



Interstate Natural Gas Association of America

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CEQ-2019-0003

March 10, 2020

Mr. Edward Boling  
Associate Director – National Environmental Policy Act  
Council on Environmental Quality  
730 Jackson Place, N.W.  
Washington, D.C. 20503

**Re: Notice of Proposed Rulemaking to Revise Regulations Concerning the National Environmental Policy Act**

Dear Mr. Boling,

The Interstate Natural Gas Association of America (“INGAA”) respectfully submits these comments in response to the Council on Environmental Quality’s (“CEQ”) request for comment on revisions to its regulations concerning the National Environmental Policy Act (“NEPA”) (the “Proposed Rule”).<sup>1</sup>

INGAA is a non-profit trade association that advocates regulatory and legislative positions of importance to the natural gas pipeline industry in the United States. INGAA’s member companies transport over 95% of the nation’s natural gas through a network of nearly 200,000 miles of pipelines. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use the fuel for heating, cooking, generating electricity, and manufacturing a wide variety of U.S. goods, ranging from plastics to paint to medicines and fertilizer.

Natural gas is clean, abundant, and affordable, making it a foundation in growing the United States’ economy and supporting a cleaner economy. Natural gas is indispensable to integrating and sustaining renewable sources of energy as part of the U.S. power generation portfolio, and is responsible for the decline in emissions from the power sector since 2005. Beyond electricity generation, natural gas has resulted in energy efficiency improvements in industrial processes, home appliances, and building heating.

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<sup>1</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684 (Jan. 10, 2020) (“Proposed Rule”).

INGAA supports CEQ's effort to make durable revisions to NEPA's implementing regulations.<sup>2</sup> These revisions are necessary to address the significant changes in how agencies identify, review, and share information since CEQ first promulgated NEPA regulations in 1978.

## **I. INGAA Supports the Hard Look at Environmental Impacts Required by NEPA**

INGAA's members support the meaningful consideration of environmental impacts by federal agencies that authorize members' projects. CEQ's proposal is particularly important to INGAA member companies because projects that seek to maintain or expand the interstate natural gas pipeline network typically are subject to regulatory oversight by multiple federal agencies, which must jointly fulfill their individual obligations under NEPA while also meeting the requirements of the statutes authorizing their decisions. The construction or operation of interstate natural gas pipelines requires that the Federal Energy Regulatory Commission ("FERC") issue a certification pursuant to the Natural Gas Act ("NGA"),<sup>3</sup> but a pipeline project typically requires permits and reviews from the U.S. Army Corps of Engineers, the U.S. Fish & Wildlife Service, and other federal agencies. These federal agencies must typically consider any significant environmental impacts arising from their proposed actions concerning an interstate natural gas transportation project.<sup>4</sup>

As the lead federal agency that authorizes interstate natural gas transportation projects, FERC fulfills its NEPA obligations by issuing and applying a categorical exclusion or by preparing a project-specific Environmental Assessment ("EA") or Environmental Impact Statement ("EIS").<sup>5</sup> EISs are generally prepared for authorizations of major interstate natural gas pipeline construction projects.<sup>6</sup> If FERC believes that a proposed action may not have significant environmental effects, then an EA will be prepared to determine whether an EIS is required.<sup>7</sup> FERC has also identified exclusions for certain actions within its jurisdiction that generally do not have significant environmental effects and, therefore, warrant a categorical exclusion from project-specific NEPA analysis.<sup>8</sup> In determining whether a categorical exclusion should apply to a particular proposal, FERC evaluates the applicant's environmental

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<sup>2</sup> See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (affording "substantial deference" to CEQ's interpretation of NEPA).

<sup>3</sup> 15 U.S.C. § 717f(c) (2018).

<sup>4</sup> See 42 U.S.C. § 4332; *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1309 (D.C. Cir. 2014) ("NEPA requires that federal agencies fully consider the environmental effects of proposed major actions, including actions that an agency permits, such as pipeline construction.") (citations omitted). As used throughout these comments, "interstate natural gas transportation project" refers to new pipelines, pipeline expansion projects of existing infrastructure, and associated facilities.

<sup>5</sup> Certain qualifying activities within the Commission's jurisdiction that involve auxiliary installations and the replacement of facilities typically do not require an individual, facility-specific NGA Section 7(c) certificate authorization. See 18 C.F.R. § 2.55. With respect to these activities, the Commission has determined that it has sufficiently satisfied its NEPA obligations through past environmental review. See e.g., *Tennessee Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61157 at P 40 (Sept. 6, 2016).

<sup>6</sup> See 18 C.F.R. § 380.6(a)(3) (an EIS will normally be prepared for "[m]ajor pipeline construction projects under section 7 of the Natural Gas Act using rights-of-way in which there is no existing natural gas pipeline").

<sup>7</sup> See 18 C.F.R. § 380.6(b) ("If the Commission believes that a proposed action . . . may not be a major Federal action significantly affecting the quality of the human environment, an environmental assessment, rather than an environmental impact statement, will be prepared first.").

<sup>8</sup> See generally 18 C.F.R. § 380.4. For example, in 18 C.F.R. § 380.4(a)(21), neither an EA nor an EIS is required to be prepared for FERC's approvals of blanket certificate applications and prior notice filings.

information and stakeholder comments to determine if extraordinary circumstances are present that counsel against applying the exclusion.<sup>9</sup>

To be clear, notwithstanding that natural gas transportation projects are privately funded, natural gas transportation projects will still be subject to NEPA review. In fact, INGAA does not expect CEQ's proposed revisions to reduce the number of member projects reviewed under NEPA. FERC, as lead federal agency, ensures that each proposed interstate natural gas transportation project receives the appropriate level of attention and analysis without wasteful effort by the agency.

When finalized, CEQ's proposed revisions would promote NEPA reviews that are more efficient, more insightful, and better aligned with NEPA's purpose as an aid to federal decision-making. Furthermore, regulatory clarity will help reduce the need to repeatedly litigate the same NEPA issues and may provide more consistent outcomes for those cases that are still litigated.

## **II. The Proposed Rule Focuses Agency Resources on Information That Is Meaningful to Its Decision**

### **A. The Revised Definition of "Effects or Impacts" Will Encourage Focused and Meaningful Agency Consideration of Environmental Effects**

It is critical for federal agencies and project applicants to know what "effects" to study in connection with a proposed federal action. INGAA supports CEQ's effort to define "effects" clearly and simply.

#### **1. The Current Framework for Considering "Effects" Needs Improvement**

The frequency of litigation concerning the scope of the effects analysis under NEPA demonstrates the difficulties agencies and courts face in applying the existing regulatory scheme.<sup>10</sup> CEQ's proposed revisions will help federal agencies implement their NEPA responsibilities and reduce litigation risk, by removing an unnecessary layer of nomenclature and explaining in simple terms the statutory bounds of the effects that must be considered under NEPA. NEPA requires federal agencies to consider the "environmental impact of their proposed action" and any "adverse environmental effects" that cannot be avoided.<sup>11</sup> CEQ's current regulations subdivide "effects or impacts" into "direct" effects and "indirect" effects of a proposed action, in addition to "cumulative effects," which are the incremental effects of the proposed action when combined with the effects of other past, present, and reasonably foreseeable actions affecting the same resource at the same time.<sup>12</sup> However, since the statute does not identify or define these three types of effects, an ever more intricate jurisprudence has arisen over the past forty or more years with a misplaced focus on the nomenclature rather than on the scope of the effects

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<sup>9</sup> See 18 C.F.R. § 380.4(b); see also *Rockies Express Pipeline, LLC*, 155 FERC ¶ 61,019 at P 41 (2016) ("[B]efore issuing a categorical exclusion the Commission evaluates the applicant's environmental information and any comments on the proposal to determine if any extraordinary circumstances are present and if no extraordinary issues are present then staff may issue a categorical exclusion.") (footnote omitted).

