

September 29, 2023

Comments on
Council on Environmental Quality (CEQ) Proposed Rule “National Environmental Policy Act
Implementing Regulations Revisions Phase 2”

Docket No. CEQ-2023-0003¹

Introduction

Business Roundtable CEOs lead U.S.-based companies that support one in four American jobs and almost a quarter of U.S. GDP. Through CEO-led policy committees, Business Roundtable members develop and advocate directly for policies to promote a thriving U.S. economy and expanded opportunity for all Americans. Business Roundtable CEOs have had a long-standing interest in making the permitting process more expeditious, predictable, and efficient while ensuring the quality of the human environment is protected and preserved.² Because of our interest in permitting reform, and the key role the National Environmental Policy Act (NEPA) plays in federal permitting decisions, Business Roundtable filed comments on both the ANPRM³ and the NPRM⁴ associated with the 2020 rule amending the NEPA implementing regulations. We appreciate the opportunity to offer comments on these proposed regulations.

Executive Summary

The U.S. is facing a myriad of infrastructure needs, including addressing climate change, rebuilding and improving existing infrastructure to support a growing economy, and ensuring secure supplies of critical minerals and materials to meet long-term security challenges. An efficient and predictable permitting process is indispensable to addressing these needs.

¹ 88 Fed. Reg. 49924 (July 31, 2023).

² Business Roundtable, *Permitting Jobs and Business Investment: Streamlining the Federal Permitting Process* (April 2012), available at: https://s3.amazonaws.com/brt.org/archive/2012_04_23_BRT_Permitting_Jobs_and_Business_Investment.pdf.

³ Business Roundtable, *Comments on CEQ Advance Notice of Proposed Rulemaking “Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act”* (August 20, 2018), available at: [BRT Comments on CEQ NEPA ANPRM.pdf](#).

⁴ Business Roundtable, *Comments on Council of Environmental Quality (CEQ) Notice of Proposed Rulemaking “Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act”* (March 10, 2020), available at: [BRT-FinalCommentsonCEQNEPANPRM.pdf](#).

NEPA plays a central role in the federal permitting process, and so we are encouraged by the attention Congress and the Council on Environmental Quality (CEQ) have given to improving the procedural steps agencies take in their required NEPA reviews.

Business Roundtable generally supports CEQ's proposed regulatory text in several sections, as described in more detail below. Most of these changes either support implementation of changes made by Congress in the Fiscal Responsibility Act of 2023 (FRA)⁵ or maintain rule changes made in 2020 that CEQ recognizes "enhanced the efficiency and effectiveness of the NEPA process" and "add value to [it]."⁶ In some instances, we suggest additional clarification, but support the overall direction of the changes made to these sections, including proposed changes to encourage the use of categorical exclusions and programmatic Environmental Impact Statements (EISs) to the maximum extent permitted by law to help streamline reviews.

Unfortunately, however, CEQ has missed an important opportunity to improve NEPA's implementing regulations in other respects and has reversed important reforms included in the 2020 regulations. At its core, NEPA is designed to improve decision making. NEPA itself does not mandate a particular result to reduce or eliminate environmental damage, and it does not provide an independent basis to either approve or disapprove a project. The proposed regulations would delete language from the 2020 regulations reinforcing this central fact and would make other changes that appear designed to convert NEPA into a substantive rather than procedural statute. The result likely will be more confusion by administering agencies regarding the central purpose of NEPA reviews.

An unfocused NEPA process that analyzes numerous alternatives that do not meet the needs of the project applicant, or are not within an agency's authority to require, not only adds complexity, cost and time to review, but also complicates decision making and increases the risk of delaying litigation. We are concerned that many of the changes CEQ is proposing would do just that.

We urge CEQ, in its final regulations, to place greater emphasis on streamlining reviews and limiting their focus to key issues falling within an agency's authority to address. Doing so will provide more useful, actionable information to decision makers.

Part I of these comments begins by explaining the importance of improving our permitting processes and the remarkable steps that Congress has taken toward that end. It then shows how CEQ's proposed rule should be reoriented to reflect Congress's intent and sense of urgency. Part II discusses the many significant aspects of the proposed rule that we support. Finally, Part III highlights particular provisions that should be clarified or corrected.

⁵ Title III of the *Fiscal Responsibility Act of 2023*, Pub. L. No. 118-5 (codified at 42 U.S.C. § 4332(2) & §§ 4336-4336e) (June 3, 2023).

⁶ 88 Fed. Reg. 49928.

Discussion

I. We Must Dramatically Improve Our Permitting Processes. Congress Has Done Its Part; CEQ Should Seize This Opportunity to Do So as Well

A. The Existing Permitting Processes for Large Infrastructure Projects Are Broken

There is widespread agreement that today's permitting process for large infrastructure projects in the U.S. takes too long⁷ and is encumbered with time-consuming litigation. Despite incremental progress in recent years, this process remains inadequate to meet today's challenges of updating aging infrastructure to address the needs of a growing economy and the imperative of reducing GHG emissions to address climate change.

