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NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
U.S. House of Representatives
Washington, DC 20515

Submitted by e-mail to: nepataskforce@mail.house.gov

Dear NEPA Task Force members:

The Edison Electric Institute (EEI) commends the House Committee on Resources Task Forces on Improving and Updating the National Environmental Policy Act (NEPA) for undertaking a long overdue comprehensive review of NEPA. We appreciate being given the opportunity to comment on the Initial Findings and Draft Recommendations of the Task Forces.

EEI Has a Direct Interest in Proposals to Improve NEPA

EEI is the trade association of United States shareholder-owned electric utility companies, international affiliates, and industry associates worldwide. Our U.S. members serve 71 percent of all electric utility customers in the Nation and generate almost 60 percent of the electricity produced by U.S. generators. In providing these services, EEI members are affected by the implementation of NEPA in many different ways due to the variety of federal or federally-delegated permits that are required for the production, transmission, and distribution of electric energy.

EEI Supports Most of the Task Force Recommendations, But Not All

EEI agrees that the fundamental purposes of NEPA are sound and should be preserved in any reforms. NEPA can, however, be improved in a number of ways based on the nation's 35-year experience in implementing this landmark statute. EEI strongly supports the overall efforts of the Task Forces and most of the recommendations made in the draft report.

In particular, we support the recommendations to expedite and streamline the NEPA process, such as mandatory timelines and page limits on NEPA documents. We believe that such changes would produce more focused, useful, and timely NEPA analyses. The recommendations also would likely reduce the costs associated with NEPA review. In addition, EEI supports the Task Force recommendations to clarify the "reasonable alternative" and "cumulative impact" analyses contained in environmental impact statements (EISs). Further, we support the recommendations regarding lead agency status and the charge to the Council on Environmental Quality (CEQ) to control NEPA-related costs and to require analysis of the environmental impacts of "no action" alternatives. Again, these changes would improve the NEPA analyses.

On the other hand, although EEI appreciates and understands the intent behind the recommendations regarding the weight to be assigned to localized comments, cooperating agency status, and citizen suits, we have serious concerns about how these recommendations would actually work in practice. EEI's views on these matters are more thoroughly discussed in the remainder of these comments.

Clarify the Definition of Major Federal Action (Recommendation 1.1)

EEI supports the Task Force recommendation to amend NEPA to better define what constitutes a "major federal action" that triggers the preparation of an EIS. EEI believes the definition should be based on a two-tiered analysis, with Level 1 not being a major federal action and Level 2 potentially being a major federal action.

NEPA should not apply when an action is predominately private but a federal agency issues a minor permit associated with the project (Level 1). In this type of situation there is no "major federal action" and therefore the predominately private action should not be subject to the EIS requirement. For example, if the Corps of Engineers (Corps) must issue a dredge and fill permit related to an aspect of a large private construction project that is subject to extensive local and state regulation, the issuance of a permit by the Corps should not, by itself, trigger the preparation of an EIS. Another example that should constitute a minor permit not subject to an EIS requirement is an authorization for a right-of-way across federal land where the segment crossing federal land is only a small part of a long transmission line. Still another example would be a project that is located alongside existing facilities with minimal impacts beyond those already present.

By contrast, when the federal government approves a license or permit for an entire project (e.g., a hydro, liquefied natural gas (LNG), or nuclear facility) or constructs or funds a project itself (e.g., a Corps dam or an interstate highway), that activity is predominately federal and thus could be a "major federal action" depending upon the level of environmental impact (Level 2). This determination must be made on a case-by-case basis, as it is under current law.

Set Mandatory Timelines (Recommendation 1.2)

EEI strongly supports the Task Force recommendations calling for mandatory timelines for the completion of NEPA documents. NEPA analyses often simply take too long and are too costly.

CEQ considered establishing strict time limits for EISs when it issued NEPA regulations in 1978. The agency did not adopt such time limits, however, out of concern that it would be "unrealistic" to apply such limits "uniformly across government" due to the variable level of complexity of proposals subject to NEPA.[1] Instead, CEQ merely provided that agencies "are encouraged to set time limits appropriate to individual actions." 40 C.F.R. 1501.8.

