March 10, 2020

Council on Environmental Quality  
730 Jackson Place NW  
Washington, DC 20503

Re: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act  
CEQ-2019-0003

On behalf of the American Council of Engineering Companies (ACEC), the following are the industry’s comments on the Council on Environmental Policy (CEQ) proposed changes to the regulations implementing the National Environmental Policy Act (NEPA). These comments reflect the input of member firm professionals with decades of experience in conducting environmental reviews and helping project sponsors and public agencies navigate the NEPA process.

ACEC is the business association of the nation’s engineering industry. ACEC members – numbering more than 5,500 firms representing over 600,000 employees throughout the country – are engaged in a wide range of engineering works that advance the nation’s economy and enhance and safeguard America’s quality of life, including transportation, energy, and water infrastructure. These works allow Americans to drink clean water, enjoy a healthy life, take advantage of new technologies, and travel safely and efficiently.

NEPA is fundamentally different from the substantive environmental laws that set and enforce federal standards concerning limits on emissions or releases of pollutants into air and water. NEPA is a procedural statute that ensures that federal agencies consider environmental consequences of their proposed actions and inform the public about their decisions. NEPA does not include a private right of action and specifies no remedies. All challenges to agency actions under NEPA are brought under the Administrative Procedures Act. If CEQ finalizes the proposed revisions, the changes would affect all industry sectors as all federal agencies will then begin updating their own NEPA procedures to align with the new regulations.

CEQ is proposing provisions that codify executive orders (e.g., One Federal Decision), court precedence and existing practice, but also include fundamental divergence from, or alterations to, existing NEPA practice. After the rule is published in final form, and with intended rescission of all previous NEPA guidance, individual agencies will need to update their implementing regulations and practices. There will be a period of uncertainty of NEPA implementation. Further, new policy as reflected in any final rule is expected to raise questions concerning alignment with NEPA statutory requirements or previous court decisions.
Despite the uncertainty, ACEC welcomes those CEQ proposed changes to NEPA implementing regulations that would enhance the project delivery process for our clients and the taxpayers they serve. However, all changes in NEPA implementation should be carefully considered to generate efficiencies and improved outcomes without undermining the core mandates of the statute. We share CEQ’s stated goals for the promotion of efficient, well informed, and timely federal decision making. We provide comments to suggest revisions that would achieve these goals without undermining the statute or causing unintended consequences of increased legal challenge and exacerbated project delays.

NEPA provides, and ACEC supports, a transparent decision-making process that gives the public a voice in actions taken by the federal government.

The proposal sets out a framework for agency threshold determinations of whether a project requires evaluation and if so, to what level, i.e., environmental impact statement, environmental assessment, or categorical exclusion. A new category for “non-major” projects is proposed that would exempt certain infrastructure projects from review. Depending on the meaning of “minimal,” (see comments below on “Definition of Major Federal Actions”) non-major projects would likely include projects with minimal federal involvement or funding, such as pipelines, bridges and roads that are largely funded by state, local or private sources. NEPA has always been required only for major federal actions. The proposal clarifies that non-major projects are exempt from environmental review. The framework changes should help to guide agencies at early review planning stages and encourage the use of categorical exclusions.

The proposed changes to more efficiently and effectively categorize projects are an improvement in NEPA process transparency. These proposed framework processes combined with more concise, readable and more widely available project documents arguably enhance transparent decision-making and public participation in actions taken by the federal government.

Noteworthy CEQ proposed changes and ACEC comments and recommended revisions follow. See “ACEC recommends revision,” below, i.e., “Existing Data and Research,” and “Cumulative Effects.”

Exhaustion and Judicial Review - 1500.3 (b) and (c); p. 1693

CEQ proposes limiting legal challenges to those that can only be brought on issues that were raised during the public comment period. “Comments or objections not submitted shall be deemed unexhausted and forfeited.” ACEC finds this change to be reasonable, particularly with the One Federal Decision process. With One Federal Decision, a significant portion of initial NEPA review that previously followed the Notice of Intent should now instead be addressed prior to initiation of the NEPA process. Extensive work undertaken by agencies, and project proponents early on under One Federal Decision along with opportunity following Notice of Intent should be respected by an exhaustion standard that ensures procedural certainty for project sponsors.
CEQ also proposes clarity on the timing of judicial review by striking references to filing of an EIS or FONSI and replacing it with issuance of a “signed ROD or taking of another final agency action.” This clarifies that under the APA, judicial review does not occur until the agency has taken final action. ACEC also supports this change as it would also add procedural certainty for project sponsors.

**Threshold Applicability Analysis and Definition of “Major Federal Action” – 1501.1, 1508.1(q), p. 1714; p. 1729**

ACEC supports CEQ’s efforts to clarify the federal actions subject to NEPA analysis, including the definition of the term “major federal action.” However, ACEC encourages CEQ to provide clearer definition of the actions that qualify for NEPA review. In the proposed revised section 1508.1(q), a “major federal action” would not include “non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project.” Clarifying the meaning of “minimal” in relation to Federal funding and involvement could help avoid litigation on the meanings of these terms. Relatedly, section 1508.1(q)(2)(iv) states that “Projects include actions approved by permit or other regulatory decision as well as Federal and federally assisted activities.” This language could be construed to contradict the language proposed in section 1508.1(q) which appears to imply that any Federal permit, regulatory decision, or federally assisted activity, not just those with more than “minimal” Federal funding and involvement, would require NEPA analysis. Resolving this apparent contradiction could also avoid litigation over threshold applicability questions and reduce likelihood of subsequent project delays.

