Comments of the National Rural Electric Cooperative Association and the American Public Power Association on the Council of Environmental Quality's National Environmental Policy Act Interim Guidance on Consideration of Greenhouse Gas Emissions and Climate Change

88 Fed. Reg. 1196 (Jan. 9, 2023)

Docket No. CEQ-2022-0005

The National Rural Electric Cooperative Association ("NRECA") and the American Public Power Association ("APPA") (collectively, "the Associations") appreciate the opportunity to submit comments on the Council of Environmental Quality's ("CEQ") National Environmental Policy Act ("NEPA") Guidance on Consideration of Greenhouse Gas Emissions and Climate Change ("Interim Guidance").[1] NRECA and APPA members have extensive experience with NEPA implementation. Construction and maintenance of electric generation, transmission, distribution infrastructure, and broadband infrastructure frequently involves seeking permits, financing, or right-of-way authorizations from federal agencies, which often requires NEPA reviews. The Associations provide these comments on CEQ's Interim Guidance based on that experience.

The NRECA is the national trade association representing nearly 900 local electric cooperatives, including 63 generation and transmission ("G&T") cooperatives and 831 distribution cooperatives. Electric cooperatives operate at cost and without a profit incentive, which makes them motivated by people, not profits. From growing suburbs to remote farming communities, electric cooperatives deliver power to 42 million Americans in 48 states or 13 percent of the nation's population and serve 92 percent of the nation's persistent poverty counties.

The APPA is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. It represents public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve and the 96,000 people they employ. The APPA advocates and advises on electricity policy, technology, trends, training, and operations. Its members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

A resilient and reliable electric grid that affordably keeps the lights on is the cornerstone of American social, economic, energy security, and national security needs. To maximize the potential of clean energy and grid resilience initiatives and the pace at which they are deployed, NEPA review and permitting processes must be accelerated. As a nation, we are heading towards a future that depends on electricity to power more of the economy. Recent modeling by the Electric Power Research Institute concluded that achieving net-zero economywide emissions by 2050 could require generation capacity to increase by as much as 480 percent compared to what is in place today.[2] Electrifying other sectors of the economy could require a three-fold expansion of the transmission grid and up to 170 percent more electricity supply by 2050, according to the National Academies of Sciences.[3]

American ingenuity and industry can address the challenge of maintaining resilient and reliable domestic energy supplies while continuing to lead the world in environmental stewardship.

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[1] National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023). CEQ has issued this guidance as interim guidance which is effective immediately.

[2] LCRI Net-Zero 2050: Ex U.S. Economy-Wide Deep Decarbonization Scenario Analysis, Executive Summary (Dec. 6, 2022), *available at* https://lcri-netzero.epri.com/en/executive-summary.html.

[3] Nat'l Acads. of Sciences, Eng'g, and Med., *Accelerating Decarbonization of the U.S. Energy System* (2021), *available at* https://nap.nationalacademies.org/catalog/25932/accelerating-decarbonization-of-the-us-energy-system.

The Associations' members are leading by example by accelerating energy innovation and powering a brighter future. In fact, data collected by the U.S. Energy Information Administration indicate that electric generators have substantially reduced emissions of carbon dioxide since 2005.[4] Electric cooperatives and public power utilities are reducing their greenhouse gas ("GHG") emissions through a variety of means, including increased use of renewable energy resources, the development of new nuclear power, the addition of distributed energy resources and storage, the adoption of energy efficiency programs, research on carbon capture technologies, and by working to enable electrification against the challenges of increased energy demand reliably.

I. CEQ's Interim Guidance Misses the Mark

The Associations support the fundamental goals of NEPA, which ensures that federal agencies carefully consider the significant environmental impacts of their decisions. NEPA does not favor one particular outcome, "[r]ather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies [to analyze] the environmental impact of their proposals and actions."[5] So long as "the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[6]

CEQ's Interim Guidance misses the mark. It encourages overbroad NEPA reviews divorced from the statutory limitations and purposes of NEPA. As such, it threatens the ability of the Associations' members to provide affordable and reliable electricity to the communities they serve, undercuts clean energy deployment, and delays critical grid resiliency and modernization efforts. As outlined below, the Associations are primarily concerned that: (1) the Interim Guidance's approach to indirect effects analysis is overbroad because it fails to adhere to the important "reasonably foreseeable" limitation in NEPA analyses; (2) the Interim Guidance's requirement that agencies apply the social cost of GHGs, a regulatory analysis tool, to NEPA analyses is misguided and will not improve project-level agency decisions; and (3) the Interim Guidance's requirement that effectively all actions include mitigation unlawfully transforms NEPA from a procedural statute into a substantive one. For these reasons, the Interim Guidance should be withdrawn and revised. Further, it should not be applied to ongoing NEPA reviews that have passed the scoping stage.