Unfortunately, experience over the past 25 years has shown that this approach to time limits does not work and that the establishment of a strict time limit is the only effective measure available to prevent unwarranted delays in the NEPA process. At its worst, the current process imposes such high opportunity costs that investments in new and needed infrastructure are effectively discouraged.

EEI agrees with the Task Force recommendation that, as a general matter, agencies should not need more than 18 months to complete an EIS. In fact, the Task Forces should consider whether a 12-month time limit would be appropriate, as CEQ has suggested in the past. Task Force Report, p. 18. In the Energy Policy Act of 2005 (EPAct), Congress has directed agencies responsible for federal authorizations related to electricity transmission facilities generally to complete the overall decision-making process – including NEPA reviews – within one year of applications being filed. EPAct section 1221(a), adding new Federal Power Act subsection 216(h). Whichever time limit the Task Forces recommend, the limit should cover all aspects of the preparation of an EIS, including any environmental assessment (EA) used to determine that in fact an EIS is required.

A 12- or 18-month deadline, combined with the possibility of a CEQ extension as discussed at the end of this section, should provide more than enough time to complete an EIS for even the most complex proposed action. This length of time should be sufficient to prepare a high quality EIS, with broad public input, that is comprehensive as well as factually and analytically sound. EISs for many major and controversial projects have been completed within such time frames when the agencies preparing the documents have used NEPA best practices. On the other hand, some agencies have not taken such a disciplined approach to completing EISs on a timely basis, in part due to overly cumbersome internal review procedures that generally add little value.

[1] 42 Fed. Reg. 55983 (1978).

EEI also supports the establishment of a mandatory time limit for the completion of an EA. However, we believe that the 9-month time limit for an EA recommended by the Task Forces is too long because the purpose of an EA is simply to determine if there are "significant environmental impacts." Instead, EEI recommends adopting a 6-month general time limit for completing an EA. Again, this time frame for completing an EA should be within the overall time frame for completing an EIS, in cases where an EIS is warranted, and should not lead to a further delay in completion of the EIS.

As to these deadlines, EEI agrees with the Task Forces that it is appropriate to provide CEQ the authority to grant time an extension for completing an EIS or an EA. But the extension authority should be used only in extraordinary cases where the mandatory timelines are not adequate for completing a NEPA document. CEQ should be directed to use this extension authority sparingly in order to prevent a situation from developing where the *de facto* time limit for completing an EIS becomes the extended deadline. In the rare cases where CEQ determines that an extension is warranted, we agree that a maximum extension of 6 months should be allowed for an EIS and 3 months for an EA. Further, CEQ should have the discretion to grant a shorter extension for the EIS or EA.

Create Unambiguous Criteria For the Use of Categorical Exclusions, EAs, and EISs (Recommendation 1.3)

EEI supports the Task Force recommendation that a clear differentiation be made between those circumstances that require an EA or an EIS. In addition, EEI recommends that NEPA be amended to clarify that activities that create temporary disturbances or other actions with minimal impacts should be evaluated as Categorical Exclusions. Further, NEPA should be amended to clarify that an activity qualifies for categorical exclusion if its impacts are already relatively well known and mitigation measures well established. At a minimum, the NEPA analysis for such activities should be extremely streamlined.

Do Not Direct CEQ to Give Greater Weight to Localized Comments than to Other Comments (Recommendation 2.1)

EEI appreciates and understands the motivation that underlies the Task Force recommendation to give greater weight to localized comments, but EEI does not support this recommendation. Unfortunately, giving special weight to localized comments could feed the "Not In My Backyard" (NIMBY) and "Build Absolutely Nothing Anywhere Near Anybody" (BANANA) phenomena sometimes associated with siting critical energy infrastructure such as power plants, electric and gas transmission facilities, and LNG import facilities. These energy facilities are already difficult to site in many areas of the country. Giving even greater weight to localized comments – at the expense of regional and national needs for these facilities – could make siting the facilities even more difficult. Instead, NEPA documents should reflect a completely unbiased assessment of

the facts, with weight only accorded to comments in proportion to the relevance, quality, and reliability of the facts and analysis they provide.

