March 10, 2020

Edward A. Boling
Associate Director for the Environmental Policy Act
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Comments on the "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act" Docket No. CEQ-2019-0003

Dear Mr. Boling,

As the chief legal officers of our states, we the undersigned attorneys general for the states of Indiana, Alabama, Alaska, Arkansas, Georgia, Kansas, Louisiana, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia write in response to a request to provide comments on the U.S. Council on Environmental Quality's ("CEQ") proposed rule "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act" ("Proposed Rule") that will update CEQ's rules for the first time in 40 years. CEQ's regulations implementing and interpreting the National Environmental Policy Act ("NEPA") have raised the cost of infrastructure projects in our states over the last 50 years and delayed much needed infrastructure improvements. This update, we hope, will allow for projects to move forward quicker, provide our states with greater autonomy, and concomitantly protect our environment. The Proposed Rule is due substantial deference and solidly within the CEQ's authority under NEPA, brings NEPA regulations in line with case law and guidance, and will have a positive net economic impact on our states.

I. BACKGROUND AND SUMMARY

The National Environmental Policy Act (NEPA) was drafted as a procedural statute to ensure that federal actions or decisions take the environment into consideration. NEPA also established the Council on Environmental Quality (CEQ), which is a part of the Office of the President. Title 1, Section 102 of NEPA provides in relevant part:

> *The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall-- ... (B) identify and develop methods and procedures, in consultation with the* [CEQ] *established by subchapter II of this chapter…* 42 U.S.C.A. § 4332 (West)

Title 2, Section 204 provides for the duties and functions of the CEQ. 42 U.S.C.A. § 4344 (West). The CEQ assists the President with preparation of the Environmental Quality Report. *Id.* The CEQ gathers timely and authoritative information concerning current and prospective condition of the environment and extent to which those conditions may interfere with the achievement of policies set forth in Title 1 of NEPA, and reviews all federal government activities pursuant to the same provisions. *Id.* In addition, the CEQ makes recommendations regarding

various environmental wellness goals, conducts studies on environmental conditions, provides definitions for environmental changes, and makes reports of such findings to the President and the public at-large. *Id.*

In 2017, President Trump issued Executive Order 13807 establishing a One Federal Decision policy, including a two-year goal for completing environmental reviews for major infrastructure projects, and directing CEQ to consider revisions to modernize its regulations. In 2018, CEQ issued an Advance Notice of Proposed Rulemaking ("ANPRM") requesting comment on potential updates to its regulations. Over 12,000 comments were received in response to the ANPRM which culminated in the CEQ's Proposed Rule.

NEPA regulations were first promulgated in 1978[1] under President Carter, and the Proposed Rule is the first attempt to re-write the regulations since initial promulgation (hereafter "Existing Process"). Since NEPA's inception, the Supreme Court has held that CEQ regulations are afforded "substantial deference" (*see Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 374 (1989)) and found that NEPA "[does] not require agencies to elevate environmental concerns over other appropriate considerations." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citations omitted). Over the past forty years, CEQ has issued a multitude of guidance and reports to clarify questions regarding the implementation of NEPA.[2] This regulation will be afforded substantial deference, as discussed *supra*; therefore, it is likely that the Proposed Rule would survive a legal challenge. Given the economic and practical considerations cited on the docket by the CEQ, we have no reason to believe that the changes proposed are arbitrary or capricious.

The Existing Process, with its jig-saw puzzle of regulations, guidance, case law, and executive orders, has resulted in a review process that takes entirely too long and drives up the cost of projects. The Proposed Rule properly applies a "proximate cause" test to the effects test in NEPA, properly respects the cooperative federalism at the heart of federal-state relations underpinning environmental laws[3] by allowing states to provide a first draft of environmental assessments and environmental impact statements, and is due substantial deference.

While opponents of the Proposed Rule claim that the reforms undermine our current environmental law, we see nothing in the Proposed Rule that would support that claim. NEPA is simply a procedural check to ensure that the environment was taken into consideration. *See* 85 Fed. Reg. 1684, 1686; *See also Balt. Gas & Elec. Co.*, 462 U.S. at 97 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976)). The Proposed Rule strikes a balance and clarifies the process by which agencies take into consideration environmental concerns.

