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Docket ID No. CEQ-2019-0003
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503
(submitted via regulations.gov)

Re: Comments on Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, CEQ–2019–0003

To Whom it May Concern:

On January 10, 2020, the Council on Environmental Quality (CEQ) published the *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act* (Proposed Rule). The MJB&A Permitting and Infrastructure Coalition[1] appreciates the opportunity to comment on the Proposed Rule.

MJB&A Permitting and Infrastructure Coalition member companies collectively engage the Administration and agencies on potential permitting modernization as well as regulatory and legislative opportunities to ensure energy infrastructure projects can proceed in a timely and cost-effective manner. The member companies design, permit, and operate fossil fuel-fired and nuclear power plants; electric and natural gas transmission and distribution systems; and solar, wind, and other renewable generation projects. Many proposed projects by member companies are affected by the implementation of the National Environmental Policy Act (NEPA). Consequently, the MJB&A Permitting and Infrastructure Coalition has been actively engaged with CEQ throughout the development of the Proposed Rule, submitting comments in August 2018 on the Advanced Notice of Proposed Rulemaking.

Our member companies are routinely faced with decisions involving long-term investments in energy infrastructure and systems that routinely take multiple years to develop, permit, and construct and can cost billions of dollars. Many of these projects involve federal actions, and due to the investment-intensive nature of our industry, timeliness and certainty in the NEPA process are crucial to provide our industry with the confidence to continue making long-term investment decisions. The uncertainty associated with the current NEPA process, including the general expectation that the process will take at least two to three years to complete for a single project, has in the past led member companies to abandon projects that require a NEPA review.

Thus, we continue to support CEQ's focus on updating NEPA regulations to increase the efficiency and predictability of NEPA reviews and ensure the legal durability of decisions while continuing to protect and enhance the quality of the human environment. The Proposed Rule includes necessary process changes that can help expedite federal agency NEPA reviews while also meeting the environmental objectives of the statute. Updates that improve regulatory certainty and result in a more streamlined process will provide our industry with the clarity needed to make well-informed, long-term investment decisions. To reinforce this certainty, we support CEQ's proposal to add

[1] The MJB&A Permitting and Infrastructure Coalition member companies including Entergy Corporation, NextEra Energy, and PG&E Corporation.

a new section (§1500.3(e), "Severability") to ensure that, in the event any sections or portions of this rule are stayed or invalidated through litigation, the remainder of the sections shall not be affected and shall continue to be operative.

The following comments are in response to specific proposed regulatory revisions.

I. The Proposed Rule includes appropriate clarifications for categorical exclusions (§1501.4, "Categorical exclusions") that are consistent with current practice.

Categorical exclusions (CEs) are a critical component of the NEPA process as they ensure proposed projects without significant effects can move quickly through the NEPA process. CEs also allow agencies to focus resources on the types of projects the statute was originally designed to capture. Our member companies routinely engage in activities that normally do not have significant effects, such as linear infrastructure projects (e.g., pipelines and transmission projects) and routine operation and maintenance activities (e.g., vegetation trimming and pole replacement projects). However, the application of CEs in these scenarios has been inconsistent across agencies and projects. While CEs are "the most common level of NEPA review," guidance on CE development and implementation is lacking, and agencies often duplicate work in making new CE determinations for the same types of projects.

Thus, we support the proposal to add section §1501.4 ("Categorical exclusions") in the Proposed Rule as it will provide important clarity on the process agencies use to determine whether a project qualifies for a CE, as well as codify current practices to ensure projects without significant effects can proceed in a timely manner. This proposed section would require agencies to identify in their agency NEPA procedures categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment (EA) or environmental impact statement (EIS). To ensure that CEs are applied consistently across agencies and similar projects, we recommend that CEQ identify specific examples of activities that are routine and/or non-invasive in nature and therefore normally have limited impacts and can be categorically excluded under certain parameters. Such examples should include installation of transmission poles, meteorological towers, and the temporary use of relatively small areas within a project site that have very minor or no impact, such as geotechnical surveys. Sometimes referred to as the "butterfly effect," there are also situations where an access road, transmission line, or pipeline, predominantly on private land, crosses over a small portion (e.g., less than 0.2 acres) of Federal land to connect one private parcel to another. In many of these circumstances, it has been the experience of our member companies that the Federal land agency requires an EA to be completed even though there are no impacts to sensitive species or habitat. In one of these instances, the EA took over 18 months to complete. For these situations, where impacts are minor and the Federal agency's role is minor in the context of the overall project, completing a full environmental review results in lengthy project delays and use of agency resources with minimal or no benefit to the environment.