Since it was enacted in 1970, NEPA has become a central part of the permitting process. NEPA also "is the most litigated environmental statute in the United States."⁸ A recent Stanford study found that NEPA challenges were filed against one quarter of energy and transportation project reviews completed between 2010 and 2018, including almost two-thirds of solar energy projects.⁹ As noted in the preamble to the 2020 final rule, the threat of litigation undoubtedly has led agencies to study even more issues in greater depth and thus has led to ever expanding environmental impact statements.¹⁰

The permitting process, and NEPA in particular, has become more time-consuming, bureaucratic, and fraught with delay over the years, with an increasing risk of litigation causing even more

⁷ In the preamble to the 2020 final implementing regulations, CEQ found "that NEPA reviews for Federal Highway Administration projects, on average take more than seven years to proceed from a notice of intent (NOI) to prepare an environmental impact statement (EIS) to issuance of a record of decision (ROD). This is a dramatic departure from CEQ's prediction in 1981 that Federal agencies would be able to complete most EISs, the most intensive review of a project's environmental impacts under NEPA, in 12 months or less. In its most recent review, CEQ found that, across the Federal Government, the average time for completion of an EIS and issuance of a ROD was 4.5 years and the median was 3.5 years. CEQ determined that one quarter of EISs took less than 2.2 years, and one quarter of the EISs took more than 6 years. And these timelines do not necessarily include further delays associated with litigation over the legal sufficiency of the NEPA process or its resulting documentation." 85 Fed. Reg. 43305 (July 16, 2020).

⁸ 85 Fed. Reg. 43309 (citing James E. Salzman and Barton H. Thompson, Jr., ENVIRONMENTAL LAW AND POLICY 340 (5th ed. 2019)) ("Perhaps surprisingly, there have been thousands of NEPA suits. It might seem strange that NEPA's seemingly innocuous requirement of preparing an EIS has led to more lawsuits than any other environmental statute.").

⁹ See Michael Bennon and Devon Wilson, *Environmental Litigation on Large Energy and Transport Infrastructure Projects in the United States*, available at <https://ssrn.com/abstract=4498938>.

¹⁰ See 85 Fed. Reg. at 43305-06: "In light of the litigation risk ..., agencies have responded by generating voluminous studies analyzing impacts and alternatives well beyond the point where useful information is being produced and utilized by decision makers. In its most recent review, CEQ found that final EISs averaged 661 pages in length, and the median document was 447 pages. One quarter were 748 pages or longer. The page count and document length data do not include appendices. The average modern EIS is more than 4 times as long as the 150 pages contemplated by the 1978 regulations."

uncertainty and delay – at the very time that our Nation needs the process to move more quickly, efficiently and dependably.

B. An Improved Infrastructure Permitting Process is Needed to Address Today's Challenges and Tomorrow's

The U.S. is facing a myriad of infrastructure needs, one of the most important of which is addressing climate change while continuing to ensure that economic growth is not impaired by an aging and inadequate infrastructure. According to the National Academies of Sciences, Engineering and Medicine,¹¹ reaching the President's net-zero carbon emissions goal by 2050 will require the nation to "double the share of electricity generated by non-carbon emissions sources to at least 75% by 2030" and to plan, permit and build critical infrastructure to support these resources.¹² New, low-carbon non-intermittent resources and electricity storage capacity will need to be deployed to back up intermittent resources when they are not available, and additional transmission will be required not only to access new renewable resources but to also support increasing demand for electricity driven by greater electrification of transportation, buildings and industry. Achieving the lower carbon future to which we all aspire will require an unprecedented amount of new infrastructure to be planned, permitted, financed and built within the next several decades.

In addition to the private sector investments that will be needed to speed the energy transition, the Infrastructure Investment and Jobs Act (IIJA)¹³ invests over \$500 billion in rebuilding roads, bridges, water infrastructure, improving resilience and bolstering broadband connectivity in rural and other underserved communities. The CHIPS and Science Act of 2022¹⁴ provides funding for reshoring microchip manufacturing capability and improving science facilities, as well as making other investments. And the Inflation Reduction Act (IRA) provides tax credits for a range of clean energy investments and technologies, among other infrastructure support.

This infrastructure funding of various types is designed to meet the challenges facing us today and those we are likely to encounter in the future. To produce it, however, will require significant changes to the federal permitting system. An efficient and predictable permitting process is

¹¹ The National Academies of Sciences, Engineering and Medicine, *Accelerating Decarbonization of the U.S. Energy System* (February 2021), available at: [Accelerating Decarbonization of the U.S. Energy System | The National Academies Press \(nap.edu\)](https://www.nap.edu/publications/accelerating-decarbonization-of-the-u.s.-energy-system). See also Princeton University, *Net Zero America: Potential Pathways, Infrastructure and Impacts, Final Report* (October 29, 2021), available at: [Princeton NZA FINAL REPORT \(29Oct2021\).pdf](https://www.princeton.edu/~netzero/NetZeroAmerica/FinalReport/Princeton_NZA_FINAL_REPORT_(29Oct2021).pdf); Electric Power Research Institute (EPRI), *LCRI Net-Zero 2050: U.S. Economy-Wide Deep Carbonization Scenario Analysis* (December 2022), available at: [3002024993 LCRI Net Zero 2050 U S Economy Wide Deep Decarbonization Scenario Analysis.pdf](https://www.eprri.org/wp-content/uploads/2022/12/3002024993_LCRI_Net_Zero_2050_U_S_Economy_Wide_Deep_Decarbonization_Scenario_Analysis.pdf); and Rhodium Group, *Taking Stock 2023- U.S. Emissions Projections after the Inflation Reduction Act* (July 20, 2023), p. 4, available at: [Taking-Stock-2023 Rhodium-Group.pdf \(rhg.com\)](https://rhg.com/wp-content/uploads/2023/07/Taking-Stock-2023_Rhodium-Group.pdf).