II. The Interim Guidance's Indirect Effects Analysis Is Problematic and Overbroad

CEQ should reconsider the Interim Guidance's approach to indirect effects analyses. Otherwise, CEQ will exacerbate rather than improve the principal problem with NEPA reviews: that they have evolved into overly long, excessively broad paperwork exercises that stifle progress and innovation contrary to NEPA's balanced objectives. Requiring consideration of an unlimited universe of indirect effects will cause analyses to further expand. Applicants, agencies, and the

[4] U.S. Energy Info. Admin, U.S. Energy-Related Carbon Dioxide Emissions, 2021 (Dec. 2022), available at https://www.eia.gov/environment/emissions/carbon/pdf/2021_co2analysis.pdf (showing detailed reductions percentages and explaining that "[r]elative to 2005 . . . , declines in carbon intensity of electricity led to significant reductions in energy-related CO_2 emissions").

[5] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

[6] *Id.*

public will be buried in a mountain of paperwork related to an ever-widening web of attenuated environmental effects that are neither reasonably foreseeable nor have a reasonably close causal relationship to the specific action at issue.

NEPA's overall purpose is to ensure that federal agencies consider "the environmental impact of the proposed action" under consideration.[7] To make sure that the information reviewed and analyses performed by agencies is relevant and helpful to fulfilling NEPA's objectives, "effects or impacts" has been interpreted to mean "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable."[8] In fact, the Supreme Court has repeatedly emphasized the limiting aspect of the "reasonably foreseeable" standard.[9] As the Court put it, "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause."[10] While the agency action need not be the "but for" cause of the impact or impacts considered, a "reasonably close causal relationship" is akin to "proximate cause from tort law."[11] Focusing on those impacts proximately caused by the agency action under consideration appropriately focuses the analysis on only those "causal changes that may make an actor responsible for an effect . . . ."[12] The "reasonably foreseeable" standard therefore serves an important purpose. It limits the required impact considerations to the environmental impacts over which the agency has some level of control by approving the specific proposed action under review.

When the "reasonably foreseeable" requirement is ignored, NEPA analyses produce a voluminous amount of information that neither helps inform the decision maker nor the public. Unfocused reviews produce confusion not clarity, unnecessarily burden federal agencies and project proponents, and stall projects vital to the American economy. They also subject the agency and project proponents to burdensome litigation over environmental effects they do not control.

The proliferation of overbroad and unnecessarily long NEPA analyses creates a bottleneck to important electric infrastructure improvements with little environmental benefit. Indeed, from the outset, CEQ has recognized the importance of timely environmental reviews and focused environmental documents. When CEQ promulgated its first NEPA regulations in 1978, it had three principal goals: to reduce paperwork, to reduce delays, and to produce better decisions.[13] To help achieve those objectives, the 1978 regulations included page limits which stated that an environmental impact statement (EIS) should normally be less than 150 pages, with a maximum length of 300 pages for proposals of "unusual scope or complexity."[14] In explaining the importance of this requirement, CEQ stated that "in many cases bulky EISs are not read and are not used by

[7] 42 U.S.C. § 4332(C)(i).

[8] 40 C.F.R. § 1508.1(g) (emphasis added).

[9] *See, e.g.*, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

[10] *Pub. Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison Co.*, 460 U.S. at 774 (1983)).

[11] *Pub. Citizen*, 541 U.S. at 767.

[12] *Id.*

[13] 43 Fed. Reg. 55978, 55978 (Nov. 29, 1978).

