Comments on the Council on Environmental Quality NPRM
National Environmental Policy Act Implementing Regulations Revisions
Docket No. CEQ-2021-0002

November 22, 2021

We, the undersigned law professors, appreciate the opportunity to comment on the proposed revisions to the National Environmental Policy Act's (NEPA) implementing regulations and write to provide a broader context for evaluating the Notice of Proposed Rulemaking's (NPRM) revisions. Many of the changes effectuated by the 2020 revisions circumvented and undermined NEPA's environmental review procedures, a course at odds with both the purposes of the NEPA statute and with the need for expeditious, informed, transparent decision-making of the sort called for by the recently enacted Federal Infrastructure Investment and Jobs Act (FIIJA) and climate change mitigation and adaptation. Accordingly, while we support CEQ's preliminary effort to restore NEPA procedures to a form consistent with the congressional purpose and national policy declared in the Act by addressing issues related to purpose and need statements, consideration of alternatives, agency compliance procedures, and a comprehensive effects analysis—we believe that CEQ needs to take a more direct and comprehensive approach to bring its NEPA regulations into better alignment with NEPA's fundamental purposes and evolving applications. Simply put, we urge CEQ to view this rulemaking, and any Phase 2 rulemaking, not simply as a repeal of the 2020 Regulations, but as an opportunity to improve the nation's environmental review procedures based on decades of experience and tailored to meet modern challenges of federal planning and decision-making.

To accomplish that, we recommend CEQ's rulemaking be guided by three central tenants:

- That CEQ's current two-phase approach to addressing the shortcomings of the 2020 regulations and improving the ways NEPA is understood and applied is flawed and more likely to perpetuate some confusion than to resolve it.
- That CEQ's 1978 NEPA regulations are the most appropriate baseline for applying and improving NEPA.
- That factors beyond NEPA and its regulations are the source of many—most—of the complaints about the burdens and delays ascribed to NEPA compliance.

We discuss these recommendations in more detail below.

I. CEQ's Current Two-Phase Approach

We understand that there are reasons for CEQ's decision to leave the 2020 rules in place while simultaneously trying to correct/improve them through the current proposed rulemaking and an anticipated second rulemaking in 2022, but we feel that this approach leaves problematic aspects of the 2020 rule in place and simultaneously in doubt. Indeed, the prospect exists that the second phase may be delayed or so restricted in scope that truly troublesome aspects of the 2020 rules (e.g., its definitions of "human environment," "reasonable alternatives," and what constitutes a "major Federal action," to name but a few) could remain in place indefinitely. The preamble to the current proposal makes clear

that CEQ believes, and we agree, that in many ways the 1978 regulations better reflect the meaning and purpose of the NEPA statute than the 2020 regulations which leads us to the conclusion that instead of trying to correct the 2020 rule incrementally, it should be repealed and CEQ should restart the process of improving NEPA's regulations from a firmer footing. That may well involve multiple phases, but it would be a vastly clearer and legally sound approach.

II. Adopt the 1978 NEPA Regulations as the Baseline for Improvement

It is beyond dispute that CEQ needs to revisit and refresh its NEPA regulations and policies from time to time. It is also beyond question that with the implementation of the FIIJA and the demands of energy transition and climate change mitigation and adaption, NEPA will be thrust into situations unlike any in its past. The threshold question today is, what should be the baseline for NEPA's future evolution? We strongly believe CEQ's 1978 regulations are the best baseline, a fact reinforced by the preamble to CEQ's current proposal. This approach would, in our view, greatly increase the ability of CEQ to meet its stated goal to "provide for sound and efficient environmental review of Federal actions, including those actions integral to tackling the climate crisis, in a manner that enables meaningful public participation, respects Tribal sovereignty, protects our Nation's resources, and promotes better environmental and community outcomes."[1]

Adopting the 1978 regulations as the baseline would also facilitate CEQ's proposal to lift the caps on agency NEPA compliance, reestablish an appropriate scope to the alternatives analysis, and restore the definitions of indirect and cumulative effects in the NEPA process—steps we strongly support.

III. Distinguish between Substantive Constraints on NEPA and Those which are Resource-Based

One of the driving forces behind the 2020 NEPA rule was the belief that NEPA compliance cost too much, took too long, and posed needless burdens and barriers to desired projects and actions. While we acknowledge the NEPA process can display all of those issues, we agree with CEQ that the language added by the 2020 Rule would not necessarily lead to more efficient reviews.[2] If anything, the potential confusion and unlawful exclusion of alternatives may actually delay the process with unnecessary litigation. Besides the lack of empirical support backing the aggressive calls for "streamlining" efforts, due to external sources of delay, accelerating the decision-making process cannot wholly be achieved by modifying NEPA regulations. We believe it is essential that the fact that NEPA compliance is chronically and purposely under-resourced is kept front and center in all discussions about NEPA's performance and how it might be improved. Similarly, it is vital that CEQ reasserts that NEPA is not a box to check on the way to taking a federal action, but is a fundamental factor in deciding if an action should be taken and what it might look like.

The NEPA process cannot be broadly characterized as inefficient as preparation times for completing EISs vary widely across the federal government. Data from the National Association of

[1] NEPA Implementing Regulations Revisions, 86 Fed. Reg. 55,757, 55,759 (Oct. 7, 2021) (to be codified at 40 C.F.R. pt. 1502, 1507, and 1508) [hereinafter *NPRM*].

[2] "CEQ does not consider that the language added by the 2020 Rule would necessarily lead to more efficient reviews and finds a lack of evidence to support that claim." *Id.* at 55,761.