Set EIS Page Limits (Recommendation 2.2)

EEI strongly supports the Task Force recommendation to codify the page limits contained in CEQ regulations: less than 150 pages for an EIS, with a maximum of 300 pages for complex projects. 40 C.F.R. 1502.7. In adopting those regulations, CEQ noted that the "usefulness of the NEPA process to decisionmakers and the public has been jeopardized in recent years by the length and complexity of environmental impact statements."[2] CEQ continued that the "only way to give greater assurance that EISs will be used is to make them usable and that means making them shorter."[3]

Unfortunately, the CEQ page limit regulation has been largely ineffective because it provides that such limits "shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages" (emphasis added). The use of the term "normally" has allowed agencies to sidestep the page limit. As a result, agencies and the private contractors that specialize in preparing NEPA documents have often produced documents that are far too long and unwieldy.

Many EIS drafters seem to be driven by the view that the more detail in an EIS the better. The opposite, however, is usually the case. Excessive length and detail often obscure, rather than illuminate, the analysis of environmental impacts in a NEPA document. This trend needs to be reversed, and probably the only way to do so is through the blunt instrument of an absolute page limit, without the "normally" qualifier.

The strict page limits recommended by the Task Forces should be implemented without the "normally" qualifier to eliminate the loophole and achieve the goal of shorter, better focused, and more readily accessible NEPA documents. In addition, an even shorter page limit of 50 pages should be adopted for EAs. This would not only save money and time, it would help improve the quality of the NEPA analysis and make NEPA documents more accessible to the public. Agencies also should be encouraged to produce EAs and EISs that are well edited, integrated, and organized. NEPA documents should be "user friendly" and analytic rather than turgid and encyclopedic.

Do Not Grant State, Local, and Tribal Governments a Right to Cooperating Agency Status (Recommendation 3.1)

EEI agrees that it is important for all relevant agencies and other stakeholders to have an opportunity to provide input into the preparation of NEPA documents. That is the purpose of the NEPA process, which invites all stakeholders to provide input in writing

[2] 43 Fed, Reg. 55983 (1978).
[3] *Id.*

and through public meetings on the environmental effects to be examined, the mitigation measures and alternatives to be explored, and the draft EAs and EISs themselves. See CEQ's current NEPA regulations at 40 C.F.R. 1501.7.

However, it is quite another matter to suggest that multiple agencies and other entities should have the right to act as "cooperating agencies" in the preparation of the NEPA documents. "Cooperating agency" status means that an agency or other entity conferred this status shares responsibility for drafting the NEPA documents. While this approach to preparing documents can work if a small number of agencies are involved and work cooperatively, it can become unwieldy as more agencies are involved, especially if the agencies disagree. That is why under current CEQ regulations cooperating agency status occurs at the discretion of the lead agency. 40 C.F.R. 1501.6. The lead agency is in the best position to know whether or not cooperating agency status for another agency will assist or hinder the NEPA process.

Simply put, having more than one agency responsible for preparing an EA or EIS can present a serious challenge of having too many chefs in the kitchen. This challenge already arises with the possibility of multiple federal agencies acting as "cooperating agencies." The Task Force proposal to extend this concept to include state, tribal, and local agencies – and perhaps other stakeholders (the heading of recommendation 3.1 is ambiguous on this point, as discussed at the end of this section) – would exacerbate this problem. Instead of streamlining the NEPA process, such increased use of the "cooperating agency" concept would be a prescription for confusion and delay.

For example, situations could easily arise where multiple federal and state agencies, Indian tribes, counties, and municipalities would all seek cooperating agency status. A NEPA document drafted by a significant number of such entities could easily result in an inadequate and untimely NEPA analysis. Similarly, if a "cooperating" agency is unwilling to work together with a lead agency in good faith, or even simply disagrees with the lead agency on one or more matters, cooperating status for that agency could complicate and obstruct the NEPA process rather than streamline it – absent sign-off by the cooperating agency, the process could be delayed indefinitely.