¹² National Academies of Sciences, *id.* at 8-9.

¹³ *Infrastructure Investment and Jobs Act*, Pub. L. No. 117-58 (Nov. 15, 2021).

¹⁴ *CHIPS and Science Act of 2022*, Pub. L. No. 117-167 (Aug. 9, 2022).

essential if we are to achieve the Administration's goals regarding the energy transition, rebuilding and improving our infrastructure, addressing climate resiliency, improving water systems for economically disadvantaged communities and meeting security challenges associated with overreliance on potential adversaries for critical minerals and other key materials.

C. Congress Has Enacted Multiple, Bipartisan Permitting Process Reforms in Recent Years – Including to NEPA

Congress, in a refreshingly bipartisan manner, has recognized the need to improve the permitting process and has enacted reforms to improve agency coordination, establish timelines for processing applications, reduce the statute of limitations for challenges to permitting decisions and most recently, codify into NEPA several reforms and best practices.¹⁵ Most notably, this past summer, Congress passed the first substantial amendments of NEPA since the law was enacted over 50 years ago.¹⁶ These historic amendments focus on expediting and streamlining the NEPA process in a variety of ways, including through better use of digital, interactive tools.¹⁷ In addition, Congress appropriated almost \$1 billion in the IRA to various permitting agencies to improve their capacities to expeditiously process applications.¹⁸

The clear congressional intent of these reforms is to establish a more disciplined, focused, modern and timely review of major federal actions that may significantly affect the quality of the human environment.

D. The Proposed Rule Should Reflect These Vital Priorities

We believe that CEQ can make several modifications to the proposed rule to more effectively reflect Congress's urgency to dramatically expedite and streamline the NEPA process. Congress wants CEQ to do more than just "provide for an efficient process."¹⁹

¹⁵ See, e.g., *FAST Act*, Pub. L. No. 114-94, tit. A, § 1304 (codified at 23 U.S.C. § 139) (Dec. 4, 2015); *FAST-41*, id. tit. XLI (codified at 42 U.S.C. § 4370m *et. seq.*); *Water Resources Development Act*, Pub. L. Nos. 110-114 and 113-121 (codified at 33 U.S.C. § 2348); *Infrastructure Investment and Jobs Act*, Pub. L. No. 117-58, div. A, § 11301 (codified at 23 U.S.C. § 139) & div. G, § 70801 (codified at 42 U.S.C. § 4370m *et seq.*) (Nov. 15, 2021).

¹⁶ See Division C, Section 321 of the *Fiscal Responsibility Act of 2023*, Pub. L. No. 118-5 (codified at 42 U.S.C. § 4332(2) & §§ 4336-4336e) (June 3, 2023).

¹⁷ New Section 110 of NEPA calls on CEQ to complete a study by June 2024 regarding the potential for online and digital technologies to reduce delays in the NEPA process, including through the use of a unified permitting portal with cloud-based, interactive capabilities. 42 U.S.C. § 4336d. The proposed rule does not reference CEQ's plans for this study. The final rule should address these issues. See our comments on proposed § 1506.12 *infra*.

¹⁸ *Inflation Reduction Act of 2022*, Pub. L. No. 117-169 (August 16, 2022) (see, e.g., §§ 40003, 60115, 60505, and 70007).

¹⁹ 88 Fed. Reg. 49924.

CEQ's discussion of the NEPA amendments made by the FRA does not acknowledge the historical significance of those amendments or discuss why they were enacted. CEQ's proposal notes that the legislation "largely codif[ies] longstanding principles".²⁰ While that is true, the legislation does much more to clarify important terms and to codify NEPA best practices that were included in the 2020 regulations. These long-overdue improvements would help smooth the path toward achieving Administration's energy and climate goals, but CEQ's rule puts them at risk.

The preamble cites four different executive orders from three presidents regarding "improving" and "modernizing . . . infrastructure review[s]".²¹ But the preamble does not explain how CEQ's proposed changes are designed to improve and modernize those reviews. This rulemaking also presents a rare opportunity to drive significant progress in "reducing GHG emissions across the economy" and "transitioning to a clean-energy economy" – two priority areas that CEQ says it is charged with implementing.²² But the current proposal falls far short of its potential in that regard. For example, the proposal directs agencies to "identify . . . *alternatives* to proposed actions that will . . . reduce climate change-related effects,"²³ rather than emphasizing the importance of expediting projects *designed to reduce* GHG emissions.

