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November 22, 2021

The Honorable Brenda Mallory, Chairman
White House Council on Environmental Quality
730 Jackson Place, N.W.
Washington, DC 20503

RE: Docket No. CEQ-2021-0002, National Environmental Policy Act Implementing Regulations Revisions

Dear Chairman Mallory:

The Associated General Contractors of America ("AGC" or "we" or "our") appreciates the opportunity to comment in this docket, in which the Council on Environmental Quality (CEQ) proposes several changes to rules concerning the process for review of Federal actions under the National Environmental Policy Act (NEPA). *See* Notice of Proposed Rulemaking (NPRM), 86 *Federal Register* 55757 *et seq.* (October 7, 2021).

We do not support the adoption of the proposed rule. The proposed rule essentially would undo several rule changes adopted in 2020 and revert to the regulatory language that was in effect before the 2020 rules changes. However, should CEQ go forward with rule changes in this docket, CEQ should at least adopt modifications or make clarifying statements in any notice of final rule consistent with the suggestions we set forth below.

Briefly, in taking this position, we consider that the review process under the current rules does require a thoughtful and thorough review of environmental issues related to a proposed Federal project or action. The proposed rule, however, would encourage or require more complex analyses, potentially not closely related to an actual project proposal. Such analyses involve additional variables. Reviewing more options or variables inevitably take more time, even if undertaken efficiently. And, to the extent the analyses are not at least closely related to an applicant's proposal, they are potentially of reduced value.

On the other hand, we are pleased that the Administration has strongly supported the recently enacted bipartisan infrastructure bill, the Infrastructure Investment and Jobs Act, Public Law No. 117-58. Infrastructure investments help grow the economy, enhance safety, and improve the quality of life – all in a manner consistent with environmental protection. And the infrastructure investment legislation includes provisions that would establish goals for the time period for

completion of environmental impact statements and environmental assessments.[1] Thus, the legislation supported by the President envisions environmental review that is prompt as well as thorough.

However, as the rule changes proposed in this docket add complexity to the review process, they have considerable potential to extend the review process and delay increased investment in roads, bridges and other infrastructure and postpone the realization of the public benefits that increased infrastructure investments will bring.

Our concerns and recommendations are outlined in more detail following background on AGC.

I. AGC -- A Leading National Association with Deep Expertise on NEPA Process and Issues

AGC represents more than 27,000 construction contractors, suppliers and service providers across the nation, through a nationwide network of AGC Chapters. AGC contractors are involved in all aspects of nonresidential construction and are building the nation's public and private buildings, highways, bridges, water and wastewater facilities, locks, dams, levees and more. AGC members large and small collectively undertake billions of dollars of projects annually and employ or indirectly support, including through impact on suppliers and customers, millions of workers.

NEPA comes into play on a significant number of critical construction projects that serve the public and the environment. Right now, NEPA is triggered at the outset of projects that require a federal permit or authorization, such as a federal land management decision, or federal funding. Federal agencies are then to take a "hard look" at the significant potential environmental effects of proposed major federal actions and then to place their data and conclusions before the public prior to making a go/no-go decision.

The numerous and significant construction activities by AGC members mean that AGC members are or have been applicants for permits that require NEPA review and are or have been highly interested parties as agencies undertake NEPA review of proposals that ultimately are to be built by construction contractors. Accordingly, AGC has significant experience with and understanding of the NEPA review process.

Contractors, and our partners in the building professions, have responded to the call to reduce the impact of our built environment on our natural environment. We have built green buildings. We have incorporated recycled materials into our roadways, bridges and buildings for more than half a century. We have created more efficient transportation systems that cut congestion and reduce wasted fuel. We have built and upgraded water treatment facilities, repaired waterways and restored wetlands. And we have cleaned polluted sites and revitalized blighted areas.

[1] See Section 11301, requiring USDOT to develop a schedule consistent with an agency average of two years to complete an environmental impact statement.

II. Specific Comments and Recommendations

A. NEPA Review Rules are Procedural Rules and Should not Mandate or Suggest Particular Results

In this docket, CEQ proposes a handful of changes to current NEPA rules while indicating that more changes will be pursued in a subsequent docket. NPRM at 55759. Before commenting on the specific proposed changes in regulations, we note that aspects of the discussion in the NPRM, an NPRM regarding the environmental review process, appear to hint at CEQ's substantive objectives.

