

**National Environmental Policy Act Implementing Regulations Revisions, Phase 2  
Council on Environmental Quality, CEQ-2023-0003**

**September 29, 2023**

**COMMENTS OF THE AMERICAN COUNCIL ON RENEWABLE ENERGY**

The American Council on Renewable Energy (ACORE) appreciates the opportunity to provide comments on the Council on Environmental Quality (CEQ) proposed revisions to its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA).<sup>1</sup> ACORE generally supports these proposed revisions and offers comments on areas of improvement or additional clarity.

**I. INTRODUCTION**

ACORE is a 501(c)(3) national nonprofit organization that unites finance, policy and technology to accelerate the transition to a renewable energy economy. Our membership represents all facets of the renewable energy marketplace, including leading developers and manufacturers, institutional investors, major corporate offtakers, and the country’s most forward-leaning utilities.

These comments focus on the need for an extensive buildout of renewable energy, storage and associated transmission infrastructure and do not address the use of NEPA for other categories of projects. ACORE recognizes that reforms to NEPA are a key component of the needed expansion of the renewable energy and transmission infrastructure to achieve the full benefit of the Inflation Reduction Act and Infrastructure Investment and Jobs Act, among other policies.

Modeling by Princeton University’s Rapid Energy Policy Evaluation and Analysis Toolkit (REPEAT) shows that under current policies, “wind and solar PV capacity additions set new records over the coming decade. The average annual rate of solar PV additions more than doubles from a 19 GW peak in 2021 to an average rate of 44-51 GW/year from 2023-2030. Onshore wind capacity additions reach 39-43 GW/year from 2023-2030, nearly triple the peak of 15 GW in 2020. Solar PV additions increase further to 123-167 GW/year on average from 2031-2035, while wind additions remain roughly steady at 26-41 GW/year during that period.”<sup>2</sup> Further, REPEAT’s analysis found

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<sup>1</sup> 88 FR 49924, July 31, 2023 (Proposed Rule).

<sup>2</sup> Jenkins, J.D., Mayfield, E.N., Farbes, J., Schivley, G., Patankar, N., and Jones, R., “Climate Progress and the 117th Congress: The Impacts of the Inflation Reduction Act and the Infrastructure Investment and Jobs Act,” REPEAT Project, Princeton, NJ (July 2023) at 73, <https://doi.org/10.5281/zenodo.8087805>.

that “the pace of electricity transmission capacity more than doubles under Current Policies scenarios relative to the Frozen Policies. High voltage transmission capacity expands roughly 15-18% from 2020 to 2030 under Current Policies and about 24-31% by 2035.”<sup>3</sup> But this renewable and transmission expansion will depend upon certain conditions, “*including the ability to site and permit projects at requisite pace and scale*, expand supply chains, interconnect generating capacity, and hire and train the expanded energy workforce to build these projects.”<sup>4</sup> (Emphasis added.)

An analysis of renewable energy and transmission projects by the Brookings Institution shows that the NEPA process does play a role in siting and permitting delays, finding that “the process of preparing EISs under NEPA is one of the longest-duration steps in federal permitting, taking a median of 3.5 years but up to nine years in some cases.”<sup>5</sup> Shortening these timelines will be one essential step to achieving the needed renewable and transmission buildout.

We also recognize that the Department of Energy (DOE) has proposed to establish the Coordinated Interagency Transmission Authorizations and Permits (CITAP) Program,<sup>6</sup> which will improve the NEPA process for certain high-voltage transmission projects and which ACORE generally supports with some recommended improvements. If CITAP is implemented, for those transmission projects that are either not eligible or for other reasons do not participate in CITAP, these NEPA revisions will be critical.

As CEQ states, “the purpose of an EIS is to serve as an action-forcing device by ensuring agencies consider the environmental effects of their action in decision making. Congress did not enact NEPA to create procedure for procedure’s sake.”<sup>7</sup> This description demonstrates that it is essential that NEPA does not itself impede projects with environmental benefits. For this reason, ACORE broadly supports the reforms in the Proposed Rule.

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<sup>3</sup> *Id.*, at 74.

<sup>4</sup> *Id.*, at 32.