E. CEQ Has Missed an Opportunity to Clarify and Improve NEPA's Implementing Regulations and has Overturned Important Reforms Included in the 2020 Regulations

Given the central role that NEPA plays in the federal permitting process, any effort to accelerate that process must address the procedural steps agencies take in their required NEPA reviews.

Agencies implementing NEPA have often lost sight of the statute's fundamental objective, which is to generate high-quality, useful information to decision-makers contemplating major federal actions significantly affecting the quality of the human environment. At its core, NEPA is designed to improve decision making.²⁴ As the Supreme Court has clarified, NEPA itself does not mandate a particular result to reduce or eliminate environmental damage,²⁵ and it does not provide an independent basis to either approve or disapprove a project. "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."²⁶

²⁰ *Id.*

²¹ *See id.* at 49925 n.2.

²² *Id.* at 49926.

²³ Proposed § 1500.2(e) (emphasis added).

²⁴ *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978).

²⁵ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

²⁶ *Id.*

An unfocused NEPA process -- that is, one that analyzes numerous alternatives that either do not meet the needs of the project applicant or are not within an agency's authority to require -- not only adds complexity, cost and time to review, but also complicates decision making. While the proposed rule would codify into the NEPA implementing regulations the FRA's definition of "reasonable alternatives," it undercuts congressional intent to streamline the process by allowing agencies to consider alternatives outside their jurisdiction²⁷ -- i.e., alternatives that are beyond both their statutory authorities to require and their area of expertise.

With new page limitations and deadlines for review now codified into NEPA by the FRA, there is an inherent tension between the number of issues that can be exhaustively reviewed and meeting these statutory requirements. This tension is not unresolvable, but it does require even greater focus and discipline in providing useful information for decision makers in a succinct way on the most important issues within an agency's authority to address.

Both the preamble to the proposed rule and the proposed regulations themselves are practically bereft of any discussion of how the proposed changes are streamlining the process, making it simpler or reducing opportunities for litigation. In total, the changes CEQ is proposing introduce more issues that should be analyzed under NEPA, require a more detailed and granular analysis of specific issues, and provide little clarity regarding how agencies are to reconcile this greater granularity with statutory page limitations and timelines for decisions. The likely result will be more unfocused reviews providing less useful information for decision makers and more opportunities for litigation by those opposing projects -- with even greater detail jammed into voluminous appendices. The end result is predictable: more delays and missed opportunities. While CEQ cannot directly affect the judicial review process in its NEPA implementing regulations, it can help ensure agencies produce more focused, high-quality analysis for decisionmakers, which should lead to better agency decisions that are more likely to survive judicial review.

In a speech last May, White House Senior Advisor John Podesta said: "If we can't build some new things in a few backyards, the climate crisis will destroy *everyone's* backyards. . . . It's time that we confront crisis with pragmatism. To go from stopping things to *building things again*."²⁸ We urge CEQ, in its final regulations, to facilitate this call to action by placing greater emphasis on streamlining and expediting reviews, with a focus on *the key issues falling within an agency's authority to address* to provide more useful, actionable information to decision makers.

II. Business Roundtable Supports Many of CEQ's Proposed NEPA Modifications

²⁷ Proposed § 1502.14.

²⁸ Remarks as Prepared for Delivery by Senior Advisor John Podesta on the Biden-Harris Administration's Priorities for Energy Infrastructure Permitting Reform (May 10, 2023), available at: <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/05/10/remarks-as-prepared-for-delivery-by-senior-advisor-john-podesta-on-the-biden-harris-administrations-priorities-for-energy-infrastructure-permitting-reform/>.

Business Roundtable does support CEQ’s proposed regulatory text in many sections, as described in more detail below. Most of these changes either support implementation of changes made by Congress in the FRA or maintain rule changes made in 2020 that CEQ recognizes “enhanced the efficiency and effectiveness of the NEPA process” and “add value to [it].”²⁹ In some instances, we suggest additional clarification, but support the overall direction of the changes made to these proposed sections.

- **1500.1(b) – Purpose.** We agree the policy statement should emphasize the need to concentrate on truly relevant issues and not amass needless detail.
- **1500.2 – Policy.** We agree that key policy objectives include reducing paperwork, requiring reviews to run concurrently and mandating that environmental documents are concise, clear and supported by evidence.
- **1501.4 (also 1506.3(d)) – Categorical exclusions.** We strongly support CEQ’s provisions regarding categorical exclusions (CEs) as necessary for the efficient administration of NEPA. Congress has evidenced support for these efficiency measures, and we are pleased that CEQ is proposing to amend the CFR text to encourage agencies to use them to the maximum extent permitted by law. In particular, we support:
 - Agencies being able to apply another agency’s CE to a proposal (§ 1501.4(e));
 - Agencies being able to adopt another agency’s CE determination regarding a particular proposal (§ 1506.3(d)); and
 - Agencies being able to create CEs outside of the rulemaking process (e.g., via land use plans), and agencies being required to post CEs on their websites (§ 1501.4(c)).
- **1501.7(g) – Joint Records of Decision (RODs).** We support CEQ’s proposal to require joint RODs. We suggest that CEQ replace the proposed regulatory standard (“except where inappropriate or inefficient”) with the clearer and more direct language included in the preamble on page 49941, which speaks of requiring joint RODs unless doing so would “inadvertently slow the NEPA process down.”
- **1501.11 – Programmatic environmental documents and tiering.** Business Roundtable strongly supports the widest possible use of programmatic documents and tiering. We suggest changing “may” to “should” in the proposed regulatory text to further encourage agency use. This would more closely track CEQ’s intent, as expressed on pages 49943-49944 of the preamble, which describe § 1501.11 as being intended to “encourage” agencies to use programmatic environmental documents and to “promote [their] effective use.”