Environmental Professionals (NAEP), for example, finds that from 1997 through 2016, most EIS documents were completed within 1 to 2 years.[3] A 2018 CEQ assessment of completion times for 1,161 EISs issued from January 1, 2010, through December 31, 2017, found that the median and mean completion times were 3.6 and 4.5 years, respectively.[4] Those timeframes may be useful metrics for planning and evaluating specific projects/programs but they are not fair metrics for evaluating NEPA compliance since the assessment used as its endpoint the issuance of a Record of Decision (ROD) not the publication of the Final Environmental Impact Statement (FEIS) which is the actual culmination of the NEPA process. Any number of things can explain a gap between the FEIS and the ROD but NEPA is not one of them.

Furthermore, many of the inefficiencies of environmental reviews can be attributed to sources of delay external to NEPA procedures. For example, the Congressional Research Service (CRS) and the Government Accountability Office (GAO) have both recognized that NEPA often functions as an "umbrella" statute, such that studies, reviews, or consultations required under other environmental laws are integrated into the NEPA process.[5] For example, most EISs discuss air quality impacts as a means of coordinating NEPA's alternatives analysis with permitting under the Clean Air Act. This blurring of statutory requirements makes it difficult to single out the costs, including time delays, and benefits of NEPA procedures on their own.[6] The CRS has highlighted the confusion caused by these overlapping roles, cautioning that "[t]he need to comply with another environmental law, such as the Clean Water Act or Endangered Species Act, may be identified within the framework of the NEPA process, but NEPA itself is not the source of the obligation. If, hypothetically, the requirement to comply with NEPA were removed, compliance with each applicable law would still be required."[7] On that note, we offer a caution of our own that the interplay between NEPA and other environmental laws does not suggest that NEPA is superfluous. In most cases, NEPA offers a vehicle for unifying the required environmental analyses in a way that can add value and enhance efficiency.

Former CEQ Chair Nancy H. Sutley raised a similar concern that "delays in project implementation are inaccurately attributed to NEPA process delays when other factors are relevant," such as securing project funding, local opposition to a project, project complexity, changes in project scope, and requests by state or local officials.[8] Likewise, in a 2012 study of EISs prepared by the Federal

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[3] NAEP, 2017 ANNUAL NEPA REPORT OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) PRACTICE 12 (2018).
[4] U.S. Government Accountability Office, GAO-14-370, *National Environmental Policy Act: Little Information Exists on NEPA Analyses* 15-16 (2014); s*ee also*, NAT'L ASS'N OF ENVTL. PROF'LS, ANNUAL NEPA REPORT 2013, 33, 35 (2014).
[5] U.S. Government Accountability Office, GAO-14-370, *National Environmental Policy Act: Little Information Exists on NEPA Analyses* 19 (2014); Congressional Research Service, The National Environmental Policy Act (NEPA): Background and Implementation 2 (2011).
[6] U.S. Government Accountability Office, GAO-14-370, *National Environmental Policy Act: Little Information Exists on NEPA Analyses* 18-19 (2014); Congressional Research Service, The National Environmental Policy Act (NEPA): Background and Implementation 8-9 (2011).
[7] *Id.*
[8] CEQ Chair Testifies on the Importance of NEPA, 75 National Environmental Policy Act Lessoned Learned 2 (June 3, 2013). The GAO has also highlighted the importance of sources of delay outside of NEPA procedures, such as engineering requirements and holdups associated with obtaining nonfederal approvals. U.S. Government Accountability Office, GAO-14-370, *National Environmental Policy Act: Little Information Exists on NEPA Analyses* 15, 19 (2014).

Highway Association, CRS found that the causes of delay were "more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope."[9] For these reasons, the 2020 modifications to NEPA's implementing regulations do not necessarily expedite the timeframe of environmental reviews and may actually serve to delay the process.

IV. Conclusion

The 2020 NEPA rule undermined one of the nation's most critical tools for ensuring sound environmental decision-making for Federal actions. We support CEQ's recommitment to environmental protection and efficient review procedures that is reflected in its proposed rule. We urge CEQ, in this and subsequent rulemakings, to establish regulations that are tailored to modern demands, grounded in agency experience, and focused on environmental protection and efficacy. We strongly assert that CEQ can best achieve this by utilizing the 1978 NEPA regulations as a baseline for improvement and centering the true (external) causes of NEPA deficiencies in its decisions instead of sacrificing critical provisions in the name of "streamlining."

Thank you for the opportunity to provide comment on this rulemaking.

Sincerely,

(All of the following are signatories in their personal capacity only. Institutional affiliations are included for identification purposes only.)

Christopher J. Dalbom, Senior Research Fellow & Adjunct Assistant Professor
Tulane University Law School

Mark S. Davis
Research Professor
Tulane University Law School

Robert. L Glickman, J. B. & Maurice C. Shapiro Professor of Environmental Law
George Washington University Law School

Lauren E. Godshall
Clinical Assistant Professor of Law
Tulane Environmental Law Clinic

Oliver A. Houck
Professor of Law Emeritus
Tulane University Law School

Elizabeth Livingston de Calderón
Clinical Assistant Professor of Law
Tulane Environmental Law Clinic

Daniel R. Mandelker
Howard A. Stamper Professor of Law
Washington University School of Law

Michael Pappas
Professor of Law
University of Maryland

[9] Congressional Research Service, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress* at Summary (2012).

Patrick A. Parenteau, Professor of Law & Senior Counsel, Environmental Advocacy Clinic
Vermont Law School

Zygmut Plater
Professor of Law
Boston College Law School

James Wilkins
Professor
Louisiana State University