<sup>5</sup> Sud, Rayan, Patnaik, Sanjay, and Glicksman, Robert, “How to Reform Federal Permitting to Accelerate Clean Energy Infrastructure - A Nonpartisan Way Forward,” Center on Regulation and Markets at Brookings Institution (February 2023), [https://www.brookings.edu/wp-content/uploads/2023/02/20230213\\_CRM\\_Patnaik\\_Permitting\\_FINAL.pdf](https://www.brookings.edu/wp-content/uploads/2023/02/20230213_CRM_Patnaik_Permitting_FINAL.pdf).

<sup>6</sup> “Coordination of Federal Authorizations for Electric Transmission Facilities,” Department of Energy, 88 FR 55826 (August 16, 2023).

<sup>7</sup> Proposed Rule at 49945.

## II. COMMENTS ON THE PROPOSED RULE

### Determination of Significance and Duration of Effects

CEQ explains that “only actions with significant adverse effects require an EIS,” which “reflects the fact that an action with only beneficial effects and no significant adverse effects does not require an EIS.”<sup>8</sup> ACORE agrees that an action with beneficial effects only should not require an EIS.

CEQ also proposes restoring language from 1978 requiring agencies to analyze the significance of an action in several contexts: the characteristics of the relevant geographic area; the potential global, national, regional, and local contexts; and the duration of the potential effects. ACORE notes that for renewable energy and associated transmission, consideration of both the wider geographic area and the duration of effects is essential to determining the environmentally beneficial outcomes of the project. CEQ notes with regard to the greenhouse gas (GHG) emissions:

For example, an agency should consider short-term construction related GHG emissions from a renewable energy project in light of long-term reductions in GHG emissions when determining the overall intensity of effects. In this situation, the agency could reasonably determine that the climate effects of the proposed action would not be significantly adverse, and therefore an EIS would not be required.<sup>9</sup>

ACORE supports this duration approach, which may apply beyond just GHG emissions, but to other benefits of renewable energy, such as reduced air emissions, lower water demand and avoided fuel extraction and the associated environmental impacts. A wider regional assessment is also relevant – for example, a clean energy project with the associated transmission can displace the need for fossil fuel projects in other geographic areas.

ACORE also supports codifying the guidance issued by CEQ in January for analyzing GHG and climate change effects of proposed actions under NEPA.

### Categorical Exclusions

ACORE supports CEQ’s proposed language codifying the process for categorical exclusions (CEs), including the ability of agencies to use CEs established by other agencies and to establish a CE within a planning or programmatic document. The use of CEs reduces the

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<sup>8</sup> Proposed Rule at 49936.

<sup>9</sup> *Ibid.*

administrative burden of having to conduct a more thorough NEPA review for activities that do not have adverse environmental impacts.

Given the importance of CEs, ACORE recommends that CEQ continue outreach to agencies and the public, such as through a Request for Information, to determine the optimal processes for identifying additional CEs in the future.<sup>10</sup>

#### Early Engagement with Communities

ACORE commends CEQ for encouraging early public engagement and the use of the term “meaningful” to describe such engagement, noting it should not just be a “check-the-box” exercise.<sup>11</sup> It is essential that such engagement by agencies be tailored to the specific needs of the communities to the extent feasible – such as by holding meetings during times that avoid conflicts with work schedules, providing virtual options and real-time translations, among other measures subject to agency resource availability.

CEQ identifies several important measures for public engagement by agencies, including accounting for affected parties’ access to electronic media and primary language when selecting the appropriate methods of notification; considering the needs of affected communities when determining what format to use for a public hearing or public meeting; and identifying a Chief Public Engagement Officer, responsible for facilitating engagement and providing technical assistance.

Unfortunately, local laws and community opposition often derail the development of clean energy projects. A May 2023 analysis by the Sabin Center for Climate Change Law “found at least 228 local restrictions across 35 states, in addition to 9 state-level restrictions, that are so severe that they could have the effect of blocking a renewable energy project,” and “293 renewable energy projects that have encountered significant opposition in 45 states.”<sup>12</sup> Therefore, federal agencies should coordinate this engagement with local governments and community groups to ensure that sufficient information is provided on the project to members of the

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<sup>10</sup> See Fishman, Xan; Jacobs, John; Minott, Owen; Winkler, Andy, “The Role of Categorical Exclusions in Achieving Net-Zero by 2050,” Bipartisan Policy Center (September 27, 2022), <https://bipartisanpolicy.org/report/categorical-exclusions/>

<sup>11</sup> Proposed Rule at 49942.