²⁹ 88 Fed. Reg. 49928.

- **1502.7 – Page limits.** CEQ has appropriately adopted the page limits prescribed by the FRA for final EISs: 150 pages, or 300 pages “for projects of extraordinary complexity.” This limit excludes appendices, however. We are concerned that the overall length of environmental documents will not decrease as a result of these limits; text will just be diverted to appendices. CEQ should consider ways to limit appendices so that this does not occur. For example, CEQ could limit appendices to tables, figures and citations and pre-existing documents that are being adopted.
- **1502.16(a) Environmental consequences.** We agree that an agency must consider potential adverse effects of the no-action alternative (i.e., the status quo) and that the “no action” alternative should serve as the baseline for review.
- **1504.2 – Early dispute resolution.** The language largely follows the FRA, which we support.
- **1506.3 – Adoption.** Agencies’ ability to adopt other agencies’ EISs and EAs was one of the beneficial features of the 2020 rules that were ratified by the FRA. *See also* page 49925 of the preamble.
- **1506.5, 1507.3(c)(12) – Agency responsibility for environmental documents.** These provisions permit agencies to allow applicants to draft environmental documents subject to agency supervision and review.³⁰ This should increase efficiency when agencies are resource constrained or lack the requisite scientific expertise. We urge CEQ to include language from FRA Section 107(f) regarding an agency’s ability to provide guidance and assistance for the preparation of these documents.
- **1506.12 – Innovative approaches to NEPA reviews.** This language creatively applies beyond “emergency” circumstances, which we support. This section also would be the logical place for CEQ to encourage agencies to move toward an interactive, cloud-based, digital process, as highlighted by NEPA Section 110.
- **Preamble page 49936.** We agree with not reinstating 1978 language regarding “controversy” being indicative of a major federal action.

III. Specific Issues of Concern

We have identified the following specific issues which we believe need greater clarification, or which run counter to promoting an efficient and effective NEPA review process and therefore should be modified or deleted.

³⁰ Proposed § 1506.5(a) cross-references proposed “§ 1507.3(c)(1),” but that is a typo; § 1507.3(c)(12) is correct.

- **Reinstate language that NEPA “is a procedural statute” that “does not mandate particular results or substantive impacts.”** While the preamble indicates these statements from the 2020 regulations are “correct,”³¹ the proposed regulatory text would delete them. We urge their retention to remind agencies of what the central purpose of NEPA is, and just as importantly, what it is not. As the Supreme Court has stated:

Congress, in enacting NEPA, did not require agencies to elevate environmental concerns over other appropriate considerations.... Rather, it required only that the agency take a ‘hard look’ at the environmental consequences before taking a major action.... The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions, and that its decision is not arbitrary or capricious.³²

- Relatedly, we are concerned that CEQ’s discussion of mitigation appears to be urging agencies to use NEPA as substantive authority to impose requirements.
 - For example, the preamble states that “agenc[ies] should, where relevant and appropriate, incorporate mitigation measures that address or ameliorate significant adverse human health and environmental effects of proposed Federal actions that disproportionately and adversely affect communities with environmental justice concerns.”³³
 - In addition, in proposed § 1508.1(w), CEQ is proposing to eliminate the following sentence: “While NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation.” These changes raise questions as to whether CEQ is suggesting agencies have the authority to require mitigation beyond the limited circumstances now permitted by NEPA. CEQ should clarify this issue in its final regulations.

Our concern on this issue was sensitized by CEQ’s statement, when it sought comments on its interim GHG guidance, that “NEPA does not limit consideration of mitigation to actions involving significant effects.”³⁴ We disagree. Rather, the role of mitigation under NEPA is to reduce the otherwise likely effects of a proposed action so that either (i) the action does not present significant effects (in which case no EIS is required), or (ii) an EIS can attribute reduced effects to that action.³⁵ In either case, as CEQ clarified in its 2011 guidance on

³¹ 88 Fed. Reg. 49930.

³² See, e.g., *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983) (citations omitted).

³³ Proposed §1505.3(b); see also 88 Fed. Reg. 49953-54.

³⁴ 88 Fed. Reg. 1196, 1206 (Jan. 9, 2023).

³⁵ See CEQ, “Memorandum on Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact,” 76 Fed. Reg. 3843, 3846 (Jan. 21, 2011).

mitigation, “[i]t is an agency’s underlying authority that provides the basis for the agency to commit to perform or require the performance of particular mitigation”³⁶ – not NEPA.

Consistent with the foregoing, we support the proposal’s retention of the 2020 rule provision, and addition of new language at proposed § 1501.6(a), allowing agencies to rely on proposed mitigation as the basis for a finding of no significant impact (FONSI).

