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March 27, 2025

Katherine R. Scarlett
Acting Chair
Council on Environmental Quality
730 Jackson Place, NW
Washington, D.C. 20503

Re: The American Exploration & Production Council's Comments on the Interim Final Rule Removing the Council for Environmental Quality's Regulations Implementing the National Environmental Policy Act (CEQ-2025-0002/90 Fed. Reg. 10,610 (Feb. 25, 2025))

Dear Acting Chair Scarlett:

The American Exploration & Production Council ("AXPC") appreciates the opportunity to comment on the Council on Environmental Quality's ("CEQ's") February 25, 2025 Interim Final Rule ("IFR") removing CEQ's regulations implementing the National Environmental Policy Act ("NEPA").[1]

I. AXPC'S INTERESTS

AXPC is a national trade association representing America's leading and most active independent natural gas and crude oil exploration and production companies. AXPC companies are among the cleanest and safest onshore producers of oil and natural gas in the world, while supporting millions of Americans in good-paying jobs and investing a wealth of resources in our communities. Dedicated to safety, science, and technological advancement, our members strive to deliver affordable, reliable energy while positively impacting the economy and the communities in which we live and operate. As part of this mission, AXPC members understand the importance of ensuring positive environmental and public welfare outcomes and responsible stewardship of the nation's natural resources.

AXPC works collaboratively with regulators and policymakers to help them understand our operations so that they will be able to create sound, fact-based public policies that result in the safe and responsible exploration and production of America's vast oil and natural gas resources. Our goal is to provide technical and regulatory knowledge, making AXPC a rich repository of resources on the industry and the science behind our operations.

AXPC's members are uniquely positioned to provide comments on how the unwarranted

[1] 90 Fed. Reg. 10,610.

expansion of NEPA review processes and governing regulations affect the development of projects that are vital to the American economy and national security. For example, as businesses with projects that are frequently the subject of NEPA reviews, AXPC's members have extensive experience working with various agencies during the NEPA review process and can provide a perspective that is particularly relevant to project-level NEPA analyses.

In light of our members' frequent hands-on experience with NEPA reviews, AXPC has long supported efforts to improve the efficiency and consistency of the NEPA review process while also reorienting those reviews so that they more clearly focus on achieving NEPA's central goal of improving agency decision-making. Decades of increasingly confusing and ambiguous analytical requirements, inconsistent agency approaches and procedures, and extensive litigation have unfortunately led to excessively lengthy NEPA review documents full of information that has no reasonable bearing on agencies' decision-making processes, and increasingly protracted review periods resulting from agencies compiling and reviewing information largely extraneous to the decisions they had to make. In the 40 years since CEQ promulgated its first regulations implementing NEPA, the average environmental impact statement ("EIS") expanded to 661 pages, with over 1,000 additional pages of appendix materials.[2] And the average time to complete these increasingly voluminous EISs increased to roughly 4.5 years.[3]

This is not what Congress intended when it enacted NEPA. Nor is it consistent with the NEPA reform Congress more recently included in the Fiscal Responsibility Act of 2023 ("FRA")[4] in the hope of reducing agencies' unnecessarily excessive procedures and analyses, and reorienting agencies' implementation of NEPA to the efficient and effective decision-making tool that Congress intended.

AXPC therefore welcomes this administration's recognition of the need to substantially reform the manner in which federal agencies implement NEPA. Indeed, we believe that President Trump's January 20, 2025 Executive Order entitled *Unleashing American Energy* ("EO 14154"),[5] CEQ's February 19, 2025 Memorandum for Federal Departments and Agencies on the Implementation of the National Environmental Policy Act ("February 19 Guidance"), and this IFR are critical to reigning in needlessly complex and protracted NEPA reviews and facilitating the efficient and statutorily-supported permitting and decision-making that are critical to America's domestic energy industry.

II. COMMENTS ON IMPLEMENTATION OF THE IFR

The IFR appropriately recognizes that, irrespective of whether it has statutory authority to issue regulations, CEQ continues to have an important statutorily authorized advisory role within the executive branch, including as a resource for federal agencies in their implementation of NEPA.[6] This enduring authority and obligation to coordinate the federal government's NEPA compliance and to advise agencies is critical to ensuring that the removal of CEQ's NEPA regulations does

[2] Council on Environmental Quality, Length of Environmental Impact Statements (2013-2018) (June 12, 2020).
[3] Council on Environmental Quality, Environmental Impact Statement Timelines (2010-2018) (June 12, 2020).
[4] Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10, 38 (2023).
[5] 90 Fed. Reg. 8,353 (Jan. 29, 2025).
[6] 90 Fed. Reg. at 10,611-12.

not disrupt agencies NEPA reviews nor unduly delay important permitting decisions and other federal actions.

