



August 15, 2018

Mary B. Neumayr,
Chief of Staff Council on Environmental Quality
730 Jackson Place NW
Washington D.C. 20503

Re: **Docket No. CEQ-2018-0001/13246**

Dear Ms. Neumayr,

ClearPath Foundation (“ClearPath”) is a nonprofit that advocates for conservative clean energy solutions. ClearPath believes that fostering nuclear, carbon capture, hydropower, and other energy technologies is essential to make the domestic energy sector cleaner and that the private sector should, and will, play a leading role in developing the next generation of American power technologies. One of the key technologies that ClearPath believes is crucial is nuclear energy. Based on the need to facilitate the continued development of the nuclear sector as a source of clean energy, ClearPath encourages the White House Council on Environmental Quality (“CEQ”) to amend the implementing regulations for the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, et seq. (“NEPA”), per the objective stated in CEQ’s Advanced Notice of Proposed Rulemaking (“ANPR”) published at 83 *Fed. Reg.* 28591 (June 20, 2018): “to update the regulations and ensure a more efficient, timely, and effective NEPA process consistent with the national environmental policy stated in NEPA.”

ClearPath believes in the principles underlying NEPA: “to [ensure] that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 CFR § 1500.1(a). At the same time, ClearPath maintains that the manner in which NEPA is implemented in practice may be greatly streamlined without sacrificing the meaningfulness or transparency of the environmental review process. Since their promulgation in 1978, CEQ’s NEPA regulations, codified at 40 CFR §§ 1500–1508, have undergone a single substantive revision. Meanwhile, NEPA reviews have become increasingly complex and onerous, often straying from the doctrine that environmental reviews and documents should “concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.” 40 CFR § 1500.1(b). CEQ should revise its regulations to establish procedures that will ensure streamlined, less confusing, and, ultimately, more effective reviews.

In so doing, CEQ should consider (a) practices implemented to date by individual agencies that have resulted in more efficient NEPA reviews and (b) worthwhile suggestions that governmental officials and regulated entities have made over the years to streamline the NEPA process but that have not been implemented or adopted as law. ClearPath hopes that CEQ’s amendments will lay the groundwork for subsequent amendments to the NEPA requirements of individual governmental authorities, such as the Nuclear Regulatory Commission’s (“NRC’s”) regulations at

10 CFR Part 51, to facilitate, rather than impede, clean energy projects, including nuclear energy initiatives. We hope the following substantive comments can support a more effective NEPA implementation.

Sincerely,



Spencer Nelson, Policy Associate
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Substantive Comments

1) More Stringent Restrictions Regarding Document Format and Length

ClearPath recommends that CEQ amend its regulations relating to the format and length of NEPA documents. A common criticism of NEPA is that environmental documents – especially, Environmental Impact Statements (“EIS”) and Environmental Assessments (“EA”) – are too long and onerous. NEPA documents tend to be several hundreds, if not thousands, of pages long, making them functionally inaccessible to the public and susceptible to legal challenges, due to the presence of internally inconsistent and confusing statements resulting from the consolidation of extraneous materials. This is the case, even though current regulations impose a 150-page limit on most Environmental Impact Statements, and CEQ guidance establishes a 10- to 15-page limit on Environmental Assessments (“EAs”). Common reasons why these page limits are ignored is that consultants responsible for preparing environmental documents often fail to conduct proper scoping to narrow the range of issues to be addressed in the EA or EIS and, when incorporating other documents by reference (as permitted under 40 CFR § 1502.21), attach the incorporated materials to the NEPA document, although it is unnecessary to do so.

Accordingly, ClearPath proposes that:

- CEQ’s regulations at 40 CFR § 1501.7(a)(7)(b) (“Scoping”) be revised to require federal agencies to establish presumptive page limits for environmental reviews;
- CEQ’s regulations at §§ 1502.7 (page limits for EIS’s) be revised to prohibit the “padding” of an EIS with unnecessary exhibits and attachments (by clarifying that the codified page limit applies to appendices, as well, and that any EIS exceeding the limit will be precluded from the record);
- CEQ’s regulations involving EAs (e.g., § 1508.9) be revised to establish a standardized format and presumptive page limit; and
- CEQ’s regulations involving Records of Decision (“RODs”; § 1505.2) should be amended to allow RODs to incorporate by reference the findings of an EIS, as opposed to restating

them, so that the ROD can then simply memorialize the agency’s final decision on the proposed action.¹

To provide flexibility, the amended regulations should allow for exceedances of presumptive page limits for proposals of “unusual scope or complexity” (the language used in § 1502.7 to authorize 300-page EIS documents), but “unusual scope or complexity” should be clearly defined, and agencies should not apply this exception to more than a certain percentage of documents.

