

Chairman Mary Neumayr
Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503
March 9, 2020

Re: CEQ NEPA Regulations, Docket No. **CEQ-2019-0003**

Dear Chairman Neumayr:

The American Council for Capital Formation (ACCF) is a nonprofit, nonpartisan economic policy organization dedicated to the advocacy of pro-growth tax, energy, environmental, regulatory, trade and economic policies that encourage saving and investment. ACCF appreciates the opportunity to provide comment to the Council on Environmental Quality (CEQ) on its proposed modernization of the National Environmental Policy Act (NEPA).

When NEPA was enacted in 1970, it was intended to ensure that federal projects would be evaluated to ensure compliance with existing environmental laws. While NEPA provides important safeguards to ensure federal agencies carefully consider environmental impacts, the process as it stands has become a tangle of bureaucratic red tape for many industries wishing to deliver on new, modernized infrastructure projects. Overly burdensome analytical requirements, broad definitions of reasonable effects or impacts, excessive levels of review and endless opportunities for review and comment have led to significant uncertainty in planning major projects.

Consider that NEPA reviews can so prolong a project that by the time permits have been approved, the project itself may no longer be of sufficient scope to meet its intended needs. The I-70 East expansion project in Denver is a good example. According to Matt Gerard of the Plenary Group, an investment company, “[t]he permit process for that project took over 13 years and it ended up with a document that was almost 16,000 pages in length.”¹ As Ed Mortimer of the U.S. Chamber of Commerce said of the project: “If it takes 20 years to get a permit, by the time that project is in construction, the capacity it was meant to handle has already

¹ *Denver takes center stage in a national debate over updating environmental policies*. The Denver Channel, February 11, 2020. <https://www.thedenverchannel.com/news/360/denver-takes-center-stage-in-a-national-debate-over-updating-environmental-policies>

exceeded it.”² Furthermore, and of great concern to ACCF, long NEPA-related permitting times may exceed financial cycles, meaning that by the time permits are granted for needed infrastructure, the funds – be they public or private – may no longer be available. Consider the potential impact on highway projects, where CEQ notes that 60% of federal highway projects take more than 6 years to complete environmental review.³

ACCF is keenly aware that major projects like developing the infrastructure so desperately needed in the U.S. rely on reasonable, fixed schedules and financial predictability to attract the capital needed to bring these projects to fruition. Infrastructure development will have the additional economic benefit of creating millions of jobs and accelerating economic growth and productivity. As such, we support the Administration’s proposal to modernize NEPA, which will allow for increased infrastructure investment, while streamlining the permitting process and assuring sound, fact-based environmental reviews, consistently applied across agencies. Further, we offer the following specific comments.

Time and Page Limits

Population and economic growth has led to an increased demand for new and updated infrastructure projects to transport goods and people, and enable necessary services in our 21st Century economy, but long wait times and high costs currently associated with permitting often deter businesses from making the capital investments needed to develop modernized infrastructure. Under NEPA, the current average time to complete a review is 4.5 years.⁴ Costs can range widely, but in 2003 the Government Accounting Office estimated that environmental impact studies (EIS) alone typically cost as much as \$2 million.⁵ Costs today will likely be much higher. In fact, in 2016 the Department of Energy estimated that NEPA-related analyses averaged \$4.2 million per project.⁶ CEQ’s proposal would help address these investment-killing delays and costs in part by establishing time and page limits to reports developed in compliance with NEPA requirements.

ACCF supports CEQ’s proposal to limit Environmental Assessment reports to 75 pages, to be completed in one year’s time, and the proposed 300-page, 2-year limits on Environmental Impact Statements. These time and page limits will be sufficient to complete the technical assessments necessary to make informed decisions

² *Ibid.*

³ *Fact Sheet: CEQ’s Proposal to Modernize its NEPA Implementing Regulations.* Council on Environmental Quality, January 2020. <https://www.whitehouse.gov/wp-content/uploads/2020/01/20200109FINAL-FACT-SHEET-v3-1.pdf>

⁴ *Fact Sheet: CEQ Report on Environmental Impact Statement Timelines.* Council on Environmental Quality, December 2018. https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timelines_Fact_Sheet_2018-12-14.pdf

⁵ *National Environmental Policy Act: Little Information Exists on NEPA Analyses.* GAO, April 2014. <https://www.gao.gov/assets/670/662543.pdf>

⁶ *NEPA Lessons Learned*, US Dept. of Energy, March 1, 2016. <https://www.energy.gov/sites/prod/files/2016/03/f30/LLQR-March-2016.pdf>

about federal projects going forward with plenty of time and more than adequate detail. These are common-sense measures that will reduce uncertainty for investors and spur infrastructure projects of all types to move forward.

Scope of NEPA-related Analyses

When passed, NEPA ensured that existing key environmental standards would be considered prior to approving federal projects. However, as other enforcement statutes, like the Clean Water Act and Clean Air Act were passed and updated, NEPA implementation has become more and more complex, adding considerable uncertainty and creating opportunities for misuse. As it stands today, NEPA analyses incorporate an extremely wide scope that leads to inefficiencies and, worse yet, often enable opponents of a project with an easy tool to block new infrastructure projects, even without significant, tangible environmental concerns. NEPA's scope should focus on information essential to the project in question, rather than the theoretical causation chain analysis that we often see now.

Under the current requirements, NEPA analyses are currently overly complex, with the anticipation of litigation in virtually every instance. Analyses therefore must evaluate every possible scenario, regardless of how remote an environmental harm may be. Incorporation of these low-probability, low-impact scenarios in NEPA-related analyses instead provide fodder for project opponents to tie up projects for years over perceived insignificant environmental impacts.