<sup>10</sup> See NATIONAL PETROLEUM COUNCIL, *Dynamic Delivery: America's Evolving Oil and Natural Gas Transportation Infrastructure*, Chapter 3, 20 (Dec. 2019) (citing information obtained from Clear View Energy Partners database) ("A 2019 study of 34 projects with more than 200 challenges to natural gas or liquids (crude oil, NGLs or products) pipelines revealed that, between 2012 and mid-2019, NEPA was the most frequent statutory basis or tactic by opponents, 39% of the challenges adjudicated or pending.").

<sup>11</sup> 42 U.S.C. § 4332(2)(C)(i)-(ii).

<sup>12</sup> 40 C.F.R. §§ 1508.7, 1508.8.

analysis. Ultimately whether an effect is “direct” or “indirect” or “cumulative” does not change an agency’s obligation under NEPA to consider the impact of its decision on the affected environment. CEQ’s proposal provides a simpler definition of effects that refocuses attention on what is meaningful to an agency’s informed decision-making and on the causal connection between the agency’s proposed action and its potential effects. This clarification will help agencies tailor their analysis to NEPA’s purpose of ensuring informed agency decision-making, and it will curb inconsistent approaches by agencies and courts.

2. Revisions to the Definition of “Effects” Should Focus Agencies on Information Meaningful to Their Decisions

CEQ’s proposed definition of “effects” would focus agencies on two important principles: causation and reasonable foreseeability.<sup>13</sup> NEPA is intended to provide a framework for federal agencies to consider the environmental effects of their decisions.<sup>14</sup> For that analysis to be meaningful, the agency must focus on information that informs the agency’s discretion pursuant to the agency’s action statute—the statute under which the agency will be making a decision triggering NEPA review. The action statute typically prescribes the scope of the agency’s authority to act, the criteria by which to act, and the ability of the agency to exercise discretion. NEPA does not modify these or any other aspects of the action statute. Instead, NEPA imposes a “discrete procedural obligation” on federal agencies to consider the environmental effects connected to their actions.<sup>15</sup> CEQ’s proposed definition of effects recognizes these limits of NEPA and appropriately defines “effects” to exclude those “that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.”<sup>16</sup> CEQ’s proposed definition of “effects” fills an important gap in the regulatory framework concerning causation and preserves the condition that effects be “reasonably foreseeable.”<sup>17</sup>

The NEPA regulations have always recognized that, to be considered, an effect must be “caused by the [agency] action,” but the regulations have never provided direction on the degree of causation required.<sup>18</sup> In response to uncertainty and inconsistent approaches on this issue, the U.S. Supreme Court has explained that NEPA requires a “reasonably close causal relationship between a change in the physical environment and the effect at issue.”<sup>19</sup> While the approach is analogous to the “doctrine of proximate cause from tort law,” the Supreme Court has instructed that “‘but for’ causation is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.”<sup>20</sup> Where a federal agency “has no ability categorically to prevent” an environmental effect, that agency is not “the legally relevant cause” of the effect.<sup>21</sup>

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<sup>13</sup> Proposed Rule, 85 Fed. Reg. at 1728 (Proposed § 1508.1(g)).

<sup>14</sup> See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

<sup>15</sup> *Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 319 (1975).

<sup>16</sup> Proposed Rule, 85 Fed. Reg. at 1729 (Proposed § 1508.1(g)).

<sup>17</sup> *Id.* at 1728 (Proposed § 1508.1(g)).

<sup>18</sup> 40 C.F.R. § 1508.8 (emphasis added).

<sup>19</sup> *Metro. Edison v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). Twenty years after *Metropolitan Edison*, courts were still challenged by the question of causation, prompting the Supreme Court to reaffirm that NEPA requires a “reasonably close causal relationship.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

<sup>20</sup> *Pub. Citizen*, 541 U.S. at 754.

<sup>21</sup> *Id.* at 769.

Despite the clear instruction from the Supreme Court, courts have not applied this precedent uniformly.<sup>22</sup> In the Proposed Rule, CEQ properly exercises its authority to revise its interpretation of NEPA to resolve inconsistent judicial application and to realign NEPA's implementing regulations with the statute and Supreme Court precedent.<sup>23</sup> CEQ's proposed definition of effects would add regulatory clarity on the required causal connection between effect and federal action. By basing its revisions on the Supreme Court's bedrock interpretation of the statute itself, agencies will gain the clear instruction needed to implement NEPA properly and consistently.

For interstate natural gas pipeline transportation projects, the NGA is the "action statute," the authority pursuant to which FERC is required to deny, approve, or conditionally approve applications to construct interstate natural gas pipeline facilities.<sup>24</sup> To be meaningful, FERC's analysis of environmental effects under NEPA should be limited to those reasonably foreseeable effects that are causally related to the agency's action under the NGA.<sup>25</sup> For example, the upstream effects associated with natural gas production and downstream effects from natural gas consumption should be excluded from the NEPA analysis of natural gas infrastructure projects.<sup>26</sup> Neither upstream production nor downstream combustion activities are within the scope of FERC's authority under NGA Section 7, and both activities are regulated by other agencies under federal and state laws other than the NGA. It is axiomatic that an agency cannot assert control or condition actions over activities that are outside the agency's jurisdiction. Thus, FERC

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<sup>22</sup> See, e.g., *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) (*Sabal Trail*).

<sup>23</sup> See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (recognizing an agency's authority to change a longstanding interpretation of an ambiguous statute). The U.S. Supreme Court has long recognized the ambiguity in the terms of NEPA and that NEPA does not apply to all effects of a federal action. See, e.g., *Metro. Edison Co.*, 460 U.S. at 773 ("To determine whether § 102 requires consideration of a particular effect, we must look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue."). CEQ's proposal would codify the Supreme Court's analysis of the causation element of effects and clarify portions of the definition that have been interpreted inconsistently with the Court's analysis. Compare *Pub. Citizen*, 541 U.S. at 767-68 (explaining that NEPA requires a "reasonably close causal relationship between the environmental effect and the alleged cause.") (citations omitted), with *Sabal Trail*, 867 F.3d at 1373-74 (FERC's certification of three interstate natural gas pipeline projects was the "legally relevant cause" of downstream power plant carbon emissions and that those emissions were required to be considered in FERC's NEPA analysis, even though another regulatory body authorized the siting of the power plant and thereby broke the causal chain.); *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1299-1300 (11th Cir. 2019) (stating that the holding in "*Sabal Trail* is at odds with earlier D.C. Circuit cases correctly holding the occurrence of a downstream environmental effect, contingent upon the issuance of a license from another agency with the sole authority to authorize the source of those downstream effects, cannot be attributed to the [agency]; its actions cannot be considered a legally relevant cause of the effect for NEPA purposes.") (citations and quotations marks omitted); *El Paso Natural Gas Co., L.L.C.*, 169 FERC ¶ 61,133 (McNamee, Comm'r, concurring at P 12 & n.29) (concurrence by FERC Commissioner McNamee disagreeing with D.C. Circuit interpretation of FERC's statutory authority under the NGA in *Sabal Trail*).

<sup>24</sup> 15 U.S.C. § 717f.

<sup>25</sup> See *Aberdeen & Rockfish R.R.*, 422 U.S. at 322 ("In order to decide what kind of an environmental impact statement be prepared, it is necessary first to describe accurately the 'federal action' being taken.").