[1] See 40 CFR § 1500-1508.
[2] See for example 46 Fed. Reg. 18026 (Mar. 23, 1981), https://www.energy.gov/nepa/downloads/forty-most-askedquestions-concerning-ceqs-national-environmentalpolicy-act; See *also* https://ceq.doe.gov/guidance/guidance.html.
[3] Cooperative Federalism: A Central Concept of Environmental Law
https://www.justice.gov/archives/opa/blog/cooperative-federalism-central-concept-environmental-law

II. THE PROPOSED RULE IS WITHIN THE SCOPE OF NEPA AND IS NOT ARBITRARY AND CAPRICIOUS

The CEQ is due deference on its interpretation of NEPA as it would be implemented under the Proposed Rule. For the CEQ to have deference, there must be lack of a direct answer from Congress on the issue at hand and the agency must be delegated authority to interpret the statute. *Chevron v. N.R.D.C.*, 467 U.S. 837, 837-38 (1984); *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296-97 (2013). Additionally, the change to the regulations must not be arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

NEPA covers the scope and application of environmental reviews. 42 U.S.C.A. § 4332. NEPA also imposes the broad policy goal of protecting environmental interests, economic interests, and other social factors. 42 U.S.C.A. § 4321. Yet, NEPA's procedural requirements do not "impose substantive duties mandating particular results," it simply provides a process for preventing "uninformed agency action." *Methow Valley* at 333 (1989).[4] Congress has not clearly spoken on how, specifically, these values or factors need to be weighed by agencies—only that such factors must be considered. *Id.*

Title 2, Section 204 provides for the duties and functions of the CEQ. 42 U.S.C.A. § 4344 (West). The CEQ has the power to review the impact of all federal government activities pursuant to Title 1 of NEPA. *Id.* In 1978, pursuant to the impact review of federal government activities, CEQ promulgated the regulations which are revisited by the Proposed Rule. See 43 Fed. Reg. 55978 (Nov. 29, 1978) (creating 40 CFR § 1500-1508); see also 44 Fed. Reg. 873 (Jan. 3, 1979) (technical corrections), and 43 Fed. Reg. 25230 (June 9, 1978) (proposed rule). The Supreme Court has found that the CEQ's regulations to implement NEPA are well within their delegated authority. *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979).[5]

The Proposed Rule simply provides the roadmap for how agencies balance environmental concerns when taking an action. The Proposed Rule is clearly within the scope of CEQ's authority because NEPA "simply prescribes the necessary process" and the Proposed Rule provides that roadmap. *Methow Valley* at 350. The Proposed Rule properly codifies case law, clarifies regulations, and accelerates the environmental review process. For these reasons, imposition of the Proposed Rule on the part of the CEQ would not be arbitrary or capricious.

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[4] First, under NEPA an agency has a right to be "arguably wrong". North Slope Borough, supra. Secondly, a determination by the Court that one of the party's projections as to growth and demand for electric power was correct, or incorrect, would involve little more than a rehashing of the merits of the conflicting positions and thus would take the Court outside of its limited scope of review. See, Sierra Club v. Froehlke, supra.
Anson v. Eastburn, 582 F. Supp. 18, 22 (S.D. Ind. 1983).

[5] "But CEQ's reversal of interpretation occurred during the detailed and comprehensive process, ordered by the President, of transforming advisory guidelines into mandatory regulations applicable to all federal agencies. See American Trucking Assns. v. Atchison, T. & S. F. R. Co., 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847 (1967). A mandatory requirement that every federal agency submit EIS's with its appropriation requests raises wholly different and more serious issues "of fair and prudent administration," ibid., than does nonbinding advice. This is particularly true in light of the Court of Appeals' correct observation that "[a] rule requiring preparation of an EIS on the annual budget request for virtually every ongoing program would trivialize NEPA." Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

III. THE PROPOSED RULE PROPERLY CODIFIES CASE LAW AND CLARIFIES REGULATIONS

Over the past 40 years, various guidance documents and court decisions have interpreted the Existing Process and resulted in a patchwork scheme of environmental policy that is overly burdensome and unpredictable. The Proposed Rule appropriately clarifies definitions and codifies guidance and court decisions so that applicants and agencies alike understand what is required. This will streamline the necessary processes to protect our environment.