For example, the discussion cites two Executive Orders issued by President Biden: E.O 13990, which refers in its title to efforts to "Tackle the Climate Crisis;" and E.O. 14008, which in its title calls for "Tackling the Climate Crisis at Home and Abroad." NPRM at 55758-59. CEQ then describes E.O. 14008's substantive goals of "reducing greenhouse gas emissions" and "policy to increase climate resilience, transition to a clean energy economy, address environmental justice and invest in disadvantaged communities," as well as other goals. Id. at 55759. Further, the discussion states that CEQ's review of NEPA regulations is to ensure that they provide for environmental review of Federal actions in a manner that … "promotes better environmental and community outcomes." Id. Clearly, "better outcomes" is a statement reflecting a substantive judgment; it is not an explanation of a review process.

We fully understand that every Administration has policy goals but advancing policy goals is not the purpose of NEPA review. Speaking of NEPA's statutory policies, including to "encourage productive and enjoyable harmony between man and his environment," the Supreme Court has stated that --

> NEPA itself does not mandate particular results in order to accomplish these ends. Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.

Department of Transportation v. Public Citizen, 541 U.S. 752, 756-57 (2004) (internal citations and quotation marks omitted).

As the Court has said, NEPA requires an agency to take a "hard look at environmental consequences" of a proposed action. Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 23 (2008) (internal citations and quotation marks omitted). In that instance, after preparation of a nearly 300-page environmental assessment (a hard look), the Navy decided to proceed with an activity that had drawn complaints from an environmental group.

We are concerned that the material in the NPRM identifying or discussing the Administration's substantive policy objectives could be viewed by agencies as a hint as to how their environmental review is to be undertaken and how they should decide issues. This may not be intended but, nonetheless, we see it as a not remote possibility.

Recommendation. For the above reasons, we recommend that any further *Federal Register* notice or other action in this or other dockets regarding NEPA review requirements focus clinically on review requirements and not include broad statements regarding substantive policy objectives.

We turn now to comments on specific proposed changes in the rules.

B. Concerns Regarding the Proposed Change to the Definition of a Project's "Purpose and Need" and the Implications for Alternatives Analysis and Review Time Frames

The NPRM includes a proposed change to the definition of a project's "purpose and need." The change would remove the focus on a project as proposed by an "applicant," as the proposed change invites an agency to modify an applicant's definition of a project's purpose and need to take into account the "public interest." NPRM at 55760. This proposed change in the definition of "purpose and need," in turn, has potentially significant implications for the scope of alternatives analysis and how much time that will take.

As a preliminary matter, we note our disagreement with the apparent assumption that an applicant's view of a project's purpose and need would not reflect the public interest. For example, as to highway or transit projects, the applicant is almost always a state or local government agency. Those agencies serve the public and take the public interest into account in formulating proposals.

We believe that the rules should take a similar view of cases where the applicant is a non-governmental entity. AGC Members, for example, are aware of the importance of environmental review. They also appreciate that proposals that do not reflect responsible environmental stewardship may not receive support and may face a difficult review process.

So, we disagree with the view apparently embodied in the proposed rule and the NPRM -- that the definition of purpose and need does not need to reflect, precisely or closely, an applicant's formulation, but only something that the agency considers to be reflective of the public interest though derived to some extent from an applicant's proposal.

The further afield that a project's purpose and need departs from what an applicant has proposed to build, an increase in variables to be considered can come into play, complicating review. Moreover, the value of the review is depreciated. The greater the extent of departure of a purpose and need statement from a purpose and need that embodies a project that has actually been proposed, it becomes less clear that analysis is focusing on a real, feasible option.

We appreciate that there can be variations on the approach to a proposal that an agency might view as reflecting added public interest considerations, but that will come into play as an agency undertakes analysis of "reasonable alternatives" to a project with a given purpose and need.

Should CEQ rules effectively encourage a more flexible approach to define a project's purpose and need, the number of "reasonable alternatives" to analyze has the potential to further expand. This scope expansion will slow down the review process.

Under the proposal in this docket, CEQ would also remove the requirement that an agency base a project's purpose and need on the agency's authority, and not end up engaging in alternatives analysis for an alternative that is beyond the agency's authority.

And perhaps the biggest complaint with the NEPA process has been the delay and slow completion of the review process for projects that are not within the scope of a categorical exclusion.

Recommendation. For such reasons, we recommend that CEQ not adopt the proposed change to the definition of purpose and need.

Recommendation. At a minimum, if CEQ does proceed to adopt the proposed change to the purpose and need definition, or something like it, a *Federal Register* notice for any such action should include a statement indicating that CEQ expects that the project proposed by an applicant will always be an alternative that is within the range of reasonable alternatives to be analyzed and that, absent unusual circumstances, the applicant's proposal should be the lead or preferred alternative for review. We think that would be an important clarification; we are concerned that the discussion in the NPRM does not show sufficient respect for what is proposed but leaves the reader to believe that, for unspecified "public interest" considerations, analysis could pivot off a purpose and need statement which departs considerably from a project that an applicant has proposed.