[14] 40 C.F.R. § 1502.7 (1979).

decision makers. . . . The only way to give greater assurance that EISs will be used is to make them usable and that means making them shorter."[15] Similarly, in early guidance, CEQ advised agencies that completion of an EIS, even for large complex energy projects, should take no longer than one year.[16] Today, the average length for a final EIS has grown to over 660 pages, and a quarter exceed 748 pages—plus an additional 1,000 page of appendices.[17] And it takes on average four and a half years simply to get a green light to *begin work* on projects that require federal permitting.[18]

Agencies are producing overly inclusive NEPA documents to stem the tide of litigation, rather than focused reviews that analyze the significant environmental effects and reasonable alternatives that will actually aid decision-makers. Yet, despite these years-long efforts to produce voluminous NEPA reviews on ever-increasing topics, such as the indirect effects analyses recommended by the Interim Guidance, the agencies have not successfully reduced the risk or reality of endless and costly litigation.[19]

Meanwhile, the setbacks and delays particularly harm electric cooperatives and public power utilities, employees, and the communities they serve. As non-profit entities, electric cooperatives and public power utilities must directly pass increased costs due to project delays onto consumers at the end of the line. Electric infrastructure investment is crucial for economic growth and to improve the quality of life for communities most in need of improved electric reliability and clean energy access. Indeed, the need to upgrade our power infrastructure and to facilitate the expansion of the grid were part of the motivation for the Bipartisan Infrastructure Law and the Inflation Reduction Act.[20]

At a time when the United States is making the largest investment in clean energy infrastructure ever, the Interim Guidance completely misses the mark by expanding rather than

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[15] 43 Fed. Reg. 55978, 55983 (Nov. 29, 1978).

[16] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981).

[17] Executive Office of the President Council on Environmental Quality, Length of Environmental Impact Statements, at 4 (2013-2018) (June 12, 2020), *available at* https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Length_Report_2020-6-12.pdf; Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,305, 43,405-06 (July 16, 2022).

[18] 85 Fed. Reg. 43,305; *see also* National Association of Environmental Professionals, 2021 Annual NEPA Report 8 (2022). In 2021, the average preparation time for a final EIS, as measured from notice of intent to final EIS, was 4.6 years.

[19] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,305, 43,309 ("NEPA is the most litigated environmental statute in the United States").

[20] *See, e.g.*, Bipartisan Infrastructure Law, Pub. L. No. 117-58, § 40101, 135 Stat. 429 (2021) (statutory section to "prevent[] outages and enhance the resilience of the electric grid"); Inflation Reduction Act, Pub. L. No. 117-169, § 50151, 136 Stat. 1906 (2022) (appropriating funding "for the construction or modification of electric transmission facilities . . . as the Secretary [of Energy] determines to be appropriate and necessary in the national interest under section 216(a) of the Federal Power Act"); *id.* at § 50152 (appropriating grant funding to facilitate siting of interstate transmission lines); *id.* at § 2204 (providing certain loan and loan modification financial assistance "for the long-term resiliency, reliability, and affordability of rural electric systems," including "improvement to electric generation and transmission systems").

focusing NEPA analyses. While the Interim Guidance recites the "reasonably foreseeable" limitation in its discussion of indirect effects,[21] its explanation of the types of effects covered as "indirect effects" would expand NEPA reviews well beyond what could be considered reasonably foreseeable. The Interim Guidance asserts that upstream and downstream indirect emissions must be considered "reasonably foreseeable since quantifiable connections frequently exist between a proposed activity that involves use or conveyance of a commodity or resource, and changes relating to the production or consumption of that resource."[22] This presumes that any GHG emissions in a chain of commerce are necessarily indirect effects, even of narrow actions committed to agency discretion.

For example, when the U.S. Army Corps of Engineers evaluates an individual Clean Water Act Section 404 permit for construction work that may be related to electric or fuel infrastructure, the Interim Guidance would suggest the Corps include all the GHG emissions from the existing plants whose power would be transported on the line, regardless of the lack of proximate cause. Similarly, when the U.S. Department of Agriculture's Rural Utilities Service (RUS) makes loans or loan guarantees to finance system improvements, such as a new transmission line project, the Interim Guidance would presume RUS's loan or guarantee would "indirectly cause" the emissions from power plants connected to that system. Rather than promote close evaluation of the reasonably foreseeable environmental impacts that are proximately caused by an agency's actions, the Interim Guidance will bury the agencies in unhelpful analyses of indirect effects that are not proximately caused by the specific action under review.

Moreover, the Interim Guidance would push agencies to analyze GHG emissions that may occur far in the future and are impossible to predict accurately.[23] For example, predicting the indirect emissions from a transmission line becomes attenuated over the life of that line because of changes in regulatory policy and the power generating fleet. By ignoring reasonable temporal bounds throughout the Interim Guidance's discussion of what is "reasonably foreseeable," the Interim Guidance assures endless guessing about future impacts.