2) A More Stringent Environmental Review Timeline

CEQ should amend its regulations pertaining to the timelines in which agencies must complete environmental reviews. The current regulation at 40 CFR § 1501.8 requires agencies to set time limits upon request. However, it does not specify how the time limit is to be set. Consequently, uncertainty regarding scheduling trickles down to NEPA regulations of individual agencies. For example, in the NRC context, the Commission’s staff has complete discretion on whether or not to establish time limits, unless an applicant requests it, in which case NRC is required to prepare a schedule. *See* 10 CFR 51.15. Even then, the NRC rule does not specify any scheduling criteria. Consequently, NEPA reviews – including those conducted by the NRC – tend to be temporally open-ended. Reviews involving EIS preparation often last two to four years from the publication of the Notice of Intent (“NOI”) to ROD issuance, while the timeframe between project planning and ROD issuance can be even longer, exceeding five or six years. These timeframes can, and should be, reduced.

ClearPath advocates the amendment of 40 CFR § 1501.8 to require agencies to establish, through rulemaking, presumptive time limits for environmental reviews, irrespective of whether a project applicant or third-party requests the establishment of such a timeline. As with the presumptive page limits recommended in the previous comment, exceptions should be made for proposals of “unusual scope or complexity.” Again, this term should be defined clearly and understandably, and limitations should be set on the percentage of instances in which the exception may be invoked. ClearPath further endorses the “tracking” and “scoring” mechanisms called for in Sections 4(b)(i) and 4(b)(ii), respectively, of the White House’s August 15, 2017 Executive Order 13807, to hold agencies accountable for conducting timely environmental reviews.

3) Avoiding Unnecessary Report Preparation Through Expanded Use of Categorical Exclusions

Consistent with the above statements, ClearPath encourages CEQ to amend its regulations to expand the use of categorical exclusions (“CatEx”) in a manner consistent with NEPA’s aims. The regulations at 40 CFR §§ 1500.4 and 1500.5 recommend the use of CatExes to minimize the administrative/paperwork burdens of, and delays in, conducting environmental reviews under NEPA. However, the actual CatEx regulation at § 1508.4 contains an open-ended deferral to implementing agencies to identify the types of actions that do not require review because they “do not individually or cumulatively have a significant effect on the human environment.”

¹ Consistent with NRC’s position on the adequacy of its RODs, as articulated in the July 19, 2013 memorandum to Hubert T. Bell, Inspector General, re: Formal Comments on Office of the Inspector General Draft Report ‘Audit of NRC’s Compliance with 10 CFR Part 51 Relative to Environmental Impact Statements.

Accordingly, in practice, many types of actions are subjected to full environmental review, even if they have a negligible chance of posing environmental impacts.

ClearPath recommends that CEQ require implementing agencies to regularly conduct internal reviews (e.g., every two years) to update through rulemaking the list of actions subject to CatEx. Furthermore, CEQ should develop specific, presumptive CatExes, which individual agencies must incorporate into their own NEPA regulations. For example, CEQ should consider creating a presumptive, CatEx for actions that will impact less than a certain number of acres. Agencies would still be able to rebut the presumption of CatEx using the “extraordinary circumstances” test set forth at § 1508.4. However, by clearly shifting the burden onto agencies, such a requirement would doubtless reduce the amount of unnecessary reviews.

The creation of presumptive CatExes along the lines described above would be of great benefit to promoting clean energy, inasmuch as it would eliminate unnecessary delays in the deployment of “next-generation” nuclear technology. These include micro-reactors, with a capacity of 50MW or less, such as those that are the subject of the pilot program that the Department of Energy must develop under the recently passed National Defense Authorization Act for Fiscal Year 2019. These reactors do not require the same level of safety and siting analysis as the water-based reactors constructed and operated to date. CEQ should amend its CEQ regulations to encourage NRC’s use of CatExes for such reactors, as well as for other actions, such as the development of demonstration reactors and other experimental use technologies, medical isotope facilities, and spent fuel storage facilities of a certain size.