C. Agency NEPA Procedures

Recommendation. We support the sentence in proposed 40 CFR 1507.3(a), which confirms that categorical exclusions in agency NEPA procedures as of September 14, 2020, are consistent with CEQ's NEPA rules. That should be retained in any final rule.

Recommendation. We also recommend that CEQ confirm, either by additional language in this subsection 1507.3(a) or in the preamble of any final rule adopting it, that nothing in the subsection precludes or discourages agencies from developing additional categorical exclusions that meet the criteria for categorical exclusions.

The proposed revision to 40 CFR 1507.3 would delete language in the current rule intended to ensure that individual departments and agencies do not develop and implement rules that are inconsistent with CEQ rules. As stated at the outset, our recommendation is that CEQ not adopt the proposed rule changes in this docket.

However, as to this issue, CEQ correctly points out that NEPA rules of individual agencies are subject to CEQ review, an important control over the potential for inconsistencies that could be burdensome to the public and even other agencies. See 40 CFR 1507.3(b)(2). Further, any changes in an agency's NEPA review rules are subject to public notice and comment procedures, not just CEQ review.

In addition, NEPA review rules of individual agencies in significant part can be viewed as neither more nor less burdensome than CEQ rules and viewed as not inconsistent, even if somewhat

extensive. What they are is more specific. The concepts addressed at the government-wide level by CEQ in its rules have to be applied to various specific contexts. It can be useful for individual agency rules to address some specific contexts by rule, so that the specific issues do not have to be repeatedly considered on a case-by-case basis. This can be helpful to both the public and agencies. Categorical exclusions are an example, but not the only example of specific NEPA processes at the agency level.

We want to emphasize that AGC views the current version of 1507.3 as standing for the sound principle of discouraging and prohibiting requirements that are inconsistent with and more burdensome than CEQ requirements.

However, to the extent CEQ seeks to pursue these objectives through other wording, that has the potential to be a reasonable result.

Recommendation. In any further *Federal Register* notice in this matter that does not retain the current version of 40 CFR 1507.3, CEQ should state, again, the view that NEPA rules at the agency level will be reviewed by CEQ for consistency with CEQ rules and that any changes to agency NEPA rules are also subject to public notice and comment. As noted earlier, CEQ must also affirm that agencies can develop categorical exclusions in addition to those currently approved.

D. The Proposed Definition of "Effects or Impacts," as Discussed in the NPRM, Appears to Expand the Scope of Issues to be Reviewed and Should not be Adopted

The proposed rule changes in the NPRM would change the definition of "effects or impacts" (in 40 CFR 1508.1(g)) in several ways.

Notably, the proposal would remove current 1508.1(g)(2)), which reads as follows.:

> A "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.

CEQ explains that it would remove this language as "confusing" and that it, along with the 2020 (current) rule's removal of "cumulative effects" from the definition of "effects or impacts" could "narrow" the scope of effects reviewed pursuant to NEPA analysis. See NPRM at 55762. So, CEQ would reinsert into 40 CFR 1508.1(g) the pre-2020 definition of "cumulative effects" as part of the definition of "effects or impacts."

On the contrary, we see confusion arising from CEQ's apparent rejection of clear language regarding NEPA review set forth by the Supreme Court.

The Court has clearly stated that "NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause." Department of Transportation v. Public Citizen, 541 U.S. 752, 767 (2004). There, the Court similarly explained that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." Id.

Yet, the CEQ would remove those criteria from the rule. Does this mean that CEQ intends for agencies undertaking NEPA review to rely on "but for" causation? Or other causation that is not "reasonably close?" Or to consider effects the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action?

The NPRM includes references to Administration policy to "reduce" greenhouse gas (GHG) emissions (e.g., NPRM at 55758-59) and expresses interest in analyzing the effects of GHGs, including when effects may be remote (NPRM at 55763). Under "but for" causation, which, under the proposal, analysis of which would no longer be ruled out by the text of CEQ's rules, a project with very limited GHG emissions could be considered, along with impacts from GHG emissions from elsewhere, as having a reasonably foreseeable effect. So, small effects – even if remote – could well become part of the analysis. This could lead to more EISs, for example, and more alternatives to be analyzed, etc., complicating and likely extending the review process.

The proposed rule would specify that effects or impacts can be "direct," "indirect," or "cumulative." Indirect effects, by the definition, must be "reasonably foreseeable."