- **Negative impacts of the no-action alternative.** One of the key features of the FRA (§ 102(1)(C)(iii)) is codification, within the reasonable range of alternatives that must be considered, of “an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative.” This phrase does not appear in the definition of “reasonable alternatives”³⁷ where the FRA definition is proposed to be codified in the CFR. CEQ acknowledges under “consequences” that the no-action alternative must serve as the baseline,³⁸ but this point should be emphasized more, especially in discussion of significance determinations³⁹ and the definition of “effects or impacts.”⁴⁰ Proposed actions must always be evaluated against the status quo, a comparison that agencies and the public often fail to make as they focus on the proposal in isolation. Finally, page 49949 of the preamble oddly describes adverse effects arising from a proposal “if it were not implemented” – but obviously those adverse effects would arise *from the status quo* if the proposal were not implemented.
- **Inadequate focus on net-beneficial projects.** CEQ correctly states that EISs are only required for adverse impacts, not beneficial impacts.⁴¹ The preamble helpfully provides examples where long-term benefits exceed short-term adverse impacts, and so an EIS is not needed.⁴² But the CFR text points the other way: “A significant adverse effect may exist even if the agency considers that on balance the effects of the action will be beneficial.”⁴³ CEQ should clarify this point.
- **Clarify that “purpose and need” refer to the “the purpose and need of the proposal.”** The purpose and need statement of an EIS is designed to identify the purpose for the proposed action and the need it addresses. This statement also helps inform the range of reasonable alternatives that the agency is required to consider. The 2020 regulations modified the 1978 regulations by adding language to address circumstances in which the agency has a statutory duty to consider an application, in which case the agency is to base the purpose

³⁶ 76 Fed. Reg. 3844.

³⁷ Proposed §1508.1(ff).

³⁸ Proposed §1502.16(a).

³⁹ Proposed § 1501.3(d).

⁴⁰ Proposed § 1508.1(g)(4).

⁴¹ Proposed § 1501.3(d)(2)(i).

⁴² 88 Fed. Reg. 49936.

⁴³ Proposed § 1501.3(d)(2)(i).

and need on the goals of an applicant, consistent with the agency's statutory authority. In addition, the 2020 regulations added conforming language relating to "reasonable alternatives" to mean "a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action and, where applicable, meet the goals of the applicant." The Phase 1 rule reverts to the 1978 regulations by removing the requirement that agencies base the purpose and need on the goals of the applicant and the agency's authority, and by removing the reference to the goals of the applicant from the definition of "reasonable alternatives." The FRA resolves this issue, however, requiring an EIS to discuss "a reasonable range of alternatives to the proposed agency action . . . that . . . meet the purpose and need *of the proposal*."⁴⁴ *Congress has thus clarified in this provision, which the preamble does not address, that in cases where an applicant has submitted a proposal to an agency for approval, the relevant purpose and need is that of the applicant.* We strongly encourage CEQ to explicitly acknowledge this statutory mandate and revert to the 2020 language to clarify that the purpose and need of the proposal is based on the goals of the applicant, consistent with the agency's statutory authority. Agencies will still be required to address all reasonably foreseeable environmental effects of a project, but they are not authorized to establish a different purpose or need for a project. Moreover, agencies will still be able to take into account policy preferences as permitted by law when deciding whether to approve a project based on a "public interest" determination or similar statutory standard. The purpose of an EIS is to gather baseline environmental information associated with a proposed project, which then feeds into an agency's review and approval process.

- **Over-interpretation of "minimal federal involvement" under definition of "major federal action."** The FRA, which added a new section 111 to NEPA, in part defined "major federal action" to exclude federal financial assistance where an agency "does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effect of the action."⁴⁵ CEQ is proposing to find "sufficient control" whenever an agency "could address environmental effects" or "has sufficient discretion to consider" them.⁴⁶ We believe this provision significantly undercuts what Congress intended when it amended NEPA in the FRA.

During the floor debate on the FRA, Senator Kelly (D-AZ) confirmed that "Federal funding doesn't control the outcome of projects that are currently being constructed. The role of the Department of Commerce under the CHIPS for America Act is to determine whether the project is worthy of investing taxpayer dollars."⁴⁷ The same is true of IJA and IRA grants.

⁴⁴ 42 U.S.C. § 4332(1)(C)(iii) (emphasis added).

⁴⁵ Pub. L. No 118-5, adding new § 111 (10)(B)(iii).

⁴⁶ See 88 Fed. Reg. 49962 and proposed § 1508.1(u)(1)(vi).

⁴⁷ 169 Cong. Rec. S1892 (daily ed. June 1, 2023).

We were heartened to learn, during a September 9 webinar with CEQ staff, that CEQ was engaged with the Department of Commerce regarding the applicability (or not) of NEPA to CHIPS Act grants. We encourage CEQ to engage similarly with all agencies issuing financial assistance under that act, the IIJA and the IRA. Obviously, excluding all these programs from NEPA would allow the benefits of the CHIPS Act, IIJA and IRA to be fully recognized and greatly influence the pace of development of new technology. In any event, up-front certainty regarding NEPA applicability would allow these programs to disburse money sooner rather than later, which is Congress’s common intent for all these statutes.