Instead, EEI encourages the Task Forces to recommend that a single agency should be responsible for preparing the NEPA documents for a given activity or set of activities. Other stakeholders, including tribal, state, and local agencies, should be required to provide their input by actively participating in the traditional NEPA process described above. In turn, the other agencies should be required to rely on the resulting analysis for complying with NEPA, rather than duplicating the analysis or substituting ones of their own. Congress has taken this approach in EPAct section 1221(a), adding new Federal Power Act subsection 216(h) for electricity transmission lines. EEI encourages Congress to adopt this strong lead agency concept more broadly.

Furthermore, we recommend clarifying that any agency that does participate as a "cooperating agency" in the preparation of a NEPA document does not get "two bites" at the decision-making apple by first serving as a cooperating agency in developing a NEPA document and then subsequently litigating before an agency or in court any decision related to that analysis. For example, in the hydroelectric licensing context, an agency should not be able to work behind the scenes on the NEPA analysis with the Federal Energy Regulatory Commission (FERC) and then turn around and litigate the resulting license before FERC or the federal Court of Appeals.

Instead, in order to be a cooperating agency, an agency should be required to agree up-front to forfeit its rights to intervene in the related federal licensing and permitting proceedings and to litigate any decisions based in whole or in part on the NEPA analysis the agency helped draft as a cooperating agency. This would help assure that only entities that seek to resolve issues in good faith through the NEPA process will be permitted to be cooperating agencies.

Despite the reference to "stakeholders" in the heading of recommendation 3.1, the Task Forces do not appear to have intended to extend the cooperating agency concept to entities other than state, local, or tribal government agencies because the subsequent text refers to political subdivisions. To avoid ambiguity, in discussing the cooperating agency concept, EEI encourages the Task Forces to clarify that they mean to cover only government agencies, not others. The term "stakeholder" is quite broad and could be construed to encompass a very large number of entities, extending from local business associations to environmental groups. While EEI agrees that it is important to obtain the input of all stakeholders in the NEPA process, non-governmental stakeholders already have ample opportunity to participate in the NEPA process, as described above. Extending cooperating agency status to them is unnecessary. Moreover, it would likely be unworkable in many NEPA processes.

<u>Do Not Create a NEPA Citizen Suit Provision, But Do Clarify Limits on Litigation of NEPA Issues</u> (Recommendation 4.1)

EEI does not believe a citizen suit regime that gives private parties the right to act as a "private attorney general" to police NEPA violations would improve the NEPA process. Instead, it would make the NEPA process more complex and litigious without any corresponding benefit. While citizen suit provisions may be appropriate to help assure compliance with certain substantive environmental laws, such as the Clean Water Act, they have no place in a procedural statute such as NEPA. The experience over the past 35 years since NEPA was enacted indicates that current law provides ample opportunities for litigation and judicial review to assure compliance with NEPA.

EEI does, however, support a number of the Task Force recommendations intended to improve the NEPA judicial review process. For example, EEI strongly supports the recommendation that any appellant that brings a lawsuit alleging a violation of NEPA

must, as a condition of being able to file such suit, have fully participated in the NEPA process that is being challenged. An appellant that has not even filed comments on a draft NEPA document should not be able to come in after the NEPA process is over alleging that a NEPA violation has occurred. Specifically, an appellant should be barred from raising any issues in NEPA litigation that the appellant did not bring to the agency's attention through written comments on a draft EIS or an EA. In addition, an appellant should be clearly required to exhaust all administrative remedies available to it prior to bringing any NEPA litigation. Such requirements will provide a strong incentive to all those involved in a NEPA process to do their best to make the process work, rather than relying on last minute litigation to achieve their goals.

EEI also agrees with the Task Force recommendation that any lawsuit settlement discussions involving NEPA review between a plaintiff and a defendant federal agency should include the businesses and individuals that would be affected by the settlement. This will help assure that the federal government is fully cognizant of the impacts of any proposed settlement before entering into it.