Curiously, the definition of cumulative effects does not similarly specify that they must be "reasonably foreseeable," yet the discussion in the notice refers repeatedly to the CEQ's view agencies must analyze and disclose "reasonably foreseeable cumulative effects." See, e.g., NPRM at 55764 and 55765.

Also noteworthy, in its effort to minimize the relevance of the Court's decision in Department of Transportation v. Public Citizen, supra, CEQ does not directly acknowledge that the Court did state that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." Id. at 767.

Further, in the case that CEQ raises under its discussion of "cumulative effects," CEQ explains, quoting the decision,

> When several proposals that have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.

NPRM at 55765 (citations omitted).

But the proposed rule's definition of cumulative impacts is not limited to the circumstances of multiple proposals pending concurrently before an agency, a limited set of circumstances that could be described with precise language.

In general, the changes to the definition of effects or impacts discussed above, and other changes that CEQ would make to that definition, appear to open up the process to wider and wider analysis. CEQ effectively says to not worry, pointing out that agencies have years of experience administering the rules that the proposal in this docket would reinstate. But it is potentially different this time, as CEQ has included many policy-laden statements in the NPRM that could drive agencies to more expansive and time-consuming analyses.

Accordingly, we offer the following recommendations regarding effects or impacts.

Recommendation. Retain the current definition of effects or impacts. In the event that CEQ does not retain the current definition, there are nonetheless improvements that can be made to the definition, to avert open-ended analysis, such as but not limited to those set forth immediately below.

Recommendation. In any further *Federal Register* notice in this matter that does not retain the current definition, and removes the current language that "effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain," the solution should not be to delete all reference to those concepts. Instead, an agency, in considering any effects that are perhaps arguably reasonably foreseeable, but are remote in time, geographically remote, or the product of a lengthy causal chain, should at least be "required to consider the extent to which the effects are" remote in time, geography, or part of a lengthy and allegedly causal chain and "consider the extent to which remoteness makes them less than reasonably foreseeable, if at all reasonably foreseeable."

Recommendation. In any further *Federal Register* notice in this matter that would adopt a definition of "cumulative effects," specify that such effects must be "reasonably foreseeable" (e.g., revise the beginning of the definition to read "Cumulative effects, which are reasonably foreseeable effects…").

Recommendation. In any further *Federal Register* notice in this matter that would adopt a definition of "indirect effects," clarify the description of growth inducing effects by inserting at appropriate points "if any." There should not be an assumption that a project or activity would have such effects, yet the proposed wording may create that impression to readers, including agency readers. There should be fair consideration to the proposition that a project does not induce growth but addresses growth that is driven by forces other than the project. Accordingly, revise the second sentence as proposed as follows (suggested new language underlined): "Indirect effects may include growth inducing effects, if any, and other effects related to induced changes, if any, …".

E. A Few Words Regarding What is Not in the Proposed Rule – and the Relationship to Prompt Review

The NPRM announced a "phased approach" to its review and potential revision of rules governing review under NEPA. See NPRM at 55759.

For years, a major concern of the public, including non-Federal agencies and businesses, has been that the environmental review process takes too long.

Nothing in this NPRM directly addresses time limits, or goals for time limits, for completion of the environmental review process for a project. We note here, in advance of any future "phase" of CEQ's plan to revise the NEPA review process, that the CEQ should not erode current goals or requirements for prompt review that either are in place or which have been reinforced by enactment of the bipartisan infrastructure bill.

We note that in January 2020 then Transportation Secretary Chao commented that environmental impact statements for highways average seven years to complete. Seven years is far too long for EIS review of a class of projects with characteristics and impacts that are extremely well understood and used directly or indirectly by nearly all Americans every day. Such delays add to the cost of such projects that are ultimately approved and go forward.

Further, a slow review process, even if the average may be less than seven years at this time, discourages project proponents and can result in meritorious projects being set aside by their supporters.

A long process is not necessary to protect the public's interest in thorough environmental review, but a long process thwarts the completion of beneficial projects that would boost the economy, provide jobs, and improve mobility for people and commerce, and enhance safety, whether highway, water, energy or other infrastructure projects.

We urge that CEQ resolve issues in this docket and future dockets consistent with maintaining and advancing the benefits of a prompt but thorough review.

Further, when added capacity eases congestion, the freer-flowing traffic can result in reduced emissions. Getting projects done faster will help reduce congested bottlenecks and reduce wasted fuel and time sitting in traffic. Today's roadway projects use modern solutions and technologies that are more respectful of environmental considerations than they were decades ago.

III. Conclusion

AGC thanks CEQ for its consideration and urges that further action in this and any related dockets be in accord with these comments.

Respectfully Submitted,

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