Of particular concern is NEPA's current inclusion of "cumulative" and "indirect" impacts. Inclusion of these overly broad terms leave the appropriate scope of NEPA-related analyses open to interpretation and can breed endless legal challenges. Often these impacts are far outside the agency authority to address and would occur regardless of intervention (i.e., global effects). Inclusion of "cumulative" effects leads to illegitimate opposition to projects that may make de minimis contributions to environmental concerns. "Indirect" effects often must be considered even though they are insignificant, as they are extremely remote or the product of a lengthy causal chain.

Take the Southeast Market Pipelines Project as an example. When fully complete, the Sabal Trail pipeline, the main pipeline in the project, will bring approximately 1 billion cubic feet per day of natural gas from Alabama to Florida, enabling Florida utilities to replace coal plants with cleaner-burning natural gas plants. Although the Federal Energy Regulatory Commission (FERC) approved the project in 2015, the U.S. Court of Appeals remanded the decision back to FERC in 2017 for not considering the downstream emissions from burning of

the natural gas that would be transmitted by the pipeline, thus establishing a new precedent under NEPA.⁷ This ruling was handed down despite the fact that replacing coal-fired power plants with natural gas could have a net environmental *benefit*, reducing CO2 emissions per kWh of power production by half! FERC commissioners re-approved the project in 2018 along party lines, and construction was resumed, but the precedent to consider downstream impacts – even those not directly associated with the project itself – in NEPA reviews has been established.

Removing these terms as proposed and including straightforward language with clear definitions and procedures will create a higher threshold for NEPA-based challenges and avoid unnecessary litigation, restoring NEPA to its original intent: collecting relevant information to inform federal decision-makers of the direct consequences of proposed actions. By removing the uncertainty of needless litigation, the Administration could again incentivize capital investment in critical infrastructure projects.

Definition of a “Major Federal Action”

Thorough NEPA reviews apply to “major federal actions.” That is, proposed projects on federal lands or with at least partial federal funding. This leads to projects that have minimal federal funding or involvement being pulled into the time-consuming NEPA process unnecessarily.

For example, in September 2018, after years of effort to permit drilling operations on private land, two parcels of land in the Wayne National Forest had auctions for their oil and gas leases suspended following a protest by environmental groups, claiming it had not yet complied with NEPA requirements. The affected area included 90% private land, with just 10% federal Forest Service land.⁸ Becky Clutter, a volunteer board member of the National Association of Royalty Owners and a property owner in the affected area said “[a]ll of the lease sales had parcel-specific environmental assessments done which stipulated that no surface disruption from drilling be allowed to occur. All drilling will be done on private property. To date, not a single permit to drill has been issued after these lease sales ... The situation gets even more convoluted as private landowners are now being told that simply because their private property gets included into a drilling unit that contains federal parcels,

⁷ “How Trump’s NEPA overhaul could affect 3 projects,” Climatewire. <https://www.eenews.net/stories/1062092145>

⁸ “Feds cancel drilling lease auction for Wayne Forest, reigniting fracking debate,” The Athens News. https://www.athensnews.com/news/local/feds-cancel-drilling-lease-auction-for-wayne-forest-reigniting-fracking/article_94914a6a-b45e-11e8-8548-fba1d1b6d1d7.html

their private parcels may now be subject to full NEPA (National Environmental Policy Act) review including archeological surveys. We don't think it's right for the government to come in to our private property.”⁹

CEQ's proposal would modify the “major federal action” definition to exclude “non-federal projects with minimal federal funding or minimal federal involvement.” ACCF supports this common-sense definition that will focus efforts on those projects that are truly significant federal undertakings, and not add uncertainty to projects that are better evaluated outside the scope of NEPA.

Categorical Exclusions

The proposal suggests that agencies should have greater authority to provide categorical exclusions for types of projects that “normally do not have a significant effect on the environment.” Further, it is proposed that agencies should have the ability to rely upon another agency's categorical exclusion. These again are common-sense approaches to reducing time and effort (and uncertainty) associated with relatively routine projects where there is unlikely to be significant impact

Deadlines for Comment and Judicial Review

While not required to do so, agencies will often consider all comments submitted to them regarding a proposed federal action under NEPA – even when they are submitted after a specified deadline. This can lead to unnecessary delays in evaluating projects and uncertainties for project developers. CEQ proposes – and ACCF supports – a firm deadline by which all comments must be received. Comments and objections that are not submitted in a timely fashion would not be considered. This firm deadline will help assure adherence to a reasonable schedule for review and add certainty to the NEPA review process.

Lastly, CEQ proposes limiting judicial review to a Record of Decision (ROD) or other final agency actions. ACCF supports this proposal as another means to streamline the NEPA process and provide greater certainty to project investors.

In conclusion, the changes proposed by CEQ noted above will streamline the NEPA review process, speeding up reviews and reducing uncertainty associated with “major federal actions.” As ACCF supporters know quite

⁹ “Residents take Wayne National Forest mineral rights fight to D.C.,” The Parkersburg News and Sentinel. https://www.athensnews.com/news/local/feds-cancel-drilling-lease-auction-for-wayne-forest-reigniting-fracking/article_94914a6a-b45e-11e8-8548-fba1d1b6d1d7.html

well, delays regarding schedule, regulatory approvals and judicial reviews are crippling to attracting and maintaining capital investment, which is key to developing the infrastructure our nation so desperately needs, especially energy infrastructure. We therefore urge adoption of the proposed modernization of the NEPA process. Should you have questions or comments regarding ACCF comments, please contact me at (202) 293-5811, or kisakower@accf.org. Sincerely,

Kyle Isakower
Senior Vice President, Regulatory and Energy Policy
American Council for Capital Formation