4) Streamlining Unnecessary Analyses of Alternatives and “Need For Action”

A hallmark of NEPA review is the analysis of “reasonable alternatives” to a proposed action, to determine whether the same goals are achievable but at less impact to the environment. *See, e.g.*, 40 CFR §§ 1500.1(e), 1502.1, 1502.14, 1508.25. Too often, the alternatives analysis is open-ended and focuses on potential measures that do not suit the “purpose and need” of the proposed action, due to differences in project type, scale, costs, etc. As an example, ClearPath points to the types of alternatives frequently addressed in EIS documents prepared in connection with applications for combined construction permit and operating permits (“COLs”) for nuclear reactor units intended to provide baseload power. In such cases, even summary consideration of solar or wind power facilities as alternatives to the proposed action is inapposite from a technical and economic standpoint, but frequently encountered in the EIS. Similarly, alternatives that tend to be discussed in greater detail based on presumed viability – e.g., coal- or natural-gas fired power generation – may not be “reasonable” because the private party COL applicant has no desire to construct such facilities or capability to do so.² The environmental review process should accord greater deference to the project proponent’s critical role in most undertaking underlying federal actions subject to NEPA. Moreover, to mitigate further the speculative nature of the alternatives analysis, the alternatives discussed should generally be limited to potential actions under the purview of the lead agency.

² Failure to consider private party motivations is cited as a fundamental flaw in NEPA analysis in “A Case Study of the Direction of a Federal Action Affecting the NEPA Assessment,” prepared by D. Palmrose, U.S. NRC (2014).

Similarly, CEQ's current regulations require that an EIS evaluate the "purpose of and need for" the proposed action, "unless the agency determines that there is a compelling reason to do otherwise." *See* 40 CFR § 1502.10, also 1502.13. However, agencies rarely make such determinations, partly because the concept of "compelling reason" is not clearly defined. For example, environmental reviews triggered by NRC licensing applications often contain lengthy and time-consuming "need for power" analysis, which is entirely superfluous, for: (1) if the impetus to increase or generate power reflects a governmental decision, the need for power analysis has already been performed by governmental authorities; or (2) if the impetus to expand baseload power is a private party decision, the project proponent already would have already performed the analysis and will bear the risk of an incorrect market-based decision.

In view of the above inefficiencies in analyzing alternatives and the purpose of and need for the proposed action, ClearPath recommends that CEQ provide a clearer definition of "reasonable alternative" that will account for alternative actions that project proponents would viably consider. Similarly, the regulations pertaining to "need for" analysis should be amended to make clear that such analysis is unnecessary where the underlying decision to undertake the proposed action is made by a governmental entity or reflects a market-based decision made by a sophisticated private party.

5) Promoting Reliance on Existing Documents

CEQ's existing regulations articulate policies to reduce administrative burdens and delays in the environmental review process. *See* 40 CFR § 1500.4, 1500.5. CEQ should revise these and other regulations to more clearly mandate reliance on existing documents, including those prepared by other federal or state agencies, to avoid "recreating the wheel" or unnecessarily evaluating recurring issues from scratch. Specifically, the amended regulations should authorize reliance on documents that evaluate environmental impacts for the same geographical site as the proposed action, or for the same type of action but at other locations, comparable to the proposed action site, provided that such existing documents are still timely. Regarding the timeliness of existing documents, CEQ should revise its regulations to provide that documents prepared during the last 5 years are presumed to be timely, and that reliance on earlier documents may be appropriate on a case-by-case basis.³ The issue of reliance is also addressed in our comments relating the use of Generic Environmental Impact Statements ("GEIS"), scoping and tiering, and the formatting of RODs.

6) Expanded Use of Generic Environmental Impact Statements

A GEIS is one form of document that agencies should develop and rely on more frequently. Through nearly four decades of implementing NEPA regulations, federal agencies have accumulated data enabling them to identify the likely impacts, alternatives, methods of implementation, etc. of particular actions. CEQ regulations currently permit, but do not clearly advocate, federal agencies to address such actions in a GEIS (40 CFR § 1502.4(c)). Consequently, not all agencies have evinced the same commitment to using GEIS documents. For example, NRC

³ The five-year period is mentioned in the following document: Audit Report: Audit of NRC's Compliance with 10 CFR Part 51 Relative to Environmental Impact Statements (OIG-13-A-20), August 20, 2013 (Office of the Inspector General, U.S. Nuclear Regulatory Commission), at p. 25.

is among the more active agencies in using GEIS's to fulfill its NEPA mandate, and uses such documents for broad actions, such as: (1) relicensing nuclear power plants, (2) handling and storing spent nuclear reactor fuel, (3) decommissioning nuclear facilities, (4) in support of rulemaking on radiological criteria for license termination, and (5) in-situ uranium recovery facilities. However, other agencies tend to be more reluctant to employ the GEIS approach, and there are also inconsistencies in the types of actions that federal and state agencies deem worthy of a GEIS.