AXPC therefore supports the Administration's decision to require agencies to expeditiously revise or establish NEPA implementing procedures within twelve months of CEQ's issuance of the February 19 Guidance.[7] We also support the manner in which CEQ has instructed agencies to conduct their NEPA practices and procedures until CEQ's rescinded NEPA regulations are replaced by agency-specific implementing procedures.

In particular, AXPC supports allowing agencies to continue following their existing practices and procedures to the extent that they are "consistent with the text of NEPA, E.O. 14154, and [the February 19 Guidance]."[8] We also support allowing agencies to voluntarily continue to rely on rescinded CEQ regulations "in completing ongoing NEPA reviews or defending against challenges to reviews completed while those regulations were in effect."[9]

As a final note with respect to implementation of the IFR, AXPC also supports CEQ's instruction that agencies consider utilizing its final 2020 rule entitled "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act" ("2020 NEPA Regulations"),[10] to guide future NEPA reviews.[11] AXPC supported the 2020 NEPA Regulations because we believed they provided long-overdue regulatory reforms that, if dutifully implemented by agencies, could reorient the NEPA review process back to the Act's core purpose of improving agency decision- making, and away from the litigation-fueled dysfunction and delay that have become the statute's hallmarks. As such, and as further explained below, we believe it is appropriate for agencies to utilize the procedures and guidelines in the 2020 NEPA Regulations to the extent those procedures and guidelines are permitted by law and consistent with EO 14154 and the February 19 Guidance. AXPC believes that doing so can help agencies effectively implement the IFR without undue disruption or delay.

III. AGENCIES' OPPORTUNITY AND OBLIGATION TO IMPLEMENT NEPA CONSISTENT WITH CONGRESSIONAL INTENT

NEPA is a procedural statute[12] that Congress expected would facilitate "fully informed and well-considered" agency decisions;[13] it certainly did not intend the Act's procedural mandates to so encumber agencies with extraneous analytical requirements that it would become effectively

[7] February 19 Guidance at p. 7.
[8] February 19 Guidance at p. 4.
[9] February 19 Guidance at p. 4.
[10] 86 Fed. Reg. 43,304 (July 16, 2020).
[11] February 19 Guidance at p. 4.
[12] *See* 42 U.S.C. § 4332(2)(C) (agency obligation under NEPA is only to prepare detailed statement on "adverse environmental effects which cannot be avoided"); *See also Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976) ("The procedural duty imposed upon agencies by this section is quite precise…"); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978) (NEPA's "mandate to the agencies is essentially procedural); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) ("NEPA… simply guarantees a particular procedure, not a particular result."); and *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 n.34 (1978) ("NEPA essentially imposes a procedural requirement on agencies, requiring them to engage in an extensive inquiry as to the effect of federal actions on the environment.").
[13] *Vt. Yankee*, 435 U.S. 519, 558 (1978).

impossible for agency reviews to culminate in reasonably timely decisions. Indeed, Congress's expectation that NEPA would "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"[14] cannot be reconciled with decades of implementing the Act such that its required reviews are now widely regarded as among the foremost obstacles to developing our nation's most critical infrastructure.

Despite decades of CEQ guidance and related case law acknowledging that NEPA reviews should be guided by the "rule of reason," the NEPA review process has generally remained unnecessarily complex, unreasonably time-consuming, and uncertain. This complexity and delay in turn acts as an impediment to investment in critical infrastructure, including projects immediately needed to facilitate the safe and effective utilization of America's critical domestic energy resources.

This IFR and the NEPA implementing procedures federal agencies must revise or establish in the next twelve months pursuant to EO 14154 and CEQ's February 19 Guidance provide those agencies a unique opportunity to address the uncertainty, inconsistency, and delay that have been the hallmarks of the federal government's implementation of NEPA for decades. In fact, given the inconsistency of many recent agency implementation practices with the statute, many agencies are effectively compelled to begin implementing NEPA consistent with congressional intent.