A. The Proposed Rule Brings the CEQ Rules in line with Case Law and Clarifies Ambiguous Terms

The Proposed Rule changes the definition of *effects* or *impacts* to only include effects that are reasonably foreseeable and "have a reasonably close causal relationship to the proposed action or alternatives." *See Council on Environmental Quality Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 1684 (Jan. 3, 2020) (revising 40 CFR § 1508.1). This change in language is drawn from court opinions which have found that environmental impact reports under NEPA need to be based on more direct sources of causation than have been asserted in some instances. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004); also *see Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 767 (1983). Despite significant input from the Supreme Court on this matter, some recent court decisions have declined to extend the same analysis. *See Sierra Club v. Federal Energy Regulatory Commission*, 867 F.3d 1357 (D.C. Cir. 2017); also *see U.S. v. Coalition for Buzzards Bay*, 644 F.3d 26 (1st Cir. 2011). Confusion created by courts regarding the standards applied by the Supreme Court to the cases presented in *Public Citizen* and *Metropolitan Edison Co.* demonstrate the need for clarity from the CEQ on these matters.

The Proposed Rule clarifies when a categorical exclusion ("CE"), environmental assessment ("EA"), or environmental impact statement ("EIS") is required. Under the Existing Process, it is up to a relevant federal agency to determine whether an action proposed by or requested of the agency requires the production of an EIS. *See Winnebago Tribe of Nebraska v. Ray*, 621 F.2d. 269, 270-71 (8th Cir. 1980). In order for a court to upset a determination by a federal agency that no EIS is needed, it must be demonstrated that "the agency's determination was not reasonable under the circumstances." *Id. (quoting Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1319-20 (8th Cir. 1974). The reasonableness standard replaces the arbitrary and capricious standard in this context. *Id.* The Proposed Rule provides clarity to applicants, agencies, and courts when a CE, EA, or EIS is proper.

When an agency makes a decision to not include an EIS, it must also determine which part of a project is relevant to its environmental review. *Winnebago* at 272. In *Winnebago*, the Army Corps of Engineers issued a permit for a section of power line to be constructed over navigable waters, but the portion of power line that the permit applied to was only about one and one-quarter miles out of the total 68 miles of the project. *Id.* at 270. The Army Corps granted the permit without an EIS and took the stance that it only needed to consider the environmental impact on the portion

of the project of which there was federal involvement through the permit—the short portion of the project which traversed navigable waters. *Id.*

The Eighth Circuit determined that a federal agency's control over an entire project, as opposed to a portion of a project, is instructive. *Id.* at 272. To necessitate federal review of an entire nonfederal project, the federal action must be a "legal condition precedent" to project commencement and the statute granting such power to the agency must clearly call for a comprehensive review by the relevant agency. *Id. cert denied*; also *see Sierra Club v. United States Army Corp. of Engineers*, 990 F.Supp. 2d. 9, 26-27 (D.D.C. 2013); *Montrose Pkwy. Alternatives Coalition v. U.S. Army Corps of Engineers*, 405 F.Supp. 2d 587, 598 (D. Md. 2005; *NAACP v. Medical Center, Inc.*, 584 F.2d 619, 632-33 (3rd Cir. 1978), *Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Regional Commission*, 599 F.2d. 1333, 1345-47 (5th Cir. 1979).

CEQ asked for comment on whether to specifically include in the definition of "effects" the concept of the close causal relationship. This clarifying language comports with Supreme Court precedent in *Dep't of Transp. v. Pub. Citizen.* 541 U.S. 752 (2004). In *Public Citizen*, the Supreme Court held:

> *[When an agency] has no ability to prevent a certain effect due to its limited statutory authority over the relevant action, the agency cannot be considered a legally relevant "cause" of the effect. [U]nder 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." Id.* at 770.

As a practical matter, the Proposed Rule would institute a more exacting approach as applied in *Public Citizen* and would comply with CEQ's mandate under NEPA. To further clarify CEQ's interpretation and the state of the law, it would be useful to include in the definition of effects, under 42 U.S.C. § 1502.16 (*as proposed*) that the *causal relationship* is analogous to proximate cause in tort law. This would resolve more recent case law from the D.C. Circuit and the First Circuit, and CEQ's definition will codify the intent of NEPA. The definition, as provided in § 1508.1(g) that would limit downstream requirements on foreseeability in instances where the federal agency does not have authority to prevent "a certain effect" would provide clarity in accordance with Supreme Court precedent. See *Sierra Club v. Federal Energy Regulatory Commission,* 867 F.3d 1357, 1382 (D.C. Cir. 2017) (*concurring opinion*). The clarifying language should also ensure that where an agency does not have jurisdiction, or where a cause of its decision is severed, the agency decision is not the cause of the environmental effect.