Additionally, activities to maintain or repair equipment in areas that have already undergone some level of environmental review should be included as CEs as these activities have foreseeable impacts that can be mitigated without additional review. In the past, it has been the experience of our member companies that CEs were utilized in these types of circumstances, and it is important that agencies can build on this experience.

We also support CEQ's recommendation that agencies utilize and/or adopt other agencies' CE determinations as this will encourage agencies to build upon each other's expertise and experience, expedite the review process, and allow agencies to ensure resources are spent on those projects for which an EA or EIS is appropriate. It has been the experience of our member companies that when one agency adopts CEs from another, project costs and delays are greatly reduced and the overall benefit to the environmental is maintained.

In an effort to provide further certainty to the process and timeliness of CE determinations, we recommend that CEQ adopt a time limit, similar to the proposed time limits for EAs and EISs, for making a CE determination. Specifically, we recommend that CE determinations be made within a specific timeframe (e.g., 30 days) of an agency receiving the information necessary to make such a determination.

II. The Proposed Rule supports enhanced coordination among multiple agencies and would help to drive timely reviews, both of which are critical to ensuring projects can proceed in a streamlined and efficient manner.

CEQ proposes several revisions to facilitate more timely and efficient reviews, including revisions to promote interagency coordination, codify expedited procedures, and clarify process and documentation requirements. We support these changes, as outlined below.

A. Coordinated Decision-Making

We support the proposed changes to §1501.7 ("Lead agencies") and §1501.8 ("Cooperating agencies") that will improve interagency coordination and make development of NEPA documents more efficient. Specifically, we support the requirement that Federal agencies evaluate proposals involving multiple Federal agencies in a single EIS and issue a joint Record of Decision (ROD) or single EA and joint Finding of No Significant Impact (FONSI). By mandating that the lead agency, in cooperation with the coordinating agencies, issue one set of decisions for a project, the Proposed Rule will streamline the NEPA process and avoid redundancies in decision-making. We also support the inclusion of language in those sections that requires the lead agency to develop and adhere to a schedule for the environmental review, any authorizations required for the proposed action, and resolution of any disputes that could cause delays to the schedule, to ensure the process is predictable and timely. We agree with CEQ that these revisions will result in reduced costs, improved relationships, and better outcomes that avoid litigation by promoting environmental collaboration.

B. Tiering and Incorporation by Reference

We support the proposed changes to §1501.11 ("Tiering") and §1501.12 ("Incorporation by reference") that will clarify when agencies can use existing studies and environmental analyses in the NEPA process and when agencies would need to supplement such studies and analyses. Allowing agencies to "tier" their EAs and EISs where it would "eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided or not yet ripe" would streamline the EA and EIS processes by focusing the review on the most important information pertinent to the proposed project and minimizing duplication. Similarly, allowing agencies to incorporate by reference studies and analyses that are relevant to the project will greatly streamline the review process by allowing agencies to maximize the use of previously completed reviews and avoid the unnecessary expenditure of resources and time to duplicate work for limited benefit to the environment. Specifically, our member companies have seen that allowing sister agencies to accept the reviews of other agencies expedites the NEPA process provided that the environmental documents prepared by one agency includes all the criteria necessary for the sister agency. In one instance, a three- to six-month EA process evolved into a two-year EIS process for one of our member company's projects because the EA did not include the necessary criteria for the sister agency to be able to utilize it to fulfill its NEPA requirements.

C. Required Analysis for Rulemakings

We support the proposed addition of §1506.9 ("Proposals for regulations") clarifying that agencies can use analyses, such as a regulatory impact analysis (RIA), prepared pursuant to other statutory or Executive Order requirements as the functional equivalent of an EIS for the purposes of NEPA, provided the analyses address the requirements

specified in section 102(2)(C) of NEPA (including environmental effects, alternatives, the relationship between short-term uses and long-term productivity, and any irreversible commitments of resources). This is an effective means to ensure timely reviews by reducing potentially duplicative work by involved parties and agencies. We also support the addition of language in §1502.24 ("Methodology and scientific accuracy") clarifying that agencies are not required to undertake new scientific or technical research to inform their analyses, thus further allowing for a consolidated and streamlined EIS review process when there is existing scientific and/or technical information available in the public record or in publicly available academic or professional sources.