Furthermore, while CEQ will continue to advise and support federal agencies in their implementation of NEPA, the elimination of CEQ's broad-based regulatory requirements provides each agency an opportunity to more precisely tailor its NEPA practices and procedures to better reflect not only the types of actions the agency typically authorizes or permits, but also the limits of agency's statutory jurisdiction and subject matter expertise. For example, and as relevant to AXPC members, leasing and permitting of upstream oil and natural gas exploration and production on federal land is largely governed by the Federal Land Policy and Management Act ("FLPMA") and the Mineral Leasing Act ("MLA"). These and other statutes prescribe the requirements, procedures, and considerations the Bureau of Land Management ("BLM" or "the Bureau") must adhere to in managing public lands and making decisions about resource development. After decades of implementing these statutes and managing public lands, BLM's expertise is quite deep, but also limited by its jurisdictional reach.

Thus, to the fullest extent permissible under the statute, BLM should be allowed to adopt NEPA implementation practices and procedures that do not require the Bureau to needlessly devote resources analyzing potential indirect impacts that are outside of BLM's jurisdiction and therefore the agency's authority to control.

Likewise, in light of courts' recognition that "the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them,"[15] BLM's implementation practices and procedures should clearly state that the Bureau need not consider alternatives that BLM lacks statutory authority to impose or enforce, or which are inconsistent

[14] 42 U.S.C. § 4331(a) (emphasis added).
[15] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

with the goals of the project sponsor. In the 2023 FRA, Congress confirmed this reasonable delineation of the range of alternatives that agencies must consider in the course of their NEPA reviews by amending NEPA to explicitly direct that "a reasonable range of alternatives to the proposed agency action must be "technically and economically feasible, and meet the purpose and need of the proposal…"[16] As such, BLM and all other agencies should clarify in their individual practices and procedures that they need only consider alternatives that are reasonable and both technically and commercially feasible in light of the project's purpose and the project sponsor's goals.[17]

While agencies should be afforded flexibility to tailor their NEPA implementation practices and procedures to reflect their statutory authority, expertise, and most commonly permitted federal actions, CEQ, through its enduring advisory role, should continue to ensure that agencies adopt practices and procedures that are consistent with NEPA as amended by the FRA. In the following subsections, AXPC identified three key aspects of NEPA that we believe CEQ should expressly instruct agencies to account for in their NEPA implementing practices and procedures.

1. Fully Utilize and Expand Categorical Exclusions, Programmatic Review Options, and Tiering

CEQ should instruct agencies to streamline their environmental reviews by revising their NEPA implementation practices and procedures to fully utilize available categorical exclusions and to establish new categorical exclusions. As a modest first step, agencies should revise their procedures to incorporate the NEPA amendments Congress included in the FRA. These amendments included multiple provisions intended to make it easier for agencies to utilize categorical exclusions for NEPA compliance.

For instance, the 2023 NEPA amendments allow an agency to "adopt a categorical exclusion listed in another agency's NEPA procedures for a category of proposed agency actions for which the categorical exclusion was established…"[18] To avail itself of this flexibility, an agency must "identify the categorical exclusion," "consult with the agency that established the categorical exclusion to ensure that the proposed adoption… is appropriate," "identify to the public the categorical exclusion," and "document adoption of the categorical exclusion."[19]

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[16] 42 U.S.C. § 4332(C)(iii).

[17] *See Protect Our Parks Inc. v. Buttigieg*, 10 F.4th 758, 764 (7th Cir. 2021) (per curiam) ("Put another way, the agencies must take the objectives they are given and consider alternative means of achieving those objectives, not alternative objectives.") (citing *Busey*); *Del. Riverkeeper Network v. U.S. Army Corps. of Eng'rs*, 869 F.3d 148, 157 (3d Cir. 2017) (stating that an alternatives analysis involves looking to "the range of projects that could achieve the same goal as the proposed project"); *Webster v. USDA*, 685 F.3d 411, 422-24 (4th Cir. 2012) (providing that "[i]n deciding on the purposes and needs for a project, it is entirely appropriate for an agency to consider the applicant's needs and goals" and considering whether agency's purposes and needs were consistent with statutory authorization); *Coal. for Advancement of Reg'l Transp. v. Fed. Highway Admin.*, 576 Fed. App'x. 477 (6th Cir. 2014) ("agenc[ies] should take into account 'the needs and goals of the parties involved'" and "an agency should always consider the views of Congress" in developing a purpose and need statement) (quoting *Busey*, 938 F.2d at 196); and *HonoluluTraffic.com v. Federal Transit Admin*., 742 F.3d 1222, 1230 (9th Cir. 2014).