B. Guidance and Current Practice

The Proposed Rule codifies guidance and current practice in several instances. As states, we are especially interested in 42 U.S.C. § 1506 (*as proposed*). 42 U.S.C. § 1506.2(b) (*as proposed*) eliminates duplication between state, tribal, and local procedures. This section allows for additional cooperation between agencies and states. As states, we are invested in the health of our environments and nobody has a greater interest in our environment than our citizens. Under 42 U.S.C. § 1506.2(c) and § 1506.5 (*as proposed*), work completed adequately by the states may not be redone by the federal agency, and lead agencies or cooperating agencies are permitted to

craft the initial draft of the EIS. Under the Existing Process, agencies may allow applicants to submit drafts of EAs, and the Proposed Rule simply extends such permission to EISs. In cooperation with our states, the streamlined approval process will still protect the environment.

IV. THE PROPOSED RULE WILL HAVE A POSITIVE ECONOMIC IMPACT ON OUR STATES THROUGH EXPEDITED PROJECT DEVELOPMENT AND APPROVAL

Under the Existing Process, the typical EIS requires six years to complete, and the typical EA takes nine to 18 months.[6] Also, as noted in the Proposed Rule, "draft EISs averaged 586 pages in total." 85 CFR 164 at 1688. While CEQ regulations recommend page limits of 150 pages or 300 pages for proposals of "unusual scope or complexity", the mean final document length is 669 pages and the median length is 445 pages. 85 CFR 1684 at 1688. The Proposed Rule will expedite the review process, allow projects to begin sooner, and respect efficient use of taxpayer funds from our states.

Under the Existing Process, an EIS for a highway takes an average of seven years to complete. Not only does delay increase costs, delay creates a scenario whereby projects indefinitely stall. This inefficiency degrades infrastructure and hinders the movement of people and goods. Indiana, for example, as the Crossroads of America, is heavily dependent on logistics and transportation industries. According to the Indiana Department of Transportation, Indiana is the fifth busiest freight state for commercial freight traffic moving 724 million tons of freight each year.[7] It is critical to Indiana's economy that infrastructure is maintained at a high level.

CEQ specifically requests comment regarding 42 U.S.C. § 1500.3 of the Proposed Rule. 42 U.S.C. § 1500.3(c) (*as proposed*) elucidates CEQ's intention that judicial review of agency compliance not occur before an agency has issued the record of decision or taken other final action. 42 U.S.C. § 1501.10 of the Proposed Rule provides for a one (1) year time limit for EAs, and a two (2) year time limit for EISs. However, these time limits may be enlarged if approved by a senior agency official after consideration of certain factors. We are concerned that future senior agency officials could use this as an opportunity to infinitely extend time limits and render the time limits for EAs and EISs useless. A presumption that an EA or EIS is deemed approved and allowing an enforcement mechanism by states to hold agencies accountable would ensure that the time limits are appropriately safeguarded in future administrations.

From a state perspective, strict timeline enforcement ensures that agencies make informed decisions which may be challenged by states. This contrasts with the Existing Process when agencies perpetually stall projects through inaction. The two-year limitation provided under the Proposed Rule would require an agency decision that could then be appealed on judicial review if necessary.

Through Executive Order 13807, President Trump plans to increase infrastructure investment by conducting "environmental reviews and authorization processes in a coordinated, consistent, predictable, and timely manner in order to give public and private investors the

[6] Francis Fukuyama, Too Much Law and Too Little Infrastructure (2016), https://www.the-american-interest.com/2016/11/08/too-much-law-and-too-little-infrastructure/ (last visited March 10, 2020)
[7] https://www.in.gov/indot/2677.htm

confidence necessary to make funding decisions for new infrastructure projects." 82 Fed. Reg. 40463 (Aug. 24, 2017). This will be accomplished through implementation of the President's "One Federal Decision" approach—a more unified environmental review and authorization process. See 82 Fed. Reg. at 40466. The Proposed Rule incorporates key elements of "One Federal Decision" including interagency coordination, joint decision-making, and a two-year timeframe for EISs.

The Proposed Rule will ensure our core environmental values are protected while more timely environmental reviews are performed. The Proposed Rule will stop the endless delays which waste taxpayer money, hinder projects, and deny jobs to our nation's workers. The simplification and acceleration of the NEPA process will be a driver of economic growth and environmental safety. Better processes will allow for shorter timelines for reviews and permitting decisions—and they will unlock our economic potential. Timelier implementation of conservation projects will help mitigate environmental impacts, such as damaging floods and wildfires. Moreover, the Proposed Rule will in no way alter protections contained in our core environmental statutes. Rather, these updates will facilitate timely and appropriately scoped environmental reviews and permitting decisions for critical infrastructure projects requiring federal agency approvals.