D. Use of Applicant and Third-Party Materials

As we have indicated in prior comments to CEQ, we support revisions to §1506.5 ("Agency responsibility for environmental documents") allowing agencies to utilize environmental materials and documents prepared by third-party entities, subject to the agency independently evaluating and taking responsibility for the documents' scope and contents. Provided the process is fully transparent and the agency and other stakeholders can fully evaluate any materials, the ability to use third-party prepared materials, EAs, and EISs will greatly reduce the resource burden on agencies, eliminate duplicative work, and expedite the NEPA review while maintaining the integrity of the process and results.

E. Time Limits for EAs and EISs

The proposed inclusion of new language in §1501.10 ("Time limits") establishing a presumptive time limit of one year for EAs and two years for EISs will provide important time certainty for projects. Previously, these time limits had been detailed in Executive Orders rather than in the regulatory text. Providing explicit regulatory text outlining the presumptive time limits for EAs and EISs will improve the regulatory certainty for all parties, especially for projects that have limited effects. For more complex EA and EIS filings, the Proposed Rule maintains flexibility by providing for longer timelines with senior agency official approval.

To further drive timely action, we suggest that CEQ add additional language in §1501.10(b)(1) and (2) to clarify the typical EA and EIS timeframes. For example, CEQ could encourage agencies to complete EAs within 4 to 6 months and EISs within 6 to 12 months. Including specific targets could help to ensure that the 1- and 2-year timeframes do not become de facto time limits in cases where EAs and EISs could be completed in a shorter timeframe. Ultimately, efficient and reliable NEPA timelines are critical to our industry's ability to accurately plan energy infrastructure projects and reduce costs, both of which are beneficial to the public.

F. Page Limits for EAs and EISs

For similar reasons, we also support the proposal to include page limits of 75 pages for EAs (§1501.5, "Environmental assessments") and 150 pages for EISs (§1502.7, "Page limits") for typical projects, and 300 pages for EISs for projects of unusual scope or complexity, as these limits will help provide important boundaries for environmental reviews. These requirements will improve regulatory certainty and help advance projects through the NEPA process in a timely fashion, while maintaining a robust level of analysis, both in scope and depth, of a proposed project's potential impacts.

G. Scoping Process

We support CEQ's proposal to modify §1501.9 ("Scoping") to clarify that agencies can begin the scoping process as soon as the proposed action is sufficiently developed for meaningful agency consideration. Currently, publication of a Notice of Intent (NOI) in the Federal Register is a precondition to the scoping process, and it has been the experience of some of our member companies that publication of an NOI can take four to six months. Any delay in

this administrative step effectively delays the entire EIS process. Allowing for an agency to commence with the scoping process as soon as practicable after the proposal for action is sufficiently developed will allow the review process to start in parallel with the publishing of the NOI. These parallel tracks are appropriate and important to ensure timely reviews.

Overall, the clarification on scoping process timing, combined with the proposed time limits for EAs and EISs, will add much needed regulatory predictability to the NEPA process and further increase business certainty.

H. Major Federal Action Definition

We support CEQ's proposal to clarify that the definition of major Federal action in §1508.1 ("Definitions") does not include non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project. This change will help to reduce proposed project costs and delays by more clearly defining the kinds of actions that are appropriately within the scope of NEPA.

III. The Proposed Rule revisions regarding "reasonable alternatives" considered for EISs (§1502.14, "Alternatives including the proposed action") should be designed to provide boundaries limiting the evaluation of alternatives to those that are relevant to the action and implementable by the lead agency.