The Interim Guidance also will lead to the double counting of GHGs and related impacts. If multiple agencies are "indirectly" responsible for emissions from the same source that is upstream or downstream of the federal decision, they each will be accounting for the same emissions impacts. This will unreasonably inflate predicted consequences, be unhelpful to decision makers, confuse the public, and unnecessarily expend resources on duplicative and overlapping analysis.

For all these reasons, the Interim Guidance's inclusion of all upstream and downstream emissions as indirect effects—divorced from their reasonable foreseeability and proximate causation—is contrary to NEPA and Supreme Court case law, which both require a "reasonably

[21] *See* 88 Fed. Reg. at 1204.

[22] *Id*.

[23] 88 Fed. Reg. 1201-02 (directing agencies to "present net GHG emissions over the projected lifetime of the action").

close causal" relationship between the major federal action under review and the impacts.[24] CEQ should revise the Interim Guidance to adhere to NEPA's requirements.

III. The Interim Guidance Improperly Promotes and Relies on the Use of the Social Cost of GHG Estimates in NEPA Analyses

The Social Cost of GHG Estimates were designed by the Interagency Working Group ("IWG") on the Social Cost of GHGs for use in cost-benefit analyses for regulatory actions under E.O. 12866. The Associations and other stakeholders have raised a number of issues with the process under which the estimates were developed, their efficacy, and their utility.[25] The Associations incorporate those past comments by reference here. Regardless of the flaws identified in those comments, the use of the estimates is particularly inappropriate in NEPA analyses.

The estimates are not designed for non-regulatory decisions, such as project-level analysis, and cannot provide a useful tool for analyzing the environmental impacts of individual agency actions. The estimates purport to provide a dollar figure that reflects the monetized socioeconomic costs of "all climate change impacts" across the planet over the next 300 years. They are based on the modeling of numerous interconnected assumptions over very long periods of time. By their nature, the estimates' modeled socioeconomic costs are uncertain and cannot purport to establish a causal relationship between any particular action and any particular impact. They therefore cannot demonstrate a reasonably foreseeable impact from a federal action, let alone a significant impact proximately caused by that action. Their use in this context, therefore, will not produce results that will be helpful to decision makers. As the Supreme Court has noted, effects fall outside of the scope of NEPA "if the causal chain is too attenuated."[26]

The use of the estimates in NEPA analyses also will be unhelpful to federal decision makers because it will skew agencies' and the public's understanding of a proposal's impacts. As explained, NEPA analyses must focus on the reasonably foreseeable environmental impacts. Many of these impacts are not quantifiable and are not easy "to put a price on." NEPA does not require a cost-benefit analysis. In fact, CEQ's regulations have always been clear that "the weighing of the merits and drawbacks . . . should not be [displayed in a monetary cost-benefit analysis] when there are important qualitative considerations."[27] In contrast, the estimated "social costs" are reflected as monetized figures. These monetized figures are not comparable to other impacts and therefore run the risk of playing a disproportionate role in what is supposed to be a balanced evaluation of impacts.

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[24] *E.g.*, *Public Citizen*, 541 U.S. at 767.

[25] *See* Association Comments to the Office of Mgmt. & Budget, RE: Notice of Availability and Request for Comment on the "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990" (June 21, 2021) ("June 2021 Coalition Comments").

[26] *Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

[27] *See* 40 C.F.R. § 1502.23 (2020) (effective November 29, 1978 to September 13, 2020); 40 C.F.R. § 1502.22 (2022) (effective September 14, 2020 to the present).

Indeed, because of the significant limitations of the estimates, federal agencies have vigorously argued against their application in NEPA reviews and have largely prevailed.[28] As the United States Department of Justice has explained to courts "the Social Cost of Carbon protocol is of very limited utility to the [NEPA] decisionmaker because of its wide margin of error and highly variable results."[29] The Interim Guidance has not recognized or explained why the federal government is changing its position now. Failure to explain such policy changes represents arbitrary and capricious decision making because it fails to "consider an important aspect of the problem" before the agency.[30] Any future reliance on the Interim Guidance by agencies would therefore place any decision they make on extraordinarily loose legal footing.

Finally, the Interim Guidance has failed to consider the numerous procedural and substantive flaws in the IWG's development of the estimates. As noted above, the Associations and others have previously submitted comments pointing out significant problems with the estimates. And regulated industries are not alone in taking issue. The National Academies of Science also issued public recommendations urging the IWG to revise its process and methodology for developing the estimates.[31] The IWG has never responded to the comments or adhered to the National Academies of Science's recommendations. The IWG's failure to respond has deprived stakeholders of a "meaningful opportunity to comment" and will render any NEPA analyses that apply the estimates arbitrary, capricious, and contrary to law.