EEI also supports the establishment of clear guidelines on who has standing to challenge an agency NEPA process. We agree that factors such as the challenger's relationship to the proposed federal action and the extent to which the challenger is directly impacted by the action should have a bearing on the determination as to whether the challenger has standing. In addition, it should be clarified that project proponents, whose economic interests are fundamentally affected by the NEPA process, may intervene as of right in a NEPA case related to the project they have proposed.

EEI also agrees that there should be a deadline for the filing of any NEPA challenge to a notice of final decision. EEI recommends that the Task Force 180-day deadline be reduced to a 60-day deadline for filing a NEPA challenge. There is precedent for such a shorter deadline. For example, Federal Power Act section 313 establishes a 60-day deadline for filing petitions for review in the U.S. Courts of Appeals to challenge FERC orders. A shorter time period would encourage a more timely exercise of one's appeal rights, providing appellants an adequate amount of time to prepare any appeal, yet preventing them from bringing suit years later when the agency and others have made major investments in reliance on the decision.

Limit "Reasonable Alternatives" Analyzed in NEPA Documents to Ones that Are Economically and Technically Feasible (Recommendation 5.1)

EEI believes that, under current law, only alternatives that are economically and technically feasible must be examined in any detail in an EIS. However, EEI supports the Task Force recommendation to place this requirement directly into the statute, because doing so would provide additional certainty.

The recommendation should be refined to provide that, when a project is being proposed by a private party, only alternatives that the private party stipulates are economically and technically feasible should be examined in an EIS. At a minimum, the applicant's input on this issue should be given substantial credence. Federal agencies often have little or no expertise regarding what alternative private actions are economically and technically feasible and can thus conduct NEPA alternative analyses that are wholly unrealistic and serve little purpose. Relying on the private project proponents to define the alternatives to be analyzed in a NEPA analysis of a private action will significantly improve the quality and usefulness of the alternatives analysis in an EIS.

Clarify that the Alternatives Analysis Must Consider the Environmental Impacts of Not Taking Action on the Proposed Project (Recommendation 5.2)

EEI strongly agrees with this recommendation because it is often the case that not implementing a proposed major federal action will have negative environmental consequences. For example, if an EIS is prepared regarding highway construction, the "no action" alternative should fully analyze and discuss the air quality impacts associated with continued highway congestion resulting from failure to improve a highway.

Do Not Direct CEQ To Make Mitigation Proposals Mandatory (Recommendation 5.3)

EEI is not entirely certain of the intent behind this recommendation. Based on its plain meaning, the recommendation seems to provide that mitigation measures recommended or proposed in an EIS or EA would be mandatory. EEI does not support such a legislative or regulatory change. NEPA is a procedural statute that requires agencies to consider the environmental impacts of major federal actions. It is not a substantive environmental statute that dictates a particular environmental outcome, including mitigation for the impacts of a proposed project or action.

EEI believes that the fundamental procedural nature of NEPA is sound and should be preserved. Substantive federal agency decisions, including mitigation for project impacts, should be made in compliance with substantive statutes such as the Atomic Energy Act, the Federal Power Act, the Federal Land Policy and Management Act, the Clean Air Act, the Natural Gas Act, the Endangered Species Act, and the Clean Water Act, not through NEPA.

Codify CEQ Regulations 1501.5 Regarding Lead Agencies (Recommendation 6.2)

EEI supports the Task Force recommendation that CEQ regulations regarding lead agencies be codified. As part of this effort, EEI recommends that the Task Force consider the benefits of expanding the role of the lead agency in accordance with the provisions adopted by Congress in EPAct regarding the siting of natural gas pipeline and LNG facilities under the Natural Gas Act (EPAct section 313) and electricity transmission facilities (EPAct section 1221).

For example, section 313 seeks to expedite the multi-faceted gas pipeline and LNG facility permitting process through a number of means. FERC is designated the "lead agency" for the purposes of complying with NEPA and coordination of all federal permits related to the approval of the construction of interstate natural gas pipelines and LNG facilities.