In our prior comments to CEQ, we noted that current NEPA regulations do not provide clear guidance on the number of alternatives that must be considered in EISs, which has led agencies to evaluate a large and potentially unwieldy number of alternatives, leading to delays and increased review costs. We agree with CEQ's view outlined in the Proposed Rule that "NEPA's policy goals are satisfied when an agency analyzes reasonable alternatives, and that an EIS need not include every available alternative where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum." We also agree it is essential that the alternatives be realistically implementable by the lead agency. Thus, we support the proposed changes to §1502.14 ("Alternatives including the proposed action") that clarify that the scope of possible alternatives are those that are reasonable and implementable. We also support the newly proposed definition of "reasonable alternatives" in §1508.1 ("Definitions") that limits consideration to only those alternatives that are "technically and economically feasible and meet the purpose and need of the proposed action." In selecting reasonable alternatives, CEQ also notes that the goals of the applicant must be considered when the agency's action involves a non-Federal entity. We support the addition of this language in the Proposed Rule as it will further clarify the range of alternatives and streamline the review process in line with CEQ's goals.

These proposed changes will provide increased business certainty, more efficient use of agency resources, and more focused attention on alternatives that could be implemented and are important to consider throughout the NEPA process.

IV. The Proposed Rule revisions to §1502.16 ("Environmental consequences") would affect how agencies consider greenhouse gas emissions and climate impacts.

For certain projects our member companies undertake, a greenhouse gas (GHG) analysis will remain a consideration that is appropriate to include to ensure well-informed decision-making and to allow agencies and stakeholders to appropriately consider reasonable alternatives. However, there is an important balance we urge CEQ to develop. GHG emissions and any potential climate impacts should not be the only effects considered in a NEPA review process and, as noted above, consideration of alternatives that are beyond the project, or not implementable, are not appropriate. Consideration of a limitless list of alternatives only leads to project delays and costs without a clear environmental benefit. Alternatively, simply eliminating consideration of climate impacts will lead to prolonged

litigation, as well as financing and investor uncertainty—all of which leads to further project delays and costs. Thus, we would urge CEQ to undertake a regulatory process to clearly define how GHG emissions can be reasonably considered in the NEPA process.

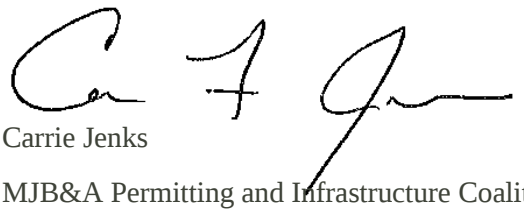
The preamble of the Proposed Rule notes that the discussion of effects should "focus on those effects that are reasonably foreseeable and have a close causal relationship to the proposed action." This change is largely effectuated through the elimination of the term "cumulative effects" and the introduction of the term "reasonably foreseeable" in the definition of "effects" (§1508.1, "Definitions"). Rather than eliminating all consideration of climate impacts, we urge CEQ to propose regulatory language that establishes appropriate boundaries to allow a reasonable consideration of GHG emissions and climate impacts. It will be important for these boundaries to include clear guidance on how to quantify direct and indirect GHG emissions and how to consider emissions in the appropriate context for electric sector projects. For example, agencies could evaluate GHG reduction benefits in cases where electric sector projects may be displacing higher emitting resources or in cases where the national and/or regional GHG emissions trends are showing an overall decline. Similarly, as certain industries pursue electrification, emissions in the electric sector may increase, while overall emissions at the state or regional level will decline. Ultimately, while the effects of GHG emissions from one project on future climate trends will not be knowable with certainty, especially at the local level, using available sector-wide emissions assessments can inform agency decision-making and provide stakeholders important information consistent with NEPA, which will help reduce the risk of costly and lengthy litigation. We welcome the opportunity to work with CEQ and stakeholders on defining the appropriate boundaries for considering GHG emissions and climate impacts in the NEPA process.

V. Additional Comments

Finally, we encourage CEQ to also consider developing additional guidance to agencies regarding FONSI determinations. Specifically, applicants should be allowed to assume the presence of a species in the impact area and then mitigate for any potential disturbance to avoid a multi-year permitting process. In these situations, agencies can take steps to ensure mitigation commitments, including monitoring. Allowing the project to proceed under a mitigated FONSI would streamline the NEPA process, avoid unnecessary project delays, and conserve agency resources while ensuring the necessary environmental protections are achieved.

We look forward to continuing to constructively engage with CEQ as it finalizes guidance and implements other reforms to ensure a more efficient, timely, and effective NEPA process. If you have any questions, please do not hesitate to contact me at cjenks@mjbradley.com.

Sincerely,



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