IV. NEPA Does Not Provide Authority for Agencies to Require Mitigation

The Interim Guidance improperly directs agencies to require mitigation and prioritizes climate considerations. NEPA—as it has been often repeated throughout the statute's history—imposes a procedural requirement, not a substantive one.[32] This means that NEPA "does not mandate particular results, but simply describes the necessary process" an agency must undertake.[33] NEPA's process requires only that federal agencies *analyze* the environmental

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[28] *350 Montana v. Haaland*, 50 F.4th 1254, 1272 (9th Cir. 2022) (holding that the Interior was not "required to use the SCC"); *EarthReports Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016) (upholding FERC's rejection of the SCC); *Sierra Club v. FERC*, 672 Fed. Appx. 38 (D.C. Cir. 2016) (same); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 31 (D.D.C. 2019) (upholding BLM's explanation that the use of the SCC was too speculative for NEPA purposes); *Citizens for Health Community v. BLM*, 377 F. Supp. 3d 1223 (D. Colo. 2019) (upholding BLM rejection of the SCC as inappropriate for small, discrete projects); *Wilderness Workshop v. BLM*, 342 F. Supp. 3d 1145 (D. Colo. 2018) (BLM was justified in providing a qualitative assessment of potential climate change impacts instead of using SCC).

[29] *See, e.g.*, Answering Brief for Defendants/Appellees at 21, *350 Montana v. Haaland*, 50 F.4th 1254 (9th Cir. 2022) (No. 20-35411), Dkt. No. 37.

[30] *See, e.g.*, *Physicians for Social Responsibility v. Wheeler*, 956 F.3d 634, 647 (D.C. Cir. 2020).

[31] American Academies of Science, *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon* (2017), *available at* https://nap.nationalacademies.org/catalog/24651/valuing-climate-damages-updating-estimation-of-the-social-cost-of.

[32] *Pub. Citizen*, 541 U.S. at 756-57; *see also Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.").

[33] *Robertson*, 490 U.S. at 350; *see also Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980); *Vt. Yankee*, 435 U.S. at 558.

consequences of their actions (including the consideration of mitigation measures). But Congress, in enacting NEPA, and the courts, in interpreting NEPA, have repeatedly recognized that agencies must juggle many competing considerations in making decisions. Environmental consequences are just one of many such considerations. For instance, Congress clearly explained that NEPA's purpose is to "create and maintain conditions under which man and nature can exist in productive harmony, and *fulfill the social, economic, and other requirements* of present and future generations of Americans."[34] And, as the Supreme Court has explained, so long as "the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[35] In other words, "[t]here is a fundamental distinction . . . between a requirement that mitigation be discussed . . . and a substantive requirement that a complete mitigation plan be actually formulated and adopted."[36]

The Interim Guidance undermines Congress's envisioned balancing of considerations by inserting outcome-determinative substantive requirements onto NEPA's procedural considerations. The Interim Guidance does this by directing agencies to require mitigation "to the greatest extent possible," and to include compensation.[37] The Interim Guidance also directs agencies to "use the information provided through the NEPA process to help inform decisions that align with climate change commitments and goals" because of "the urgency of the climate crisis."[38] These statements predetermine substantive outcomes by requiring agencies to align all decisions with those goals. It improperly "constrains" the agencies "from deciding that other values" should prevail and presupposes that mitigation is appropriate.

As such, the Interim Guidance is contrary to the statutory underpinnings of NEPA, the regulations interpreting NEPA, and controlling case law. NEPA, after all, does not necessarily require an agency to avoid impacts as long as they are adequately considered. By prioritizing mitigation efforts regardless of or above all other relevant considerations or costs, the Interim Guidance unlawfully transforms NEPA from a procedural statute into one with substantive requirements.

V. The Interim Guidance Is Otherwise Additionally Fundamentally Flawed

The Interim Guidance also suffers from several fundamental flaws that will render any NEPA analyses that rely on it arbitrary, capricious, and contrary to law.

First, the Interim Guidance inappropriately favors renewable energy alternatives over fossil fuel related projects with no statutory basis by instructing agencies to consider renewable energy alternatives to fossil fuel related projects.[39] Presumptively requiring consideration of such alternatives is a substantive policy-oriented objective that violates NEPA's instructions. NEPA does

[34] 42 U.S.C. § 4331(a) (emphasis added).