To facilitate efficient and timely NEPA review, CEQ should amend its regulations to affirmatively recommend the use of GEIS documents whenever possible. The amended regulations could require agencies to evaluate upfront whether use of a GEIS would be appropriate for certain types of imminent actions that are likely to recur and, absent specific reasons why a GEIS would not suffice, to develop a GEIS for those actions. Consider that the NRC is likely to continue to receive licensing applications for advanced reactors (e.g., small modular reactors, non-light water reactors, micro-reactors, etc.). In the vast majority of these cases, the EIS analysis is likely to be the same; therefore, a GEIS, along the lines of those currently used for *in situ* uranium recovery and license renewals, will suffice to cover the advanced reactor license applications.

7) Promoting Tiering and Scoping

The above comments reflect ClearPath's strong support for tiering and scoping in the NEPA review process, to ensure that environmental reviews utilize and, to the extent necessary, build off existing information and focus on those issues that are truly significant. CEQ's existing regulations reference "tiering" (e.g., 40 CFR §§ 1502.4(d), 1502.20, the definition is given at 1508.28), but do not sufficiently emphasize it as the recommended procedure conducting meaningful review. Such emphasis, coupled with more detailed regulations concerning the procedures for tiering, are necessary to ensure that agencies follow the practice. For example, CEQ should strongly consider amending its EIS regulations to require the development of a new, freestanding EIS, only if the agency can point to specific and compelling reasons, why the same degree of meaningful review cannot be achieved through reliance on existing documents. Absent such a showing, the standard review process should involve reliance on pre-existing materials, including a GEIS, to be complemented with narrowly scoped supplemental environmental impact statements ("SEIS") that address targeted matters not covered in the earlier documents or conditions that have changed since the earlier documents were prepared. Furthermore, CEQ's regulations should be amended to permit the development of an SEIS without mandatory scoping based on a final EIS/GEIS; alternatively, if a governmental authority exercises its discretion to perform scoping, the public should be precluded from raising objections to a draft SEIS on the basis of issues covered during scoping.⁴

8) Increased Coordination Between Federal and State Agencies

Existing NEPA regulations require the lead federal agency to coordinate with state agencies to avoid duplicative analysis. *See* 40 CFR § 1506.2. Such coordination is especially useful when a state lead agency undertakes a NEPA-like review pursuant to a state analog to NEPA – i.e., a State

⁴ Consistent with NRC's position, as articulated in the July 19, 2013 memorandum to Hubert T. Bell, Inspector General, re: Formal Comments on Office of the Inspector General Draft Report 'Audit of NRC's Compliance with 10 CFR Part 51 Relative to Environmental Impact Statements.

Environmental Policy Act (“SEPA”). In such instances, failure to consolidate federal and state environmental reviews can create problems. For example, allowing federal and state environmental review to proceed on separate tracks doubles the burden on all cooperating agencies whose input is necessary for each review. It also stands to create confusion, as NEPA and SEPA reviews may proceed along different timelines, thus resulting in the undesirable outcome of the same project being described at different stages in various public documents. Third, the “two-track” approach affords project opponents twice the opportunity to oppose the proposed action.

To avoid these problems and bolster meaningful coordination between federal and state lead agencies, ClearPath recommends that CEQ amend its regulations to require that, in cases where both NEPA and SEPA review will entail the preparation of an EIS, federal and state lead agencies enter into a memorandum of agreement, as soon as possible, to (1) prepare a single document that will satisfy both review processes and (2) allocate responsibilities to ensure meaningful coordination.⁵

9) Setting Deadlines on Public Participation and Consolidating Hearings

While recognizing that public participation is an integral aspect of NEPA, ClearPath identifies the need for CEQ to amend its regulations to make public participation more efficient. As with other elements of NEPA review, ClearPath recommends that CEQ establish presumptive limits for public notice and comment that can only be extended under unusual circumstances. Moreover, to the extent possible, the amended regulations should direct agencies to consolidate public hearings, which address contested issues, with mandatory administrative hearings, to ensure that all issues raised on the record are dealt with at the same time. Such consolidation is of special interest to the nuclear industry, where the construction of special types of facilities, such as uranium enrichment facilities, are subject to a mandatory hearing requirement separate and apart from any public hearing. NRC has already successfully established “single hearing” procedures with respect to COL applications for multiple modules of essentially identical design at a single facility.

⁵ See, e.g., the recommendations made in the Golder Associates Report to the Washington State Energy Facility Site Evaluation Council, “Small Modular Reactors: An Analysis of Factors Related to Siting and Licensing in Washington State” (2016).