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Vice President & General Counsel

October 27, 2006

NEPA Modernization (CE)
Attn: Horst Greczmiel
Associate Director for NEPA Oversight
722 Jackson Place, NW
Washington, DC 20503

Submitted by e-mail to: hgreczmiel@ceq.eop.gov

Dear Mr. Greczmiel:

The Edison Electric Institute (EEI) is submitting these comments in response to the Council on Environmental Quality's (CEQ's) notice and request for comments on proposed guidance for "Establishing, Revising, and Using Categorical Exclusions under the National Environmental Policy Act" (NEPA). That notice was published at 71 Fed. Reg. 54816 on September 19, 2006 and invited comments by today.

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 rely on electricity generation, transmission, and distribution facilities whose construction and operation often require one or more Federal or Federally-delegated permits, licenses, or other regulatory approvals. In turn, these approvals can trigger the application of NEPA. Thus, EEI's members are directly affected by the implementation of NEPA, and EEI has a direct interest in improving implementation of the statute.

EEI Supports Use of Categorical Exclusions to Help Streamline NEPA Implementation

We fully agree with the intent of the categorical exclusion provisions of CEQ's regulations: to avoid unnecessary NEPA analysis and documentation. NEPA requires preparation of an environmental impact statement (EIS) only for activities that qualify as major Federal actions having significant effects on the human environment. 42 U.S.C. § 4332(2)(C). If a category of activities clearly does not qualify as such an action, it should

be categorically excluded, to save Federal agencies, licensees, permittees, regulated entities, and the general public the time, effort, and resources involved in the preparation of an EIS or an environmental assessment (EA) to determine whether an EIS is required. This is simply good government. Furthermore, it is in keeping with the intent of the Paperwork Reduction Act to minimize the regulatory and paperwork burdens imposed by the Federal government. 44 U.S.C. §§ 3501 et seq.

EEI Generally Agrees with the Proposed Guidance, With Some Improvements

We appreciate CEQ's efforts in the proposed guidance to encourage agencies to use categorical exclusions and to do so in an appropriate manner. We support, for example, the comment that "Federal agency personnel should develop a categorical exclusion when they identify a class of actions without significant environmental impacts." Proposed guidance, section II. We also support CEQ's recognition that agencies can substantiate designation of new categorical exclusions in a variety of ways, including past agency experience, demonstration projects, professional staff and expert opinion, and benchmarking to compare one set of activities with another. Proposed guidance, section III.

At the same time, we encourage CEQ to make several improvements in the proposed guidance.

First, we encourage CEQ to provide additional guidance on the types of activities that qualify for categorical exclusions. Agencies should provide categorical exclusions for: (a) activities that do not involve major Federal actions, as well as activities that do not have significant effects on the human environment; (b) activities that involve only temporary disturbances or other actions with minimal environmental impacts; and (c) activities whose environmental impacts are already relatively well known and mitigation measures well established, provided those mitigation measures are included as part of the proposed activities.

Under NEPA, only *major Federal actions* that significantly affect the human environment require preparation of an environmental statement. The proposed guidance focuses on whether an activity has significant effects on the environment. But the guidance ignores the question whether a major Federal action is involved. If an action is predominately private, it typically should not require preparation of an EA or EIS. For example, if a proposed private construction project requires an Army Corps of Engineers (Corps) dredge and fill permit related to a minor part of the project, the issuance of the Corps permit by itself should not trigger preparation of a Federal EA or EIS. Similarly, if a transmission line or other right-of-way is predominately located on non-Federal land and only a minor part crosses Federal land, that small Federal role should not by itself require preparation of an EA or EIS. Such non major Federal activities should be covered by categorical exclusions.

In addition, under NEPA, as the proposed guidance recognizes, a project without significant effects on the human environment also does not require preparation of an EA or EIS. Thus, for example, categorical exclusions should cover a project that is being located alongside existing facilities with minimal impacts beyond those already present. Categorical exclusions should also cover renewal of Federal licenses, permits, and other authorizations, if no significant changes in the facility are proposed. Further, categorical exclusions should cover activities whose effects are well understood and are being mitigated using well-established mitigation measures. At a minimum, the NEPA analysis for such activities should be extremely streamlined.

Second, we encourage CEQ to look for ways to streamline the process of adopting a categorical exclusion. In section IV of the proposed guidance, CEQ points to its 40 C.F.R. § 1507.3 regulations governing adoption of agency procedures for implementing NEPA as the method for adopting categorical exclusions. Those regulations envision a multi-step process involving *Federal Register* notices and consultation with CEQ and the public. We encourage CEQ to look for ways to streamline the process for adopting and revising categorical exclusions. Certainly, minor modifications and changes that are highly consistent with existing Federal agency categorical exclusions should not necessarily require a full notice-and-comment, consultation-with-CEQ process.