[35] *Robertson*, 490 U.S. at 350.

[36] *Id.* at 352.

[37] 88 Fed. Reg. 1206.

[38] *Id.* at 1204.

[39] *Id.* (directing agencies to evaluate "clean energy alternatives to proposed fossil fuel-related projects").

not give CEQ or the agencies authority to change the purpose of a project or a federal agency's statutory authority.[40] As CEQ's existing regulations note, agencies may consider "reasonable alternatives to the proposed action,"[41] but those alternatives must remain consistent with a project's "purpose and need." Put another way, the alternatives must be "technically and economically feasible and meet the purpose and need of the proposed action."[42]

While many of the Associations' members are deploying renewable energy projects, consideration of renewable alternatives is not always a reasonable alternative, including where reliability, geographic, infrastructure, and cost constraints make them simply infeasible. As the courts have noted, "[a]n agency cannot redefine the goals of the proposal that arouses the call for action;" rather, "it must evaluate alternative ways of achieving its goals, shaped by the application at issue and by the function that the agency plays in the decisional process."[43] Presupposing consideration of renewable alternatives is contrary to these constraints. The Interim Guidance should clarify that agencies must not predetermine certain types of alternatives.

Second, the Interim Guidance inappropriately favors renewable projects by presupposing they require less analysis of impacts than other projects. The Interim Guidance suggests that "[a]bsent exceptional circumstances, the relative minor and short-term GHG emissions associated with construction of certain renewable energy projects, such as utility-scale solar and offshore wind, should not warrant a detailed analysis of lifetime GHG emissions."[44] While that statement may be accurate for a particular project, the Interim Guidance does not explain why it is not equally true for other projects designed to improve the efficiency and reliability of the electric grid. The Interim Guidance provides no principled basis for why the indirect emissions from renewable energy projects—including the emissions from the manufacturing, transportation, installation, and disposal of the equipment—need not be considered while suggesting those same emissions must be considered for traditional energy projects.

Third, the Interim Guidance fails to provide sufficient instruction on when agencies can make findings of no significant impact. A finding of no significant impact documents an agency's conclusion that a federal action will not have a significant impact on the human environment and

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[40] *See* 42 U.S.C. § 4334 ("Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency."); Exec. Order No. 11,514 § 2(g), 3 C.F.R. 902 (1966-1970) ("In carrying out their responsibilities under the Act and this Order, [federal agencies shall] comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements.").

[41] 40 C.F.R. § 1502.13, 14(a).

[42] 86 Fed. Reg. 55,760; *see also, e.g.*, *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1230 (9th Cir. 2014).

[43] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991); *see also City of Grapevine, Tex. v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) ("[W]here a federal agency is not the sponsor of a project, 'the Federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.'" (quoting *Busey*, 938 F.2d at 197-98)).

[44] 88 Fed. Reg. 1201.

why.[45] Where such a finding is appropriate the agency need not prepare the more extensive and burdensome EIS. Many small infrastructure projects, including maintenance activities, will have no significant impact and should be primed for quicker NEPA reviews. CEQ should provide agencies with better direction to ensure that projects that do not significantly increase GHG emissions can qualify for a finding of no significant impact. For example, CEQ should refocus the Interim Guidance to ensure agencies analyze only the reasonably foreseeable impacts of the precise agency action under consideration.

Finally, there are numerous infrastructure projects for which NEPA reviews have been significantly underway before the Interim Guidance's publication. The Interim Guidance represents a fundamental shift in the government's approach to NEPA. Standard principles of fairness, reliance, and due process mandate that such vast policy changes may only apply prospectively. CEQ should clarify that the Interim Guidance does not apply to NEPA analyses that began before the Interim Guidance is finalized.

VI. Conclusion

For the foregoing reasons, the Associations urge CEQ to withdraw the Interim Guidance and reconsider its terms to address these and other stakeholder's comments. Failure to do so will render NEPA analyses of electric infrastructure projects that are critical to the Association's members and the communities they serve vulnerable to unreasonable delay and lengthy litigation. We would be happy to meet with you to discuss these comments. If you have any questions, please contact Viktoria Seale at (703) 907-5805 for NRECA and Carolyn Slaughter at (202) 467-2900 for APPA.

[45] 40 C.F.R. § 1508.13.