
4. State and local conformity with the federal process to ensure fast and certain permitting and adjudication

Conclusion

CEQ's action to revise the NEPA process is timely, since the bipartisan Infrastructure Investment and Jobs Act just signed into law contains significant investments in clean energy and climate technology. These include \$27 billion for grid infrastructure and \$21.5 billion for a new office of clean energy demonstrations, which will lead to development and deployment of

advanced clean energy technologies.⁸ It also includes \$10.5 billion for hydrogen and direct air capture regional hubs to advance those technologies, and \$6 billion to support the existing civil nuclear fleet. As CEQ reviews the NEPA regulations, the Agency should not undermine the robust infrastructure programs contained in the Infrastructure Investment and Jobs Act.

Thank you for the opportunity to comment on these changes. ClearPath encourages the staff to continue to consider new ways to improve the efficiency and effectiveness of the entire

6

<https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Final-Record-of-D ecision Vineyard-Wind-1.pdf>

⁷ <https://www.aspeninstitute.org/publications/building-cleaner-faster-report/>

⁸ <https://static.clearpath.org/2021/08/Energy-Provisions-in-the-Infrastructure-Act-Have-Huge-Value.pdf>

Page 4

permitting process. Please do not hesitate to reach out for additional information or to discuss this letter.

Sincerely,

Jena Lococo
Program Manager
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