<sup>26</sup> See *Dominion Transmission, LLC*, 163 FERC ¶ 61,128 at PP 41, 62 (2018). In addition to not being causally related to FERC's approval, FERC also has stated that the effects from natural gas production and consumption are generally not reasonably foreseeable consequences of FERC approval of infrastructure. *Id.* at PP 59, 62.

has “no ability categorically to prevent” upstream or downstream activities.<sup>27</sup> CEQ’s proposal recognizes these legal and practical limits when it clarifies that NEPA does not require an agency to analyze an effect it has no ability to prevent or that would occur regardless of the proposed action.<sup>28</sup>

CEQ’s proposed definition of “effects” also would preserve the condition that the effects of a proposed federal agency action be reasonably foreseeable.<sup>29</sup> Although effects that are sufficiently causal to be considered in an agency’s NEPA analysis are also typically foreseeable, foreseeability constitutes an independent element that must be met. Courts have found that an effect is reasonably foreseeable if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”<sup>30</sup> Courts have also excluded from the element of reasonable foreseeability “highly speculative harms that distort the decisionmaking process by emphasizing consequences beyond those of greatest concern to the public and of greatest relevance to the agency’s decision.”<sup>31</sup> Where the significance of an effect that is attributable to an agency action is not reasonably foreseeable—qualitatively or quantitatively—it is not required to be considered under NEPA because it does not contribute to the agency’s decision-making process.<sup>32</sup> CEQ’s proposal appropriately retains the element of reasonable foreseeability in the definition of “effects” and will support agencies in limiting the scope of effects to those that inform the decision before the agency.

INGAA recommends that CEQ further revise the definition of “effects or impacts” to include specific factors that should be considered when determining the scope of effects an agency must review during its decision-making. These factors should include:

- the degree of authority the federal agency has over the activity;
- whether the activity would or could continue regardless of the federal action;
- the relevance of the effects to the decision factors under the action statute;
- whether other federal, state, or local agencies are the primary regulator for the activity;
- whether environmental considerations and public participation are included by these other agencies in other proceedings governing the activity;
- the degrees of conditionality between the federal action and the effect of the activity; and
- the extent to which the federal agency can mitigate the effects.

These factors probe both the legal limits of the agency’s purview and the value and relevance of analyzing the activity in question. As such, they support the intent of Congress in making NEPA a procedural aid to inform decision-making, rather than a vehicle for ever-more-expansive analyses of

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<sup>27</sup> See *Pub. Citizen*, 541 U.S. at 769.

<sup>28</sup> See Proposed Rule, 85 Fed. Reg. at 1729 (Proposed § 1508.1(g)(2)).

<sup>29</sup> See *id.* at 1728-29 (Proposed § 1508.1(g)).

<sup>30</sup> *Sierra Club v. Fed. Energy Regulatory Comm’n*, 827 F.3d 36, 47 (D.C. Cir. 2016) ((citing *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005) (quoting *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir.1992))).

<sup>31</sup> *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005) (citing *Robertson*, 490 U.S. at 356) (internal quotation marks omitted).

<sup>32</sup> See *Friends of Capital Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1064 (D.C. Cir. 2017) (“Baseless speculation is unhelpful and agencies need not foresee the unforeseeable. . . .”) (citations and internal quotation marks omitted); see also *Pub. Citizen*, 541 U.S. at 767 (“inherent in NEPA and its implementing regulations is a ‘rule of reason,’ which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process.”).

concatenated causal chains deemed “direct” or “indirect.”<sup>33</sup> This assessment should be bounded by a rule of reason. Consistent with this principle, when considering the affected environment, an agency should assess the current and future condition of the affected environment based upon what is reasonably foreseeable at the time of decision. This approach also avoids the need for a separate “cumulative impact” analysis, since effects would in any event be assessed based on the known and reasonably foreseeable condition of the affected environment.

INGAA encourages CEQ to review all existing guidance documents, including those pertaining to the scope of the effects analysis, and to conform and align the guidance documents to the principles of the Final Rule.

## **B. The Proposed Rule Helps Agencies Define the Purpose and Need of Federal Actions and the Alternatives That Meaningfully Inform Agency Decision-Making**

INGAA supports the intent of CEQ’s proposal to more clearly define the requirements for identifying the purpose and need for a proposed action based on the relevant statutory authority and, where the agency action is at the behest of the applicant,<sup>34</sup> the goals of the applicant. A well-defined purpose and need is essential to effective and efficient NEPA review and for the lead agency to get the appropriate support from the other agencies. The purpose and need explains why the action is proposed and appropriately tailors the scope of NEPA analysis.

NEPA imposes only procedural requirements on federal agencies and does not mandate particular results.<sup>35</sup> The procedural nature of NEPA supports the Act’s goal to better inform agencies in their decision-making.<sup>36</sup> By clearly and correctly defining the purpose and need, agencies can confidently identify alternatives, if any, that meet the purpose and need. Having a clear and tailored purpose and need ensures that time, money, and other resources are allocated and directed in support of an analysis that meaningfully informs the agency about the actual decision it proposes to make.

INGAA supports the proposed revision to § 1502.13 to clarify that, when the agency is reviewing an application for federal authorization, the purpose and need should reflect the purpose of the federal action proposed by the applicant. For example, INGAA members file applications with FERC pursuant to Section 7(c) of the NGA for authorization to construct and operate new interstate natural gas pipelines.<sup>37</sup> Pipeline companies seek Section 7 authorization from FERC in response to the public’s need for natural gas, which is commonly demonstrated through contractual agreements with prospective customers (namely, shippers of natural gas). With respect to these authorizations, the purpose and need for the proposed action is to provide for the transportation of natural gas between specific locations.<sup>38</sup>

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<sup>33</sup> *See Pub. Citizen*, 541 U.S. at 769.

<sup>34</sup> INGAA recommends that the Final Rule make clear that the phrase “where applicable” used in the definition of “reasonable alternatives” is intended to apply to all situations where the agency action is at the behest of an applicant (instead of actions initiated by the agency). *See* Proposed Rule, 85 Fed. Reg. at 1730 (Proposed § 1508.1(z)).

<sup>35</sup> *See Pub. Citizen*, 541 U.S. at 756.

<sup>36</sup> *See id.* at 768-69.

<sup>37</sup> *See* 15 U.S.C. § 717f(c) (2018).

<sup>38</sup> *See, e.g., PennEast Pipeline Project Final Environmental Impact Statement*, Docket No. CP15-558-000, FEDERAL ENERGY REGULATORY COMMISSION 1-3 (Apr. 2017) (adopting that the purpose and need of proposal was “to provide about 1.1 million dekatherms per day (MMDth/d) of year-round natural gas transportation service from northern Pennsylvania to markets in New Jersey, eastern and southeastern Pennsylvania, and surrounding states.”).

This definition of the purpose and need not only reflects the goals of applicants in defining the scope of the NEPA review, but also reflects FERC's statutory authority. Congress required FERC to approve applications for the construction and operation of interstate pipelines that meet the statutory criteria prescribed by the NGA. Defining the purpose and need of FERC's Section 7 review more broadly, for example, to include the transport or supply of an end-user with energy other than natural gas, would inappropriately expand the scope of the NEPA analysis to consider environmental effects associated with facilities beyond FERC's jurisdiction to direct or control and would involve information that FERC could not meaningfully incorporate into its decision-making.

INGAA also supports the proposed changes to clarify the scope of the alternatives analysis. The alternatives analysis should be limited to alternatives that are reasonable and that achieve the purpose and need of the action.<sup>39</sup> If not appropriately limited based on these principles, the agency's NEPA review may consider alternatives that are irrelevant, infeasible, or beyond the statutory reach of the agency. Such an expansive alternatives analysis would detract from NEPA's purpose to meaningfully inform agency decision-making and to facilitate public understanding of the proposed action. INGAA also agrees with the Proposed Rule's clarification that the agency need not consider "all" reasonable alternatives but, instead, must consider reasonable alternatives sufficient to inform the agency about the consequences of the proposed action.