**Time Limits - 1501.10; p. 1699**

ACEC welcomes and supports a presumptive time limit of 1 year for completion of an EA and 2 years for completion of an EIS. While the formal time period for the NEPA review may be shortened, overall, the actual environmental review process may not be reduced significantly, particularly for complex or controversial projects.

Agency commitment and ability to meet the renewed expectation of timely review will likely be the key factor for timely compliance. The Senior Agency Official may approve a longer time period for review. With One Federal Decision, a 2-year review is reasonable since a significant portion of initial NEPA review that previously followed the Notice of Intent should now instead be addressed prior to initiation of the NEPA process. Tasks such as generation of a draft purpose and need and preliminary range of alternatives will continue, but within the period preceding formal initiation of the NEPA process.

**Page Limits – 1501.5 (e); 1502.7; p. 1700**

ACEC welcomes and supports the desire to encourage brevity and readability of Environmental Assessments (EA) and Environmental Impact Statements (EIS). Page limits set appropriate benchmarks, allowing for more detailed technical information in appendices. A more concise, readable statement would be welcomed by all concerned, project sponsors and challengers alike. For more complex projects that require a waiver of the page limits, we would encourage CEQ to
ensure that the necessary approvals from senior agency officials not cause unnecessary project delays.

In 2006, ACEC partnered with AASHTO and the Federal Highway Administration to produce a guidance document *Improving the Quality of Environmental Documents*. The report noted, “In the past few decades, NEPA documents have evolved into voluminous collections of data aimed at meeting increasing legal requirements. In many cases, these documents have become overwhelming and incomprehensible to the average citizen. Many EISs and EAs are not clearly written, are poorly organized, and are presented in a format that is difficult to follow.” The report made recommendations for clearer, more concise writing; effective organization and formatting; and effective use of visual elements. The revisions in the proposed rule are consistent with the goals of that report, and ACEC encourages CEQ and implementing agencies to make use of those recommendations.

**Public and Tribal Engagement - 1502.21, 1503.1, p.1721; 1500–1508, p.1692**

ACEC supports the proposal to allow use of modern information technologies in the NEPA public engagement process. However, it should be noted that electronic information technologies alone may not provide adequate public access in some regions of the country. Provision of non-electronic means of information access should be considered where electronic access is limited. ACEC also welcomes an elevated role for tribes in the consultation process by placing tribal governments, states, and local units of government on an equal footing.

**Categorical Exclusions – 1501.4; pp. 1695-1696**

ACEC supports the proposal to clarify the process that agencies follow in applying a Categorical Exclusion where an action does not normally have a significant effect on the environment. ACEC also supports changes to encourage agencies to utilize CEs initially developed by other agencies that have a commonality of factual and legal circumstances. This reasonable approach saves time and effort without shortcutting meaningful review.

**Purpose and Need; Alternatives – 1502.13; 1502.14; 1508.1 (z); pp. 1701-1702**

ACEC supports clarifications that “purpose and need” and alternatives should be limited by the federal agency’s authority and jurisdiction. This may be more relevant to privately funded projects where the private entity sets the overall purpose. Publicly sponsored and funded projects tend to have clearer definition of purpose and need and alternatives that are put forth by the public sponsor and align well with a federal partner’s authority. For example, a state transportation agency proposes a roadway widening and the federal transportation agency with authority is typically aligned with the need. The examples below focus on private projects where limitations will be beneficial.

As an example, there was an oil shale mining project in Utah where a transmission line and other utilities were needed to serve the mine and required crossing BLM lands. The transmission line and other utilities were going to support the proposed mine located on private lands. The EIS process was encumbered by challenges from groups asking the BLM to assess air quality
operations of refineries located more than 200 miles away that would ultimately process the oil product. In a decision on the utility lines’ right-of-way application, the BLM had no authority to review or assess the operation of the refineries. U.S. EPA also tried to intervene and insist on granting right-of-way to only a few of the utility lines, not the full suite of requested utilities in the project application. This resulted in BLM adding additional alternatives to the EIS analysis that did not meet the project’s stated purpose and need, and needlessly added cost to complete the analysis.

Offering another example, there was a transmission line project in Nebraska that required NEPA review under Section 10 of the Endangered Species Act for incidental take of a protected species. The EIS was prepared by the local USFWS field office for evaluation of impacts of the Habitat Conservation Plan to the human and natural environment. The routing of the transmission line was not under the jurisdiction of USFWS since it did not cross federal lands; however, the USFWS took jurisdiction and proposed alternative routes that did not meet the purpose and need of the project. The routes were also significantly longer and costlier than the proposed route. The local field office refused to remove or eliminate the alternative routes in the EIS which required involvement of the regional USFWS office. Ultimately USFWS solicitors had to resolve the problem, but the jurisdictional alternatives over-reach caused needless significant NEPA process delays, project execution delays, and increased costs to the project proponent.