- **Deletion of provisions intended to reduce litigation.** The 2020 rules indicate that litigation is not a purpose of the NEPA rules. CEQ proposes to delete this provision, without adequate explanation.⁴⁸ Similarly, CEQ proposes to delete language indicating that there is no presumption that NEPA violations constitute finding of irreparable harm or basis for injunctive relief.⁴⁹ Courts are, of course, the final arbiters of whether an action constitutes irreparable harm or is the basis for injunctive relief, but the agency’s view on these issues is relevant.
- **Relevant special expertise may include “indigenous knowledge.”**⁵⁰ CEQ has not adequately explained what it means by the term “indigenous knowledge.” As the preamble notes, even the Office of Science and Technology Policy memorandum that it references does not define the term.⁵¹ The proposal reinstates several regulatory references to the nation’s “cultural heritage,” consistent with NEPA Section 101(b)(4), and “indigenous knowledge” could be defined as knowledge that supports that goal. And to the extent that “indigenous knowledge” refers to local or particular data (e.g., on changes in wildlife abundance over time) that residents of a community possess, potentially exclusively, agencies obviously should seek to identify and obtain that information as part of community engagement. Such information is not qualitatively different than the same data collected by other entities. To the extent the term implies some different “way of knowing,” however, it is likely inconsistent with statutory requirements for scientific integrity and reliable data and resources added to NEPA by the FRA.⁵²
- **Ability of agencies to include reasonable alternatives not within their jurisdiction – proposed § 1502.14(a).** The Supreme Court has unanimously held that, when an agency has no legal power to prevent a certain environmental effect, there is no decision to

⁴⁸ See proposed § 1500.1(c)).

⁴⁹ See proposed § 1500.3(d)).

⁵⁰ 88 Fed. Reg. 49941.

⁵¹ *Id.*

⁵² See 42 U.S.C. §§ 4332(2)(D) and (E).

inform and the agency need not analyze the effect in its NEPA review.⁵³ By the same logic, it is illegal for an agency to consider alternatives that it has no statutory authority to permit or otherwise approve. At a minimum, such alternatives are not reasonable. For CEQ to state or imply otherwise is an invitation to agencies to engage in mission creep into areas where they have little expertise. It is also likely to create interagency conflict. Finally, it is a further invitation to litigation if alternatives outside an agency's jurisdiction are not adequately considered. The preamble says "CEQ anticipates that such consideration would be a relatively infrequent occurrence,"⁵⁴ but we take little comfort in this vague prediction. Relatedly, we oppose agencies being able to object to proposals that violate agency policies, where those policies are not effectuated by statute.⁵⁵

- **Requirement that agencies identify the "environmentally preferable alternative" – proposed § 1502.14(f).** In the alternatives analysis, the proposed regulations require agencies to identify the environmentally preferable alternative. This is defined as the alternative [that] will best promote the national environmental policy expressed in section 101 of NEPA by maximizing environmental benefits, such as addressing climate change-related effects or disproportionate and adverse effects on communities with environmental justice concerns; protecting, preserving, or enhancing historic, cultural, Tribal and natural resources, including rights of Tribal Nations that have been reserved through treaties, statutes or Executive Orders; or causing the least damage to the biological and physical environment. The environmentally preferable alternative may be the proposed action, the no action alternative, or a reasonable alternative.⁵⁶

While NEPA is intended to require a "hard look" at the potential environmental consequences of major federal actions significantly affecting the quality of the human environment, this requirement appears to elevate environmental considerations into ones that would in many cases result in a "no action" default recommendation based on environmental factors alone. We believe this elevates NEPA into something it was not intended to be and is another step toward trying to turn NEPA into a substantive rather than procedural statute.

Also, determining which alternative is "environmentally preferable" is likely to be an irreducibly subjective determination in many if not most cases. It might be objectively possible to determine the most environmentally preferable alternative where (i) the

⁵³ See *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004): "We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions the agency cannot be considered a legally relevant 'cause' of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a 'major Federal action.'"

⁵⁴ 88 Fed. Reg. 48848. The preamble also cites only two examples of when an agency might do this, one of which ("when agencies are considering program-level decisions") is not self-explanatory.

⁵⁵ *Id.* at 49936.

⁵⁶ Proposed § 1504.14(f).

significant adverse effect of a project involves a single environmental endpoint (e.g., turbidity impacts on a stream), (ii) one alternative would clearly present lower risks to that endpoint and (iii) no alternative would offer offsetting benefits to another endpoint (e.g., carbon-free generation of electricity). In any other case, however, an agency will be faced with balancing environmental impacts (negative and positive) to different endpoints. In the absence of a rigorous system that makes these impacts commensurable, choosing the environmentally preferable alternative involves an inherently subjective tradeoff. NEPA only requires agencies to identify and discuss significant environmental impacts. Assuming an agency does so, how the agency then chooses among alternatives considering those impacts, along with other factors, should be within the agency's discretion.