[18] 42 U.S.C. § 4336c.

[19] 42 U.S.C. § 4336c.

In addition to counseling agencies to increasingly utilize other agencies' categorical exclusions, CEQ should also advise agencies to assess whether they routinely authorize additional categories of actions that do not generally result in significant environmental impacts but are not yet covered by a categorical exclusion. To support agencies in these streamlining efforts, CEQ should expand its efforts undertaken during the first Trump Administration to create a centralized and readily searchable database of categorical exclusions that federal agencies and project proponents alike can use to easily identify exclusions that would apply to specific federal actions or which could be adopted from other agencies.

Most importantly, however, CEQ should instruct each federal agency to ensure that its processes and procedures fully utilize currently available categorical exclusions and contain adequate provisions requiring them to transparently explain precisely why the agency declined to utilize a seemingly suitable categorical exclusion for a proposed federal action. This guidance is surprising necessary because, as AXPC members are aware, agencies frequently decline to utilize even those categorical exclusions enacted by Congress.

For instance, in Section 390 of the 2005 Energy Policy Act ("2005 EPA"), Congress categorically excluded five types of oil and natural gas activities from the requirement to develop environmental assessments ("EAs") and environmental impact statements ("EISs") based on Congress' determination that these activities do not individually or cumulatively have a significant effect on the human environment.[20] These five categories of activities included:

> (1) Individual surface disturbances of less than five acres so long as the total surface disturbance on the lease is not greater than 150 acres and site-specific analysis in a document prepared pursuant to NEPA has been previously completed.
>
> (2) Drilling an oil or gas well at a location or well pad site at which drilling has occurred previously within five years prior to the date of spudding the well.
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> (3) Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within five years prior to the date of spudding the well.
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> (4) Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within five years prior to the date of placement of the pipeline.
>
> (5) Maintenance of a minor activity, other than any construction of major renovation or a building or facility.[21]

Notwithstanding that Congress statutorily required these categorical exclusions to be utilized, BLM and other agencies have expansively interpreted a provision of the 2005 EPA that allowed

[20] 2005 EPA at Sec. 390(b).
[21] 2005 EPA at Sec. 390(b).

these exclusions to be rebutted only in "extraordinary circumstances," and as a result, have rarely ever applied these five statutory categorical exclusions. This is plainly not what Congress intended when it enacted Section 390 of the 2005 EPA, and it is entirely consistent with CEQ's enduring advisory role to ensure that agencies utilize categorical exclusions such as this in a manner consistent with congressional intent.

Finally, CEQ should advise agencies to continue to streamline their NEPA processes by continuing to programmatically review all general and/or programmatic permits such as the U.S. Army Corps of Engineers' nationwide permit program. CEQ should also encourage agencies to revise their NEPA implementation practices and procedures to clearly and expressly state that existing and completed NEPA documents can be directly relied upon in reviewing and authorizing future actions as well as by using those existing documents to use used as part of tiering analyses that can often allow agencies to abbreviate their reviews without sacrificing analytical rigor. Effective tiering is critical to timely reviews because it can allow agencies and project proponents to avoid the need to duplicate substantial portions of completed NEPA reviews.

2. Adhere to the Deadline and Page Limits Congress included in the FRA

As with multiple other provisions of the NEPA amendments Congress enacted through the FRA, many agencies have failed to meaningfully adopt practices and procedures to implement and abide by congressionally prescribed deadlines and page limits. To ensure that these recent congressional efforts to streamline NEPA reviews are lawfully implemented and adhered to, CEQ should advise agencies to expressly include these statutory deadlines and page limits in their implementing procedures and practices, and to narrow as much as possible the circumstances under which agencies have previously justified circumvention of these deadlines and page limits.

For instance, Congress, through the FRA, established a one year deadline for any agency's preparation of an EA and a two year deadline for an agency's preparation of an EIS.[22] Nevertheless, agencies frequently exceed these deadlines, often by relying on an FRA provision that allows an agency to consult with an applicant and, based on that consultation, provide "only so much additional time as is necessary to complete" the EIS or EA.[23] While agencies that have extended their reviews using this provision of the FRA presumably did so in consultation with the project proponent, in many cases the project proponents may be effectively compelled to consent to the extensions based on agencies explicit or implicit threats that failures to do so may lead to disapprovals.