CEQ's proposed revisions recognize that any alternatives considered should be sharply focused on the specific purpose and need of the proposed federal action.<sup>40</sup> Alternatives that do not accomplish the purpose of the proposed action will yield information that is not useful in guiding the agency's decision.<sup>41</sup> For example, FERC's review of applications to construct and operate natural gas pipelines cannot be meaningfully informed by alternatives that do not provide for the transportation of natural gas. Other alternatives, such as those involving nuclear energy or the generation and transportation of solar energy, would not respond to the demonstrated demand for natural gas and also lie entirely outside FERC's statutory authority pursuant to the NGA. Accordingly, such alternatives are properly excluded from the NEPA analysis conducted for a natural gas transportation project.

The proposed definition of "reasonable alternatives" also recognizes that practicality and feasibility are important principles to achieving the goals of NEPA.<sup>42</sup> The breadth of alternatives

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<sup>39</sup> See *Pub. Citizen*, 541 U.S. at 767 ("inherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process."); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978) ("Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved."); *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 869 (D.C. Cir. 1999) (stating that "a reasonable alternative is defined by reference to a project's objectives.").

<sup>40</sup> See *Slater*, 198 F.3d at 869.

<sup>41</sup> See *id.* at 867 (an agency need only consider alternatives that "bring about the ends of the federal action.") (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991)); *Ctr. for Biological Diversity*, 941 F.3d at 1297 ("the rule of reason recognizes that it is pointless to require agencies to consider information they have no power to act on, or effects they have no power to prevent.").

<sup>42</sup> See 42 U.S.C. § 4331(b) ("In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources.") (emphasis added); see also *Metro. Edison Co.*, 460 U.S. at 776 (scope of NEPA inquiries



considered should be probative of the proposed action before the agency, while being bounded by the practical constraints of agency resources.<sup>43</sup> Similarly, the depth of analysis for each alternative must also be practical and feasible in light of the purpose of the analysis. Comprehensive analysis of every possible alternative is inimical to NEPA's practical purpose and to an agency's duty to act promptly on the proposal that actually lies before it for action.

In NEPA analyses prepared for interstate natural gas transportation projects, the alternatives considered must meet the purpose to provide for the transportation of natural gas between identified locations (e.g., the Gulf of Mexico and New Jersey).<sup>44</sup> For example, these alternatives might reasonably include (i) modifications to existing, or other proposed, natural gas pipeline projects; (ii) alternate routes of the proposed pipeline between the defined supply and delivery areas; (iii) the use of different compressor technology; or (iv) the addition of compressors versus pipe to increase capacity. These alternatives inform the decision before FERC because they might reasonably achieve the applicant's goal to transport natural gas to meet existing or anticipated demand. NEPA does not require the analysis of alternatives that would not accomplish this purpose, such as non-natural gas energy projects or measures that artificially constrain demand or favor certain demand centers over others.<sup>45</sup> Agencies are also not required to consider alternatives that are not technically feasible, economically feasible, or practicable.<sup>46</sup> For example, alternatives that would require the use of new or experimental construction methods due to limited availability or because the required technology is unproven should be excluded from an agency's NEPA review.

CEQ's proposal includes helpful revisions in support of these important principles and would focus NEPA reviews on alternatives that meaningfully inform the agency. INGAA supports CEQ's proposed revision to the definition of "reasonable alternative" to clarify that the goals of the applicant should inform the reasonable range of alternatives. This is consistent with judicial interpretation of the existing NEPA regulations and with CEQ's proposed revisions to the purpose and need statement.<sup>47</sup>

### **C. The Information Considered by Agencies Should Be Meaningful to the Decision**

NEPA's purpose is to ensure that federal agencies consider the environmental impacts of their decisions, and that the public is aware of and can contribute to the information considered by the agency. In support of this purpose, CEQ has long recognized the potential for NEPA to be transformed

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must remain manageable to meet NEPA's goal of informing agency's fully informed and well considered decision).

<sup>43</sup> See *Vt. Yankee*, 435 U.S. at 551 ("the concept of alternatives must be bounded by some notion of feasibility. . .").

<sup>44</sup> See, e.g., *PennEast Pipeline Project Final Environmental Impact Statement*, Docket No. CP15-558-000, FEDERAL ENERGY REGULATORY COMMISSION 3-2 (Apr. 2017) (including in FERC's evaluation criteria for selecting alternatives that each alternative must "have the ability to meet the objectives of the project.").

<sup>45</sup> See, e.g., *Gateway Expansion Project Environmental Assessment*, Docket No. CP18-18-000, FEDERAL ENERGY REGULATORY COMMISSION 1 (July 2018) ("The purpose of the Project is to transport natural gas to fulfill customer's needs, and as wind is not an alternative for natural gas transportation, it is not viable for the Project.").

<sup>46</sup> See, e.g., *PennEast Pipeline Project Final Environmental Impact Statement*, Docket No. CP15-558-000, FEDERAL ENERGY REGULATORY COMMISSION 3-2 (Apr. 2017) (including in FERC's evaluation criteria for selecting alternatives that each alternative must be "technically and economically feasible, reasonable, and practical").

<sup>47</sup> See *Slater*, 198 F.3d at 867 (an agency need only consider alternatives that "bring about the ends of the federal action.") (citing *Citizens Against Burlington, Inc.*, 938 F.2d at 195 (D.C. Cir. 1991)).

inappropriately into an information-generating statute.<sup>48</sup> INGAA supports CEQ's proposed revisions to reaffirm the purpose of NEPA and provide guidance to agencies on the appropriate use of existing available information.

1. Agencies Should Avail Themselves of Existing Information That Is Probative of Significance

CEQ's proposed revisions are intended to revise the NEPA regulations "to facilitate more efficient, effective, and timely NEPA reviews by federal agencies."<sup>49</sup> In support of these goals, the revised regulations instruct federal agencies to "make use of reliable existing data and resources"<sup>50</sup> in order to inform an agency's determination whether additional information is needed.

INGAA supports an agency's reliance on and review of the analyses and determinations of other federal or state agencies, where available and appropriate. Reliance on other agency determinations does not modify an agency's obligation to make its own determination of significance.<sup>51</sup> Rather, it reduces duplicative analysis across agencies and recognizes that certain agencies undertake analyses of effects included in NEPA reviews. The use of existing credible analyses will inform agency decision-making and promote efficiency. However, INGAA recommends that CEQ clarify that federal agencies should not delay the completion of their NEPA analysis to wait for another agency to complete analyses that, if they were timely available, would be informative.<sup>52</sup>

In analyzing effects in NEPA reviews, federal agencies should be allowed to rely on comprehensive federal regulatory regimes designed to address impacts to the human environment. Specifically, INGAA encourages CEQ to create a presumption that such regulatory regimes are sufficient to ensure that impacts do not rise to significance for NEPA purposes, unless the rule of reason dictates otherwise. For example, the Clean Air Act ("CAA") is the comprehensive federal law that regulates the emission of air pollutants to protect public health and the public welfare.<sup>53</sup> It assigns to EPA the authority and obligation to protect air quality through ambient air quality standards designed primarily to protect the public health and secondarily to protect the public welfare.<sup>54</sup> Combined with direct regulation of air emissions from stationary and regulated sources, the achievement and maintenance of these standards are intended to limit the adverse impacts of air quality on public health and the environment. The technical analyses that support EPA's setting of these standards, evaluation of state plans to achieve and maintain these standards, and development of a framework necessary to evaluate the impacts of air pollution sources on these standards are thorough, comprehensive, and probative of the level of impact that a source may have on air quality. Thus, the analyses and determinations under the CAA of the impact of a project are sufficient to inform the NEPA assessment of significance on air quality, and obviates the need for FERC or any other federal agency to conduct additional modeling not required by the CAA. In applying

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<sup>48</sup> See 40 C.F.R. § 1500.1(c) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."); Proposed Rule, 85 Fed. Reg. at 1712 (Proposed § 1500.1(a)) ("NEPA's purpose is not to generate paperwork or litigation, but to provide for informed decision making and foster excellent action.").