- **Authority of agencies to go beyond these regulations when promulgating their own implementing regulations.** This proposal is likely to create inconsistency and confusion. We urge its deletion.
- **Adoption of CEQ's GHG guidance.** On page 49945 of the preamble, CEQ is proposing to incorporate in whole or in part its GHG *Guidance on Consideration of GHG Emissions and Climate Change*. We appreciate the urgency of addressing climate change and strongly support actions to do so, including recognizing the potential climate effects of proposed projects in agency NEPA reviews. As noted earlier, the basic purpose of many major projects is precisely to *reduce* GHG emissions. Where a project may increase them, we support disclosure of emissions and voluntary mitigation where possible.

However, codification of CEQ's interim GHG guidance into the final NEPA procedural regulations is problematic for several reasons. The fundamental substantive difference between a "guidance" document and a regulation is that guidance documents are not legally binding, while regulations are. The binding effect of regulations is the basis for the procedural difference between the two: the Administrative Procedure Act (APA) requires regulations to undergo notice and comment rulemaking, whereas guidance documents are not.⁵⁷ A principal reason agencies issue guidance documents is that they then have the ability to adjust that guidance based on changing circumstances and evolving knowledge, without having to go through the rulemaking process. To the extent the NEPA rules incorporate the GHG guidance, CEQ will have lost that flexibility. Also, to the extent CEQ does so, it will likely have violated the APA, because the current proposal does not identify and seek comment on the specific portions of the guidance that the agency is considering codifying. Business Roundtable strongly opposes CEQ issuing "voluntary" guidance and then using a separate rulemaking to transform that guidance into a mandatory requirement.

⁵⁷ See 5 U.S.C. § 553(b).

More generally, if the final rule adopts the guidance in total, CEQ will essentially have converted NEPA into a climate-focused super-statute, relegating all other issues to secondary status, and thus further leading to unfocused reviews and increased risk of litigation.⁵⁸ CEQ's guidance is extremely broad⁵⁹ and would require agencies not only to quantify GHG emissions of a proposed project, but also run scenarios of their potential impact and require consideration of alternatives, including a "no action" alternative that could reduce GHG emissions, even though agencies may have other responsibilities that may conflict with these requirements. CEQ's guidance would require agencies to conduct the type of granular analysis of potential climate effects relating to an individual project, including the potential for disproportionate and adverse human health and environmental effects on communities with environmental justice concerns, which will be difficult if not impossible to quantify with respect to a specific project. We urge CEQ to forego incorporating the GHG guidance either in whole or in part into its final NEPA regulations and instead work to provide additional detail and specificity around the types of climate change impacts and effects to be assessed by agencies in revised guidance.

Conclusion

We do not believe there must be a conflict between a healthy environment or economic growth, and we strongly support the goals originally enshrined in NEPA. We agree with CEQ that, in a sense, NEPA was ahead of its time.⁶⁰ NEPA was devised in an era when major federal projects could be, and often were, built without taking into consideration potential environmental consequences, and that had to change.

Now, however, after more than five decades of judicial interpretations filling in NEPA's original bare canvas, we believe NEPA has become something it never was intended to be. Rather than simply ensuring that federal agencies understand and consider the environmental impacts of their actions, litigants are using NEPA as a cudgel to slow or stop infrastructure improvement – even those that are expected to produce widespread environmental benefits, or widespread economic benefits with minimal environmental effects. We are sure this is not what NEPA's original

⁵⁸ In that respect, NEPA would become like the comprehensive "risk" bills that Congress considered in the 1990s, which would have imposed upon environmental statutes a "supermandate" requiring that any regulations thereunder be cost-justified on the basis of reducing risks. See Jeff Gimpel, "The Risk Assessment and Cost Benefit Act of 1995: Regulatory Reform and the Legislation of Science," 23 J. OF LEG. 61, 86-87 (1997), available at <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1214&context=jleg>.

⁵⁹ 88 Fed. Reg. 1196 (Jan. 9, 2023), Council on Environmental Quality, *National Environmental Policy Act Guidance on Consideration of GHG Emissions and Climate Change* available at: [2023-00158.pdf \(govinfo.gov\)](https://www.govinfo.gov/procurement/2023-00158.pdf).

⁶⁰ *Id.* at 49924.

supporters had intended when it passed Congress with widespread bipartisan support in 1969.⁶¹ Simply put, without NEPA, it used to be too easy to build projects; now, with NEPA, it is too difficult.

We urge CEQ to revisit these proposed regulations and revamp them so that they serve our shared goals of accelerating the energy transition; rebuilding and improving our infrastructure; addressing climate resiliency; meeting security challenges associated with overreliance on potential adversaries regarding critical minerals and other key materials; and ensuring that we have affordable and reliable supplies of energy and materials to power a growing economy, while also protecting the quality of the human environment.

CEQ should amend its proposed rules to provide greater efficiency, clarity, and focus to speed environmental reviews by providing high-quality actionable information to decisionmakers, thus hopefully mitigating opportunities for litigation.

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⁶¹ Since 1970, Congress has also dramatically constrained the potential environmental impacts of major projects via comprehensive environmental regulatory statutes regarding clean air, clean water, solid and hazardous waste, and endangered species, all of which existed in only rudimentary form – if at all – when NEPA was enacted.