CEQ should also encourage agencies to adopt practices and procedures that better allow the agencies to meet the FRA's statutory deadlines. For example, although the FRA directed agencies to establish procedures that allow a project sponsor to prepare "an environmental assessment or an environmental impact statement under the supervision of the agency,"[24] few agencies have taken full advantage of this provision. Thus, CEQ should counsel agencies to

[22] 42 U.S.C. § 4336a(g)(1).
[23] 42 U.S.C. § 4336a(g)(2).
[24] 42 U.S.C. § 4336(a)(f).

ensure not only that that statutory deadlines are met, but that the agencies are utilizing all of the tools Congress provided to facilitate compliance with those deadlines.

Similarly, Congress's NEPA amendments in the FRA set page limits of 75 pages for EAs and 150 pages for EISs but allows up to 300 pages for EISs involving "extraordinary complexity."[25] While Congress's use of the term "extraordinary" strongly implies that Congress intended this exemption to be utilized sparingly, agencies frequently far exceed the statutory page limits by determining that the analyses are of "extraordinary complexity." Thus, we believe CEQ should encourage agencies to develop practices and procedures that specify what constitutes "extraordinary circumstances," and provide guidelines to ensure that those circumstances are genuinely extraordinary and rare.

3. Acknowledge NEPA's Procedural Role and Refrain from Mandating Particular Results

Notwithstanding that NEPA, its legislative history, and five decades of binding Supreme Court case law indisputably demonstrate that the Act "does not mandate particular results, but simply describes the necessary process,"[26] CEQ has previously directed agencies to use their NEPA reviews to mandate particular outcomes. Rather than establishing processes for analyzing the potential environmental impacts of proposed actions, agencies were previously directed to use their NEPA authority to achieve administrative environmental policy objectives. But "Congress in enacting NEPA,… did not require agencies to elevate environmental concerns over other appropriate considerations."[27]

For example, agencies have previously claimed authority under NEPA to require applicants to mitigate impacts of their proposed projects. This was not permissible. NEPA "does not mandate the form or adoption of any mitigation."[28] In fact, the Act "does not mandate particular substantive environmental results; rather, it focuses Government and public attention on the environmental effects of proposed agency action."[29] Thus, the only authority an agency has to require mitigation therefore must be found in the agency's action statute.[30] As the Supreme

[25] 42 U.S.C. § 4336(a)(f).

[26] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350; *See also Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980*); Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004); *Vt. Yankee*, 435 U.S. at 558.

[27] *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

[28] 40 C.F.R. § 1508(s).

[29] *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 68 (D.C. Cir. 2011) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989)); *See also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

[30] *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.").

Court has recognized, "[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed-rather than unwise-agency action."[31]

Given agencies' previous imposition of mitigation mandates in the face of their plain impermissibility, we believe it is important that CEQ counsel each federal agency to revise its NEPA implementation practices and procedures to clearly state that the agency shall not require project proponents to implement mitigation measures. CEQ should further advise agencies that project proponents may still voluntarily propose mitigation measures to reduce the anticipated impacts of their projects, but agencies cannot require mitigation measures as part of their NEPA analyses unless another applicable statute requires mitigation.

IV. CONCLUSION

AXPC appreciates the opportunity to provide these comments on CEQ's IFR. As noted throughout these comments, we support this Administration's efforts to ensure that agencies implement NEPA in accordance with the text of the Act and consistent with the procedural rule Congress intended.

AXPC believes that the IFR represents an important opportunity to reorient agencies' NEPA practices in a manner consistent with the Act's procedural purpose and to promote efficient, fair, transparent, and legally defensible permitting processes. As this Administration understands and appreciates, fully and effectively utilizing America's domestic energy resources requires federal agencies to abandon those NEPA practices and procedures that have fostered delay and uncertainty at the expense of reasoned decision-making.

Thank you again for your consideration of these comments. If you have any questions or would like to discuss these comments, please feel free to contact Wendy Kirchoff at 281-386-7324 or wendy.kirchoff@axpc.org.

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[31] *Methow Valley Citizens Council*, 490 U.S. at 350 (comparing NEPA, which does not impose substantive obligations on an agency, with Section 7 of ESA, which requires agencies to insure that its actions do not jeopardize threatened or endangered species).