The Proposed Rule reflects the original intent of NEPA, which is to require a *hard look* at the environmental impacts of major federal projects, not to stop projects in their tracks. Today, many industries—including farming, ranching, labor, mining, and construction—are in favor of the Proposed Rule because they are excited about the positive effect it will have on infrastructure projects. The changes will effectively balance economic growth with environmental stewardship. Farmers and ranchers rely on the land, some directly on federal forests and rangelands, and the Proposed Rule will simplify compliance while spurring responsible management of those resources. Laborers, miners, and builders rely on construction projects, which the streamlined federal permitting process of the Proposed Rule will accelerate. Equally important to many of the players is the simplicity of the Proposed Rule. No more will livelihoods be put on hold as infrastructure projects become mired in a review process that is needlessly long, complex, and lacks transparency. When the old NEPA rules stood in the way of progress, both industries and communities suffered. But, the common-sense underpinnings of the Proposed Rule will benefit everyone while avoiding unnecessary federal regulation. The simplification and acceleration of the NEPA process will result in less money wasted on lengthy, and sometimes litigious, NEPA reviews. That money can be invested into the infrastructure projects themselves, resulting in more jobs for farmers, ranchers, workers, suppliers, builders, etc.

There are also some deeply ingrained economic problems in the structure of the currently existing rules that the Proposed Rule will hopefully address. First, a certain *status quo* bias exists wherein NEPA reviews concentrate only on the potential adverse effects of a project, while simultaneously ignoring clear and significant reductions in the likelihood of environmental damage or reduction in costs of achieving lower levels of environmental risk. Second, under *Scenic Hudson Preservation Conference v. Federal Power Commission,* 354 F.2d 608 (2nd Cir. 1965), an appellate court held that a project can only be approved if the record on which it is based is "complete." The need for a "complete" record is an obvious route toward endless litigation and

delay, in that there is no limiting principle that would exclude consideration of any given potential environmental impact, regardless of how trivial or speculative. And third, there is a shifting of costs that is ultimately unfair to industry. Not all environmental impacts are worth avoiding. That is, the benefits of a given project may outweigh any adverse environmental impacts, but because the NEPA regulatory approach does not require compensation for asset owners—unlike a case under a takings approach—the law in effect allows Congress to demand a maximalist protection of environmental values without bearing any of the costs of doing so. All compliance costs fall to industry, while the benefits accrue to others. The proposed changes will hopefully address these three longstanding economic problems.

V. CONCLUSION

As demonstrated, the Proposed Rule is not arbitrary or capricious, effectively codifies existing case law and CEQ guidance, will have a positive economic impact through expedited project development approvals, and will ensure that our nation's environmental resources continue to be utilized in a conservative, responsible manner. As CEQ chairman Mary Neumayr stated: "[The Proposed Rule] would modernize, simplify and accelerate the NEPA process in order to promote public involvement, increase transparency, and enhance the participation of states, tribes, and localities."[8]

We urge the CEQ to adopt the Proposed Rule with consideration of the concerns expressed herein.

Sincerely,

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[8] CEQ Chairman Mary B. Neumayr, *Opinion: A needed update to the nation's environmental rules*, Washington Examiner (Jan. 9, 2020, 11:00 AM), https://www.washingtonexaminer.com/opinion/op-eds/a-needed-update-to-the-nations-environmental-rules

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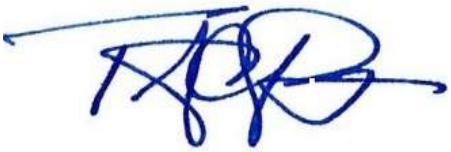

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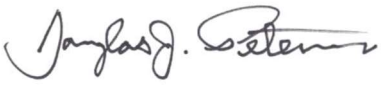

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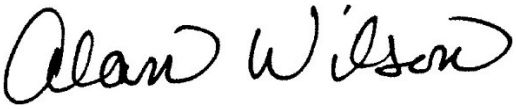

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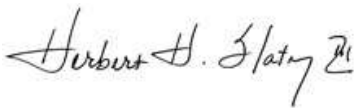

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