<sup>12</sup> Eisenson, Matthew “Opposition to Renewable Energy Facilities in the United States,” Sabin Center for Climate Change Law (May 2023 ed.), [https://scholarship.law.columbia.edu/sabin\\_climate\\_change/200/](https://scholarship.law.columbia.edu/sabin_climate_change/200/)

community. We encourage CEQ to seek opportunities for efficient and effective outreach, and avoid duplicative requirements.

### Analysis of Alternatives

ACORE supports the required analysis of a “no action” alternative, including any adverse environmental effects of *not* implementing the proposed action. Consistent with the benefits of renewable energy and transmission projects, not carrying out the proposal can itself have adverse environmental impacts which must be accounted for in the analysis.

CEQ clarifies that the effects of these alternatives, including the no action alternative, must address the effects on climate change and “the resiliency of the proposed action and alternatives in light of climate change.”<sup>13</sup> This analysis must therefore take into account the ability of renewable energy to provide resilience in multiple forms – including reduced reliance on fuel that is vulnerable to the impacts of extreme weather,<sup>14</sup> and greater reliability provided by interregional transmission.<sup>15</sup>

### Deadlines and Single Environmental Document

ACORE supports the requirement for agencies to complete an Environmental Assessment (EA) within one year and an Environmental Impact Statement (EIS) in two years, and encourages CEQ to develop additional mechanisms to remedy delays in these timelines. The Proposed Rule provides only for the submission of a report to Congress on missed deadlines, and a requirement for agencies “to elevate any unresolved disputes contributing to the missed milestone to the appropriate officials.”<sup>16</sup>

As an example of an additional remedy, under the Federal Power Act Section 216(h), if an agency fails to act on an application within the deadline set by DOE, or denies an application,

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<sup>13</sup> Proposed Rule at 49950.

<sup>14</sup> See “December 2022 Winter Storm Elliott Grid Operations: Key Findings and Recommendations - FERC, NERC and Regional Entity Joint Staff Inquiry” (September 21, 2023) at 10, finding that 55 percent of the generator outages, derates and failures to start during the storm were caused by freezing issues (31 percent) and fuel issues (24 percent), of which almost all involved natural gas.  
<https://ferc.gov/news-events/news/presentation-ferc-nerc-regional-entity-joint-inquiry-winter-storm-elliott>

<sup>15</sup> Goggin, Michael, Grid Strategies LLC, *The Value of Transmission During Winter Storm Elliott* (February 2023), finding that an additional gigawatt of interregional transmission capacity between a number of regions would have saved nearly \$100 million during Winter Storm Elliott,  
<https://acore.org/wp-content/uploads/2023/02/The-Value-of-Transmission-During-Winter-Storm-Elliott-ACORE.pdf>.

<sup>16</sup> Proposed Rule at 49973.

the project proponent or any state where the facility would be located may appeal to the President for review of the application. CEQ should consider whether such an appeal process may be available within the NEPA regulations.

ACORE supports the language in the Proposed Rule for lead and cooperating agencies to use a single EA and if required, a single EIS. CEQ modifies this single document requirement with the phrase “to the extent practicable.”<sup>17</sup> ACORE recommends that agencies seeking to use more than one environmental document be required to provide a written justification to and receive approval from CEQ where a single document is deemed to not be practicable.

When the “starting of the clock” commences is a concern. ACORE members are aware of several instances where it appears an agency subjectively delays the issuance of a Notice of Intent and/or the determination that an application is incomplete. Such delays before the start of the clock counter the intent of §1501.10(b)(3). A set of application completeness criteria, or a checklist, would allow for an applicant to estimate project timelines with a higher degree of certainty.

#### Page Number Limits

ACORE supports the proposed page number limits in the environmental reviews, and also recommends that page limits be established for citations and appendices. Moving more complex and technical language into an appendix is an appropriate step for improving the readability of the environmental studies, but without a limit on such appendices, there remains a risk of an extensively lengthy environmental review document which will make it more difficult for impacted communities and other parties to meaningfully participate in the process.

Similarly, ACORE recommends that CEQ’s proposed language to “encourage” summaries to not exceed 15 pages, be replaced with a specific page limit.