<sup>49</sup> Proposed Rule, 85 Fed. Reg. at 1691.

<sup>50</sup> *Id.* at 1721 (Proposed § 1502.24).

<sup>51</sup> See *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1118 (D.C. Cir. 1971).

<sup>52</sup> Furthermore, INGAA recommends that CEQ clarify that other federal agencies should timely participate in the FERC process to ensure that the analysis includes all of the required all statutory analyses (e.g., Corps needs to review and offer input regarding alternatives).

<sup>53</sup> 42 U.S.C. § 7401 *et seq.*

<sup>54</sup> See 42 U.S.C. § 7409(b).

this presumption of sufficiency, an agency such as FERC would retain its ultimate responsibility to apply the rule of reason to ensure that such reliance is merited in a particular instance.<sup>55</sup>

2. Information Gaps Should Be Addressed Where Doing So Is Not Unreasonable and If the Information Would Be Meaningful to the Agency's Decision

In fulfilling an agency's obligation to consider the impacts of its decision, CEQ has long recognized the possibility that there may be incomplete or unavailable information for the agency to consider.<sup>56</sup> Where the information relates to a "reasonably foreseeable adverse impact" that is "essential" to the agency's reasoned choice among alternatives, CEQ's proposal would shift the standard for obtaining such information from where the costs to obtain are not "not exorbitant" to where the cost to obtain are "not unreasonable."<sup>57</sup>

INGAA supports changing the existing standard. NEPA does not require time consuming and expensive analysis searching for data that, in the end, does not meaningfully affect the outcome. When assessing whether it is "unreasonable" to obtain additional information, the lead federal agency should balance the utility of the missing information to the federal decision against any hurdles to obtaining the information, by considering the following factors:<sup>58</sup>

- The availability of reliable (albeit incomplete) information that is probative of the effects of the agency's decision;
- The difficulty in obtaining more information;
- The available resources to secure more information;
- The increased financial cost of obtaining the information; and
- The delays and other impacts to achieving the purpose and benefits of the proposed action.

For example, to the extent that information based on field surveys is not available, CEQ should encourage agencies to rely on and accept desktop evaluations, data gathered via remote sensing, and reliable databases. While it is almost always possible to gather more field data concerning any subject, such as habitat, vegetation, or geology, by ordering, for example, another study of seasonal habitat use, the lead federal agency should critically assess whether existing information about the resource or similar resources is probative of the potential for significant impacts and, even if not, whether it would be unreasonable to seek additional field data in light of the factors noted above.

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<sup>55</sup> For example, for matters relating to pipeline safety, FERC routinely relies on the requirements administered by the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration. *See, e.g., Northeast Supply Enhancement Project Final Environmental Impact Statement*, Docket No. CP17-101-000, FEDERAL ENERGY REGULATORY COMMISSION ES-3 (Jan. 2019) ("FERC's regulations require that an applicant certify that it would design, install, inspect, test, construct, operate, replace, and maintain the facility for which a Certificate of Public Convenience and Necessity is requested in accordance with DOT's federal safety standards and plans for maintenance and inspection. FERC accepts this certification and does not impose additional safety standards.").

<sup>56</sup> *See* 40 C.F.R. § 1502.22.

<sup>57</sup> Proposed Rule, 85 Fed. Reg. at 1721 (Proposed § 1502.22(b)).

<sup>58</sup> CEQ has requested comment on whether "overall costs" warrants further definition to address whether costs are or are not unreasonable. *Id.* at 1703.

Focusing critically on meaningful information, while considering existing information and the different types of costs to develop new information, is in keeping with NEPA's purpose to aid decision-making pursuant to the action statute. Codifying these precepts in the Final Rule will help ensure NEPA does not continue to evolve into an information-gathering exercise with ever diminishing utility for decision-makers.

#### **D. Agencies Should Rely Upon Reliable Data Sources**

NEPA provides a framework for agencies to make informed decisions, based on the consideration of the impacts of their decisions. For this analysis to be meaningful, it must be made on data and information that are reliable.

INGAA supports CEQ's revisions that require agencies to base their decisions upon "reliable" data sources.<sup>59</sup> Recent advances in remote sensing, digital imagery interpretation, and geographical information systems make it increasingly possible for applicants to develop detailed information that can provide a reliable basis for the agency to make informed decisions. Explicit reference in the regulations that "remotely gathered information" using widely accepted technical protocols can be considered reliable data will encourage and direct agencies to rely on and accept this information in order to move their environmental review along when other sources of information are not reasonably available. Reliance on data that are not reliable has the potential to introduce significant uncertainty into the agency's consideration of impacts.

INGAA recommends that CEQ provide guidance to federal agencies on what it means to be a "reliable data source." The attributes that CEQ could consider include the completeness and accuracy of the data, whether the data collection or analysis followed widely accepted technical protocols, and the purpose and policy judgments that underlie data. CEQ should also provide clarification that, as with any analysis considered by a federal agency, NEPA requires that agencies must independently consider the value of the information.<sup>60</sup>

#### **E. The Scope of the NEPA Review Should Be Tailored to the Federal Agency's Involvement in the Project**

INGAA recommends that CEQ clarify that the scope of the NEPA review should be tailored to the federal agency's involvement in the project. Where the federal agency's role in approving the project is narrow and where NEPA is triggered, the NEPA analysis should be appropriately limited to analyzing impacts accordingly. This would be consistent with the existing practice of the U.S. Army Corps of Engineers, which provides that the NEPA scope be established to "address the impacts of the specific activity requiring a Department of the Army permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant federal review."<sup>61</sup> Courts have upheld this approach.<sup>62</sup> By codifying this principle in its NEPA regulations, CEQ will clarify federal agency obligations and promote more efficient and effective NEPA reviews of private projects requiring limited federal approval or authorization.

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<sup>59</sup> Proposed Rule, 85 Fed. Reg. at 1721 (Proposed § 1502.24).

<sup>60</sup> See *Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1118 (interpreting the statutory language of NEPA to require Federal agencies to make their own independent consideration of the significance).

<sup>61</sup> See 33 C.F.R. § 325 App. B(7)(b)(1).

<sup>62</sup> See, e.g., *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 50 (D.C. Cir. 2015) (upholding U.S. Army Corps of Engineers approach limiting NEPA analysis to portions of a pipeline requiring Clean Water Act verifications, easements, or Endangered Species Act authorization).

Where the entirety of a project requires federal agency approval or authorization, such as NGA certification for interstate natural gas pipelines, such projects will remain subject to NEPA review for the complete project. Even then, the scope of the NEPA review would be tailored according to the applicant's purpose and the authority of the specific federal agency over the project as a whole.

### **III. Ensuring Coordinated, Streamlined NEPA Review Among Multiple Agencies Is Essential to the Timely Development of Infrastructure Required to Meet the Public Need for Natural Gas.**

#### **A. Codifying *One Federal Decision* Principles Will Facilitate Coordination Among Agencies and Support More Efficient and Predictable NEPA Reviews**

INGAA supports CEQ's effort to codify aspects of the "One Federal Decision" framework set forth in Executive Order 13807 and the March 20, 2018 interagency Memorandum of Understanding.<sup>63</sup> Specifically, INGAA supports CEQ's revisions to the NEPA regulations that clarify that, on behalf of all participating federal agencies, the lead federal agency shall identify the purpose and need, set permitting timetables, and establish milestones for a proposal. These revisions will facilitate greater coordination among agencies and aid more efficient and predictable NEPA reviews. FERC's leadership when conducting NEPA reviews for interstate natural gas pipeline permitting is generally effective, but the codification of One Federal Decision concepts would provide additional support for FERC to take a stronger role as lead agency, particularly when faced with delays and inaction by other agencies.