In this lead agency role FERC establishes a schedule for the completion of all proceedings for federal permits. The relevant federal and state agencies must comply with this schedule. If the schedule is not complied with, the United Stated District Court for the District of Columbia has exclusive jurisdiction over any civil action regarding a failure by a federal or state agency to comply with the FERC schedule. This means, for example, that the Corps must act on an application for a Clean Water Act section 404 dredge and fill permit in accordance with FERC's schedule or face the threat of a civil action by the project proponent in U.S. District Court.

Section 313 also expedites judicial review of federal law permits issued by a federal or state agency by providing exclusive jurisdiction in the United States Court of Appeals over civil actions regarding these permits. For example, litigation regarding the issuance of a Clean Water Act section 401 certification for an LNG facility would occur in the U.S. Court of Appeals instead of a state court. In addition, the record developed by FERC would be the basis for judicial review, not the record compiled by the federal or state agency issuing the permit.

Broader application of the section 313 strong lead agency concept to federal authorizations required for other activities, such as electricity generating facilities, mining, and oil and gas leasing, would streamline the NEPA process for these activities as well as facilitate the timely issuance of related permits.

Do Not Create a "NEPA Ombudsman" Within CEQ (Recommendation 7.1)

EEI appreciates the intent behind the recommendation to establish a NEPA Ombudsman, but we believe that to a certain extent CEQ currently exercises this responsibility. EEI is concerned that the creation of a new NEPA Ombudsman at CEQ could further complicate the NEPA process by drawing CEQ into a large number of NEPA disputes on a case-by-case basis. In general, EEI believes a better approach is for parties with concerns about NEPA-related issues to bring those to the attention of the decision-making agency itself rather than draw another agency into the process.

Direct CEQ To Control NEPA Related Costs (Recommendation 7.2)

EEI strongly supports the recommendation to give a clear charge to CEQ to control NEPA costs. The NEPA process can provide broad societal benefits. It is important, however, to keep track of and limit NEPA costs in order to assure that the costs of the NEPA analysis do not outweigh the benefits.

Clarify the Meaning of "Cumulative Impacts" (Recommendations 8.1, 8.2)

EEI strongly supports the Task Force recommendation to clarify, with appropriate constraints, the meaning of the requirement that an EIS analyze and consider "cumulative impacts." Although the consideration of cumulative impacts can be a useful exercise in certain instances, the requirement has been construed in certain cases by the federal courts in an overly inflexible manner and has resulted in EISs even being needlessly invalidated. For example, in *City of Carmel-by-the-Sea v. DOT*, 123 F. 3d 1142, 1160-61 (1997), the 9th Circuit held that the cumulative impact analysis was inadequate even though plaintiffs did not identify any specific action that the EIS failed to consider.

EEI supports clarifying that an agency's assessment of existing environmental conditions will serve as the methodology to account for past actions, to prevent agencies speculatively attempting to recreate a hypothetical past baseline. EEI also strongly supports the recommendation to focus analysis of future impacts on concrete proposed actions rather than actions that are "reasonably foreseeable." Speculation regarding the future indirect impacts of a federal action is not a useful exercise.

Have CEQ Study Potential Further Improvements (Recommendations 9.1-9.3)

EEI supports the CEQ studies recommended by the Task Force. In particular, a study of NEPA's interaction with state "mini-NEPAs" could lead to beneficial elimination of duplication between NEPA and state processes.

Conclusion

EEI believes that the Task Forces have performed a valuable public service through their willingness to engage in a thorough review and examination of NEPA. No statute should be above periodic review and examination. NEPA has broad impacts, both positive and negative, and Congressional review is timely and overdue. EEI looks forward to working with the Task Forces and others on legislative and regulatory improvements to NEPA, particularly the recommendations discussed in these comments.

If you have any questions relating to these comments, please contact any of the following EEI staff: Meg Hunt, mhunt@eei.org, 202/ 508-5634; Rick Loughery, rloughery@eei.org, 202/ 508-5647; or Henri Bartholomot, hbartholomot@eei.org, 202/ 508-5622. Thank you.

Sincerely,

- signature -

Ed Comer