#### Findings of No Significant Impact (FONSI)

ACORE’s supports the provisions for the use of a FONSI, which is an established practice and should be codified. But we oppose the need for monitoring and compliance plans proposed in §1501.6. Such monitoring requirements unnecessarily increase the costs of mitigation.

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<sup>17</sup> Proposed Rule at 49971.

### Alternatives Including the Proposed Action

ACORE recommends adding language to §1502.14 that would require consulting with a project sponsor to solicit input on the technical and economic feasibility of alternatives prior to selecting which alternatives to analyze in the EIS. Such an approach is consistent with Title III, Section 321(a) of the Fiscal Responsibility Act (FRA) of 2023, which requires that the “reasonable range of alternatives” be “technically and economically feasible and meet the purpose and need of the proposal.”

The best way to determine whether alternatives being considered meet these thresholds is through consultation with the project sponsor. Analyzing alternatives that do not meet the purpose and need of the project sponsor or are not otherwise feasible would not be a worthwhile use of the agency’s, applicant’s, or public’s time as doing so would result in no project selected as the preferred alternative. A project can always be rejected if the agency cannot identify a preferred alternative that is actually feasible for the project sponsor, and therefore, there is no benefit from analyzing alternatives that are non-starters.

### Appropriate Level of Review

ACORE recommends revising the language in §1501.3 (d)(2)(iii) as follows: “The degree to which the proposed action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, park lands, Tribal sacred sites, ~~prime farmlands~~, wetlands, wild and scenic rivers, or ecologically critical areas.” As the Natural Resource Conservation Service (NRCS) itself notes, the Farmland Protection Policy Act “does not authorize the Federal Government to regulate the use of private or nonfederal land.”<sup>18</sup> The NRCS goes on to note “Activities not subject to FPPA include:” “Federal permitting and licensing, Projects planned and completed without the assistance of a Federal agency,” among others. Moreover, the inclusion of prime farmlands in this subparagraph could be misinterpreted as requiring agencies, such as the U.S. Fish and Wildlife Service, to consider impacts, such as land use, beyond those that are under their control.

ACORE also asks that §1501.3(d)(2)(viii) be revised as follows: “The degree to which the action may adversely affect an endangered or threatened species or its ~~habitat, including~~

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<sup>18</sup> US Department of Agriculture Natural Resources Conservation Service website, “Farmland Protection Policy Act,” <https://www.nrcs.usda.gov/conservation-basics/natural-resource-concerns/land/cropland/farmland-protection-policy-act> (Visited September 29, 2023).

habitat that has been determined to be critical under the Endangered Species Act of 1973.” CEQ’s proposed expansion beyond critical habitat to anywhere a listed species may occur is unnecessarily broad, and particularly problematic for widespread species for which habitat is not a limiting factor.

### Major Federal Action

ACORE is concerned about the narrow interpretation by CEQ in §1508.1 of a “major federal action” compared to the definition of “major federal action” recently adopted by Congress in the FRA. CEQ’s definition in §1508.1(u)(2)(B)(iii) excludes federal assistance “where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effects of the action.” CEQ is proposing to interpret this language as *including* in the definition of a major Federal action situations in which the agency has the authority to deny the request of assistance in whole or in part due to environmental effects or impose conditions on the receipt of financial assistance to address the effects.<sup>19</sup>

The inclusion of these circumstances would essentially render the congressional exclusion useless — contrary to the intent of the FRA — because an agency could in most cases cite environmental impact as a basis for denying or attaching conditions to a funding request. There are situations in which an applicant for federal financial assistance plans to proceed with the project even if the request for financial assistance were to be denied. In such cases, the federal agency does not control the environmental effects of the action (which will occur regardless of the federal financial assistance) and cannot be said to exercise sufficient control or responsibility over the subsequent use of funds to warrant NEPA review. CEQ’s proposed approach is to require NEPA analysis in this situation, but potentially modify the scope of review, yet this is inconsistent with congressional intent.

### **III. CONCLUSION**

ACORE supports the primary provisions of the Proposed Rule and the potential benefits of a more efficient NEPA process for clean energy and associated transmission infrastructure. We urge CEQ to modify the rule as recommended herein to obtain the greatest benefits from its implementation.

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<sup>19</sup> Proposed Rule at 49962.



Respectfully submitted,

Elise Caplan  
Vice President, Regulatory Affairs  
American Council on Renewable Energy  
[caplan@acore.org](mailto:caplan@acore.org)