INGAA supports CEQ's proposed revision to strengthen FERC's leadership by providing a regulatory basis for FERC, and other lead federal agencies, to develop a joint schedule and corresponding milestones for NEPA reviews.<sup>64</sup> INGAA also supports revisions to the NEPA regulations that place obligations on cooperating agencies to meet FERC's environmental review schedule, consult with FERC, and identify any issues that may impact FERC's ability to meet the joint schedule.<sup>65</sup> In addition to facilitating more efficient and coordinated NEPA reviews, these revisions will also support more transparent and predictable timetables for completing reviews. Permitting predictability is particularly important for capital-intensive projects such as interstate natural gas pipelines. The revisions provided in CEQ's proposal would complement other actions that have been taken to provide transparency, such as the permitting dashboard and quarterly updates provided for in the Fixing America's Surface Transportation Act.<sup>66</sup> With these goals, CEQ sets an expectation for agency coordination and agency action against which agency action will be assessed.

INGAA supports the Proposed Rule's preference for issuing a single Record of Decision ("ROD") and NEPA document when a proposed project triggers actions by multiple federal agencies, but INGAA recommends that CEQ further clarify that agencies are only required to do so if it would be practicable and comparatively more efficient.<sup>67</sup> CEQ's proposed revisions would provide for agency flexibility where the issuance of a single ROD or NEPA document would be "impracticable."<sup>68</sup> This language recognizes that in certain situations, it may not be practicable to issue a single ROD for the

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<sup>63</sup> See Exec. Order. No. 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, 82 Fed. Reg. 40,463 (Aug. 24, 2017); Memorandum for Heads of Federal Departments and Agencies from Mick Mulvaney, Director, Office of Management and Budget and Mary Neumayr, Chief of Staff, Council on Environmental Quality, M-18-13 (Mar. 20, 2018).

<sup>64</sup> See Proposed Rule, 85 Fed. Reg. at 1716 (Proposed § 1501.7(i)).

<sup>65</sup> See *id.* (Proposed § 1501.8(b)(6)).

<sup>66</sup> 42 U.S.C. § 4370m.

<sup>67</sup> See Proposed Rule, 85 Fed. Reg. at 1716 (Proposed § 1501.7(g)).

<sup>68</sup> *Id.*

remaining federal agency authorizations. Accordingly, INGAA suggests that CEQ revise proposed § 1501.7 to require agencies to prepare a single ROD or NEPA document only to the extent the lead federal agency determines that it would be practicable or comparatively more efficient. CEQ has previously recognized that FERC issues licensing orders as a separate record of decision and that this practice is consistent with the One Federal Decision policy.<sup>69</sup> CEQ should clarify that this practice, and similar circumstances that may arise at other agencies, is also consistent with the Final Rule. This revision would reasonably achieve CEQ's goals of improving interagency coordination and improving the efficiency of the NEPA process.

In addition, INGAA recommends that CEQ clarify the designation of the "senior agency official." INGAA supports the Proposed Rule's requirement for agencies to identify an accountable agency representative to guide scheduling and to resolve potential delays associated with the purpose and need statement, alternatives, or other issues in developing the EA or EIS.<sup>70</sup> CEQ's proposed definition of "senior agency official" specifies that the official must be "of assistant secretary rank or higher, or equivalent . . . ."<sup>71</sup> INGAA recommends that the Final Rule provide agencies that lack an "assistant secretary" position, such as FERC and other independent agencies, with express authority to delegate the responsibilities of the "senior agency official" to the appropriate staff. This clarification will reduce the potential logistical challenges faced by FERC and other agencies in implementing the Final Rule.

#### **B. The Proposed Rule Codifies Principles of Judicial Review That Will Support Clear Requirements for Public Participation and Facilitate Informed and Efficient Agency Decision-Making**

INGAA supports CEQ's proposal that any comments or objections that are not raised in the administrative record during the public comment period shall be forfeited<sup>72</sup> and, as such, shall be precluded from judicial review. This principle is consistent with judicial precedent and can reduce the number of challenges based on issues that the agency has not had an opportunity to consider during its decision-making process.<sup>73</sup> These revisions would supplement an agency's governing statutes, which may include provisions that require parties to exhaust administrative remedies as a predicate to judicial review. For example, the NGA precludes judicial review of objections to FERC certificate orders for interstate natural gas pipelines unless the issue was raised in a petition for rehearing before FERC or there was a reasonable ground for failure to do so.<sup>74</sup> The Final Rule should clarify that CEQ's regulations do not modify the obligations and rights of judicial review otherwise prescribed by an agency's governing statutes.

INGAA also supports the Proposed Rule's requirement that objections submitted by public commenters regarding the submitted alternatives, information, and analyses section of an EIS must be

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<sup>69</sup> See Letter from Ms. Mary B. Neumayr, Chairman, CEQ, to Hon. Neil Chatterjee, FERC (Aug. 22, 2019).

<sup>70</sup> See, e.g., Proposed Rule, 85 Fed. Reg. at 1716 (Proposed § 1501.8(b)(6)).

<sup>71</sup> *Id.* at 1730 (Proposed § 1508.1(dd)).

<sup>72</sup> See *id.* at 1713 (Proposed § 1500.3(b)(3)).

<sup>73</sup> See, e.g., *Pub. Citizen*, 541 U.S. at 764 ("Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration.") (citing *Vt. Yankee*, 435 U.S. at 553).

<sup>74</sup> See 15 U.S.C. § 717r(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.").

submitted within 30 days of the notice of availability for the final EIS.<sup>75</sup> This requirement would provide the public a reasonable period of time to comment on the agency's final EIS. It would also ensure that public comments have been submitted to the decision-making agency by the time the agency may first issue its decision on the proposed action.<sup>76</sup> This will support informed and efficient agency decision-making.

INGAA supports the Proposed Rule's provision specifying that judicial review of an agency's NEPA compliance should not occur until an agency has taken final agency action.<sup>77</sup> This is consistent with longstanding principles of administrative law and will help prevent premature challenges to NEPA review.<sup>78</sup> CEQ's discussion in the preamble to the Proposed Rule suggests that agencies may designate a final EIS, a FONSI, or a categorical exclusion determination as a final agency action.<sup>79</sup> Whether an action is "final agency action" pursuant to the Administrative Procedure Act is a question that is necessarily informed by the agency's statutory authority and administrative decision-making processes. For example, final EISs issued by FERC in relation to interstate natural gas pipeline certifications do not constitute final agency action because they are recommendations by FERC's staff to the FERC Commission. Because it is the FERC Commission that decides whether to issue the final decision in these proceedings—i.e., the order issuing the certificate for the pipeline—the FEIS is not the "consummation" of the agency's decision-making process.<sup>80</sup> Furthermore, encouraging agencies to inappropriately label a NEPA document as final agency action would invite inconsistent timelines for the judicial review of those NEPA documents where the underlying proposal involves multiple agencies. For these reasons, the Final Rule should clarify that NEPA does not provide additional authority to agencies to designate or modify what constitutes final agency action by an agency.

INGAA is concerned with a portion of Proposed § 1500.3(c) relating to administrative stay procedures. Specifically, allowing parties to seek administrative stays of final agency decisions that have been lodged in court for judicial review invites confusion about the authorities and procedures governing the review of FERC's action on a certificate application under the Natural Gas Act.<sup>81</sup> We recommend revising and clarifying the proposed language to avoid the inference that NEPA creates additional rights to request review or stay other than those already governing the agency's action.