ACEC agrees that the agency should provide clarification on, and examples of, what would fall within agency authority and jurisdiction.

ACEC agrees that the agency should not only consider what is meaningful to their decision but also support the original intent of NEPA to disclose all data related to the project. As an example, the BLM doesn’t have regulatory authority over water quality impacts, but the general public should be made aware of potential water quality issues affected by the proposed action.

ACEC supports clarifying that reasonable alternatives should meet the goals of the applicant where the action is at the behest of the applicant. For example, a remote mining project should not have to consider renewable energy alternatives, like solar or wind generation sources, when those resources will not meet a purpose and need that requires a low cost, continuous, reliable 24 hours-a-day, 7 days-a-week power source.

**Mitigation - 1508.1 (s); pp. 1709-1710**

ACEC supports a proposed change to narrow the role of mitigation by requiring agencies to identify the legal basis for mitigation. In our experience, local agency offices and project challengers can unreasonably influence the need for mitigation and collection of data concerning mitigation, based on their local interests. As an example, a recent Wyoming electric transmission project was requested to collect recent species survey data, even though existing data collected by the State were available. The requested $100k field survey offered no substantive, new information pertinent to the project sponsor, beyond what the existing State data already provided. It only served to meet the demands of the local agency staff that had interest in collecting data for their own use in the same geographical footprint.
**Existing Data and Research** - 1502.24; p. 1721

ACEC members as professionals (engineers, scientists and related professions) provide scientific and technical studies and analyses in support of clients’ infrastructure projects. Agencies often hire ACEC firms to do research and perform environmental assessments.

To support timely and efficient consideration of environmental information early in the process, agencies need to identify and fill information gaps. Many local, state and federal agencies lack data that sufficiently characterizes the environment to be impacted. Where data is absent, incomplete or outdated (more than 10 years old), undertaking of new scientific and technical research to collect data is necessary and justified. Resources (whether ecological, natural, aesthetic, historic, cultural, or economic) for which environmental impacts of the proposed action and reasonable alternatives including the proposed action and their significance, are to be compared, as required in section 1502.16, must be known.

Without data, a project sponsor risks project stoppage and delay. New roadway or pipeline, or siting a treatment plant or bridge crossing, among other projects requires some sense of archeological and other site data prior to construction. Conducting appropriate scientific and technical research is necessary to reduce risk of a project coming to an abrupt halt when a resource is unexpectedly encountered. NEPA objectives would be met better with regulatory provisions that encourage agencies to develop or improve, and then share, databases of environmental and cultural resources.

**ACEC recommends revision** of section 1502.24 to read as follows: *Agencies shall make use of reliable existing data and resources and may undertake new scientific and technical research as needed to inform their analyses and fill data gaps. Any new research should be limited in geographic scope and duration to the project’s identified effects and design life. Agencies are encouraged to share data and research.*

**Cumulative Effects** – 1508.7; pp. 1707-1708

NEPA requires that effects of projects on the environment be evaluated by federal agencies. Existing implementing regulations divide effects into the direct (impacts of the action) and indirect (separated in time or distance) effects and the cumulative effects (incremental impacts of the action combined with other actions). The proposed rule eliminates the requirement to evaluate cumulative effects as presently defined. The explanation for elimination of cumulative effects evaluation is that the determination of the scope of cumulative effects has been difficult in practice.

ACEC members are engineers, scientists and related professionals and as such design and develop projects according to the standards of their specialized areas of interest. This protects lives, safeguards the public interest and public or private funding. The avoidance of unintended consequences should be encouraged to diminish risks such as environmental, financial, legal or project failure. This is best managed by a comprehensive and holistic view of large projects or inter-related smaller projects and that view should include a cumulative effects analysis.
Associating the weight of cumulative effects and connected actions with overall project size (greater time, money, physical areas, community) and longer project lifecycles supports a more efficient NEPA process while reserving additional analyses on large-scale or unique projects with the likelihood of higher impacts. This also preserves the professional standards of various industries through proper due diligence and risk avoidance.

Allocating review time for larger or unique projects and the need for cumulative effects analyses early, during planning stages, may offer opportunities to reduce impacts and risks at project inception, while providing an accurate level of effort for project reviews and a decrease in overall review time needed.

To further increase efficiency when evaluating a project’s cumulative effects, a shared network of relevant data and public information should be encouraged.

The removal of cumulative effects would likely result in additional litigation because it does not align with the statute. Removal of terms will create uncertainty in the application of the new CEQ rule and uncertainty equals risk. Redefinition would undo 40+ years of NEPA case law, which will result in litigation and ultimately project delays, which would negate the intent toward a more streamlined NEPA process.

**ACEC recommends revision** of section 1508.7 to read as follows: *Agencies shall require a cumulative effects analysis on large-scale or unique projects to protect the public, safeguard public interests, protect funding and reduce foreseeable risks.*

Thank you for your attention to these views. Any questions concerning these comments may be directed to Lynn Schloesser lschloesser@acec.org.