INGAA recommends that CEQ clarify that agencies retain discretion in determining whether to prepare a supplemental EIS ("SEIS"). The proposed revisions would provide that agencies are required to

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<sup>75</sup> See Proposed Rule, 85 Fed. Reg. at 1713 (Proposed § 1500.3(b)(3)).

<sup>76</sup> See 40 C.F.R. § 1506.10(b) (providing "[n]o decision on the proposed action shall be made or recorded [in cases requiring EISs] by a Federal agency until" 30 days after the EPA publishes the notice of availability). CEQ has proposed clarifying revisions to this provision in § 1506.11(b) of the Proposed Rule. See Proposed Rule, 85 Fed. Reg. at 1726.

<sup>77</sup> See Proposed Rule, 85 Fed. Reg. at 1684, 1713 (Proposed § 1500.3(c)).

<sup>78</sup> See *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

<sup>79</sup> See Proposed Rule, 85 Fed. Reg. at 1693-94.

<sup>80</sup> See *Bennett*, 520 U.S. at 177-78.

<sup>81</sup> For example, courts have held that FERC's power to correct an order remains with FERC only until the record on appeal has been filed with a court of appeals. See *Tenn. Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1108 (D.C. Cir. 1989) (the "power to correct an order remains with the Commission until such time as the record on appeal has been filed with a court of appeals or the time for filing a petition for judicial review has expired.") (citing *Pan Am. Petroleum Corp. v. FPC*, 322 F.2d 999, 1004 (D.C. Cir. 1963)) (internal quotations marks omitted). The NGA already addresses FERC's authority to grant stays of FERC orders during the administrative rehearing process. See 15 U.S.C. 717r(c) ("The filing of an application for rehearing . . . shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order.").

prepare SEISs only if a major federal action remains to occur and certain other requirements are met.<sup>82</sup> The proposal includes four provisions relating to SEISs, some which are permissive and some of which impose requirements on the agency.<sup>83</sup> In addition to the particular scenarios and requirements included in the proposal, SEISs provide a valuable tool that can facilitate efficient agency response. An agency may determine that timing and resource considerations support the issuance of a SEIS. For example, agencies may prepare SEISs to address concerns raised by a court. Accordingly, CEQ should clarify that the decision to prepare an SEIS remains within the discretion of the agency.

### **C. The Regulations Should Clarify the Types of Private Activities That Can Proceed Before the NEPA Analysis Is Final**

CEQ's regulations have long recognized that certain activities related to a proposal may proceed before the NEPA analysis is final.<sup>84</sup> However, over time, the lack of specificity in CEQ's NEPA regulations has caused agencies and courts to take widely different approaches to the type and scope of activities that may proceed.

To begin, INGAA encourages CEQ to clearly state that physical investigative work necessary to support applications for federal permits and authorizations can proceed. In addition, INGAA supports CEQ's efforts to clarify the type and scope of other activities that may proceed during the NEPA review process.<sup>85</sup> Allowing other activities to proceed as the NEPA analysis unfolds aligns with NEPA's "action-forcing" procedures.<sup>86</sup> Specifically, INGAA suggests that CEQ include in the Final Rule two considerations to guide agencies in identifying actions that may proceed during the NEPA process. First, are the activities authorized under the requisite authority? This consideration would not implicate NEPA, which does not provide any substantive environmental obligations or authorities. Second, would the activities have insignificant environmental impacts? This consideration would ensure that agencies comply with NEPA's central requirement to consider "significant" environmental impacts.

In order to provide the needed clarity to federal agencies on the full range of activities that can proceed before the NEPA analysis is final, INGAA encourages CEQ to revise the language of proposed 40 C.F.R. § 1506.1(b) as follows:

If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to ensure that the objectives and procedures of NEPA are achieved. This section does not preclude ~~development by applicants of plans or designs or applicants from, for example, performing performance of other~~ activities necessary to support an application for Federal, State, Tribal, or local permits or assistance; development by applicants of plans or designs to support the project that is subject to Federal authorization; the purchase of long lead-time equipment or purchase options by applicants; or the ~~An agency considering a proposed action for Federal funding may authorize such activities, including, but not limited to,~~ acquisition of interests in land (e.g., fee simple, rights-of-way, and conservation easements) from non-

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<sup>82</sup> See Proposed Rule, 85 Fed. Reg. at 1719 (Proposed § 1502.9(d)).

<sup>83</sup> *Id.*

<sup>84</sup> 40 C.F.R. § 1506.1.

<sup>85</sup> See Proposed Rule, 85 Fed. Reg. at 1724; *id.* at 1719 (Proposed § 1506.1(b)).

<sup>86</sup> *Robertson*, 490 U.S. at 350 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976)).



Federal entities, purchase of long lead time equipment, and purchase options made by applicants.

#### **D. The Regulations Should Retain Flexibility for Applicant-Supported Mitigation**

Through NEPA, Congress directed federal agencies to consider the significant impacts of their actions.<sup>87</sup> The mitigation of environmental impacts is an effective tool for avoiding, minimizing, and compensating for environmental impacts in support of the goals of NEPA.

The value of mitigation must be balanced against the procedural nature of NEPA.<sup>88</sup> As the Supreme Court has recognized, the consideration of mitigation measures supports NEPA, whereas substantive obligations to develop and implement mitigation measures are inconsistent with NEPA's procedural mechanisms.<sup>89</sup> Thus, the requirement that federal agencies include mitigation measures (not included in the proposed action) in the alternatives considered in an EIS supports the procedural action-forcing nature of NEPA; whereas, NEPA does not confer substantive authority to implement mitigation measures any more than it authorizes or requires an agency to adopt an alternative to the proposed action.<sup>90</sup>

Mitigation measures are an important part of the NEPA process, and project applicants should retain flexibility in their ability to use such measures. Consistent with Supreme Court precedent,<sup>91</sup> a federal agency cannot require substantive mitigation obligations under NEPA, but applicant-supported mitigation measures should be widely accepted. INGAA encourages CEQ to adopt final regulations that encourage greater flexibility in the use of applicant-supported mitigation.

Specifically, INGAA agrees that, where the agency action is at the behest of the applicant, the agency should not be able to impose mitigation measures absent requisite legal authority. However, CEQ should clarify that applicants may continue to propose and commit to mitigation measures that do not originate in federal authority. Such commitments may be documented in the NEPA record and in such agreements or federal, state, or local authorizations as the applicant may obtain concerning the mitigation measures. CEQ's proposed requirement to document mitigation supporting a Finding of No Significant Impact should be revised accordingly.<sup>92</sup>

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<sup>87</sup> See 42 U.S.C. § 4332(2)(C); see also *Metro. Edison Co.*, 460 U.S. at 773 (“Thus, although NEPA states its goals in sweeping terms of human health and welfare, these goals are ends that Congress has chosen to pursue by means of protecting the physical environment.”).

<sup>88</sup> See *Vt. Yankee*, 435 U.S. at 558 (“NEPA does set forth significant substantive goals for the Nation, . . . its mandate to the agencies is essentially procedural.”).

<sup>89</sup> See *Robertson*, 490 U.S. at 351-52 (“There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other.”).

<sup>90</sup> See *id.* at 352 (“because NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain assurances that third parties will implement particular measures”). See also 40 C.F.R. § 1502.14(f) (“Include appropriate mitigation measures not already included in the proposed action or alternatives.”).

<sup>91</sup> See *Robertson*, 490 U.S. at 351-52.

<sup>92</sup> See Proposed Rule, 85 Fed. Reg. at 1719 (Proposed § 1506.1(c)) (“The finding of no significant impact shall state the means of an authority for any mitigation that they agency has adopted, and any applicable monitoring or enforcement provisions. If the agency finds no significant impacts based on mitigation, the

**E. Reasonable Page and Time Limits Will Focus Agencies on Identifying and Analyzing Information That is Meaningful to Agency Decision-Making.**

INGAA supports the presumptive page and time limits proposed by CEQ.<sup>93</sup> Setting clear and reasonable limits for EIS and EA documents will focus agencies on identifying and analyzing information that is meaningful to agency decision-makers and the public. Presumptive time limits will also encourage agencies to prepare NEPA documents in a timely manner and will facilitate more efficient permitting and approval of non-federal proposals, such as the certification of interstate natural gas pipelines. CEQ has appropriately proposed to allow agencies the flexibility to determine that a longer page or time limit is necessary to meet the agency's obligations under NEPA.<sup>94</sup> Where a federal agency action is at the behest of a non-federal project proponent, the Final Rule should provide the agency discretion to approve a longer page or time limit if requested by the non-federal project proponent.

CEQ's proposed revisions will enable agencies to reduce the amount time it takes to prepare NEPA documents. The average preparation time of EISs completed in 2018 was approximately 4.9 years.<sup>95</sup> CEQ's proposed presumptive time limit of two years will encourage agencies to meet this goal by focusing on information that is most meaningful to the decision before the agency. Section 1501.9(d) in CEQ's proposal will guide agencies in timely publishing their notice of intent by requiring a determination as soon as practicable, thereby beginning the presumptive two-year period.<sup>96</sup>

INGAA encourages CEQ to provide additional guidance in support of meeting these limits by directing agencies to focus on the most significant issues. In other words, an agency need not conduct an equally comprehensive analysis across all issues. Appropriately weighing the impacts associated with an action will support agency efforts to develop an analysis that is probative of significant issues while meeting the reasonable time and page limits proposed by CEQ.

INGAA supports retaining the authority of lead agencies to set time limits shorter than the presumptive limits proposed by CEQ.<sup>97</sup> Where the agency exercises this authority, INGAA suggests that the agency-specific time limit should reflect the advantages gained by agency-specific processes and how to implement those processes. For example, a time limit prescribed by FERC should be measured from the beginning of FERC's pre-filing processes. The Final Rule should also recognize that conforming changes in certain agency NEPA regulations, such as FERC's regulations codified in 18 C.F.R. Part 380,

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mitigated finding of no significant impact shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts.”).

<sup>93</sup> See *id.* at 1717 (Proposed § 1501.10) (prescribing presumptive time limits of one year for EAs and two years for EISs); *id.* at 1715 (Proposed § 1501.5(e) (prescribing a presumptive page limit of 75 pages for EAs); *id.* at 1719 (Proposed § 1502.7) (prescribing a presumptive page limit of 300 pages for EISs).

<sup>94</sup> The Proposed Rule provides the authority to approve longer time and page limits to the designated “senior agency official.” As discussed in Section III(A), INGAA recommends that the Final Rule provide agencies that lack an “assistant secretary” position, such as FERC and other independent agencies, with express authority to delegate the responsibilities of the “senior agency official” to the appropriate staff. See *supra* Section III(A).

<sup>95</sup> See NATIONAL ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS, 2018 ANNUAL NEPA REPORT 9-10 (Nov. 2019).

<sup>96</sup> See Proposed Rule, 85 Fed. Reg. at 1716 (Proposed § 1501.9) (“As soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment and requires an [EIS], the lead agency shall publish a notice of intent to prepare an [EIS].”).

<sup>97</sup> See *id.* (Proposed § 1501.10(a)).

may be necessary. CEQ should direct agencies to incorporate into their agency-specific regulations and processes the changes in CEQ's Final Rule within a reasonable period of time.

In addition to supporting more effective and timely reviews, the proposed revisions would increase timeline transparency and provide non-federal project proponents with greater project certainty. Specifically, INGAA supports the authority granted to the senior agency official to set time limits for each constituent part of the NEPA process.<sup>98</sup> INGAA recommends that CEQ further facilitate project certainty by requiring agencies to provide non-federal project proponents with (i) notice of an agency's decision to approve a longer time period within a set number of days of the agency's approval of the longer time period and (ii) a reasonable opportunity to cure any alleged defects attributed to the project proponent that the agency believes supports the approval of a longer time period. By requiring this additional level of agency communication, the non-federal project proponent may be able to either mitigate the potential delay or adjust its planning accordingly.

#### **F. Applicant-Prepared NEPA Documents Can Facilitate Accelerated Agency Review**

INGAA supports CEQ's proposed revisions to provide greater flexibility for applicants and other non-federal project proponents to participate in the preparation of NEPA documents.<sup>99</sup> INGAA members regularly participate in the preparation of NEPA documents in support of FERC's certification of interstate natural gas transportation projects either by submitting applicant-prepared EAs or by paying for third-party contractors to assist FERC in developing EAs or EISs.<sup>100</sup> The involvement of applicants in the preparation of NEPA documents can facilitate accelerated agency review and may mitigate delays caused by agency resource constraints. CEQ's proposed revisions appropriately recognize that agencies should remain responsible for the scope and content of the ultimate NEPA document. INGAA supports CEQ's proposed revisions to § 1506.5(c) to expressly allow a contractor or applicant to prepare an EIS and recommends that similar language be used in Proposed § 1506.5(b) to provide the same opportunity for the preparation of EAs. Although the language in Proposed § 1506.5(b) suggests an applicant may prepare an EA with agency approval, CEQ should modify this language to provide additional clarity and create greater consistency within § 1506.5.<sup>101</sup>

#### **G. Including the Costs of Preparing an EIS Will Support Transparency**

INGAA supports CEQ's proposal to require agencies to include the estimated total cost of preparing an EIS on the cover of each EIS.<sup>102</sup> This revision will support transparency regarding costs and will facilitate drawing comparisons across agencies and types of actions. If costs are more transparent, agencies may be encouraged to review costs associated with EISs and to focus resources on impacts that

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<sup>98</sup> See *id.* at 1717 (Proposed § 1501.10(d)).

<sup>99</sup> See Proposed Rule, 85 Fed. Reg. at 1725 (Proposed § 1506.5).

<sup>100</sup> See generally FEDERAL ENERGY REGULATORY COMMISSION, GUIDANCE MANUAL FOR ENVIRONMENTAL REPORT PREPARATION FOR APPLICATIONS FILED UNDER THE NATURAL GAS ACT 5-1 (Feb. 2017) ("Applicant-Prepared Draft Environmental Assessments for Natural Gas Act Applications"); *id.* at 6-1 ("Providing a Third-Party Contractor to Assist FERC in Developing Environmental Documents for Natural Gas Act Applications").

<sup>101</sup> Section 1506.5(b) of the Proposed Rule suggests that an agency may permit an applicant to prepare an EA, but does not expressly provide applicants with the right to do so. See Proposed Rule, 85 Fed. Reg. at 1684, 1725 (Proposed § 1506.5(b)) ("If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.") (emphasis added).

<sup>102</sup> See *id.* at 1720 (Proposed § 1502.11(g)).

are most informative to the agency's decision-making process. To the extent that an agency estimates costs based on the cost of compliance with other environmental review and authorization requirements, INGAA agrees that agencies should clearly indicate where such estimates were used. Where practicable, however, agencies should distinguish between costs associated with NEPA compliance and costs associated with compliance with other environmental requirements.<sup>103</sup>

#### IV. Conclusion

INGAA appreciates the opportunity to comment on the Proposed Rule. If you have any questions or need more information, please do not hesitate to contact Sandra Snyder at 202-216-5955.

Sincerely,



Sandra Y. Snyder  
Vice President, Environment



Joan Dreskin  
Senior Vice President & General Counsel

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<sup>103</sup> CEQ discusses estimates of agency costs associated with other environmental requirements in the preamble of the notice of proposed rulemaking. *See id.* at 1701. INGAA recommends revising Proposed § 1502.11(g) to include these principles.