Third, we encourage CEQ to advise agencies to consult with licensees, permittees, and other regulated persons and entities that may be affected by changes in categorical exclusions or might benefit from new exclusions. In section V of the proposed guidance, CEQ advises agencies to consult with "interested parties such as public interest groups, Federal NEPA contacts at other agencies, consultants, and Tribal, State, and local government agencies," but omits reference to a group of key stakeholders that will often be most directly affected by the agency's categorical exclusions – namely, the regulated community. We encourage CEQ to remedy this omission. Similarly, in periodically reviewing categorical exclusions, as encouraged by section VII of the proposed guidance, agencies should invite input by the regulated community, which is likely to have suggestions for improving an agency's existing list of categorical exclusions.

Fourth, we encourage CEQ to clarify that, in implementing a categorical exclusion, no additional paperwork is required. In part VI of the proposed guidance, CEQ quotes its prior guidance as stating: "Accordingly, the Council strongly discourages procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded." CEQ Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263 (July 28, 1983). But in the next paragraph, CEQ goes on to say: "Each Federal agency should decide if a categorical exclusion determination warrants preparing additional paperwork and, if so, how much documentation is appropriate." This statement undermines the earlier guidance. EEI encourages CEQ to continue discouraging preparation of additional paperwork for *use* of a categorical exclusion. To the maximum extent possible, such exclusions should be "self implementing," without the need for an agency or regulated entity to prepare additional paperwork. At a

minimum, CEQ should encourage agencies to keep such paperwork to a minimum, in the form of a brief statement that documents why a particular activity falls within the categorical exclusion.

EEI Encourages CEQ to Take Additional Steps to Improve NEPA Implementation

In addition to the above suggestions, we support a number of the proposed recommendations of the House Committee on Resources Task Forces on Improving and Updating the National Environmental Policy Act (NEPA Task Force), which took public comments earlier this year on expediting and streamlining the NEPA process. In particular, we support: (a) use of mandatory time lines and page limits on NEPA documents; (b) clarifying the "reasonable alternative" and "cumulative impact" analyses contained in EISs; (c) improving the "lead agency" role; (d) controlling NEPA-related costs; and (e) requiring analysis of the environmental impacts of "no action" alternatives.

EEI strongly supports time limits 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. 42 Fed. Reg. 55983 (1978). 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 28 years has shown that this approach to time limits does not work and that the establishment of a strict time limit is probably 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.

If an EIS is involved, we encourage CEQ to recommend completion of NEPA review within 12 months of an application for a license, permit, or other Federal authorization. Consistent with this, 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). If only an EA is involved, the deadline should be much shorter. We recommend 6 months from receipt of the application. CEQ could grant an extension in extraordinary cases, but those should be the rare cases, and the extension should be no more than 3 months for an EA or 6 months for an EIS.

EEI also supports page limits for EAs and EISs. We recommend that agencies use a 50-page limit for EAs and 150-page limit for EISs, and produce even shorter documents whenever possible. CEQ regulations already specify that EISs "normally" should not exceed 150 pages, 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." CEQ also noted that the "only way to give greater assurance that EISs will be used is to make them usable and that means making them shorter." 43 Fed, Reg. 55983 (1978). We wholeheartedly agree.

Unfortunately, the current CEQ page limit regulation has been largely ineffective because agencies have used the term "normally" 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 ultimately the only way to do so is probably through use of an absolute page limit, without the "normally" qualifier. 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.

EEI encourages CEQ to remind agencies that, under current law, only alternatives that are economically and technically feasible must be examined in any detail in an EIS. Moreover, agencies should invite applicant input on the economic and technical feasibility of alternatives, and that input should be given substantial credence. Agencies often have little or no expertise regarding what alternative private actions are economically and technically feasible. As a result, without applicant input on this issue, the agencies risk conducting NEPA alternative analyses that are unrealistic and serve little purpose. Enlisting private project proponents to help 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.

EEI also encourages CEQ to recommend that a single lead 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 NEPA process. In turn, other agencies implementing provisions of Federal law should be required to rely on the lead agency's analysis for complying with NEPA, rather than duplicating that analysis or substituting analyses 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 CEQ to adopt this strong lead agency concept more broadly.

Furthermore, CEQ should clarify that any agency that participates 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 a 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.

EEI encourages CEQ to advise agencies to consider the consequences of not approving or undertaking the proposed activity. Often, 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.

CEQ also should advise agencies to control NEPA costs. The NEPA process can provide broad societal benefits. However, it is important to keep track of and to limit NEPA costs in order to assure that the costs of the NEPA analysis do not outweigh the benefits.

EEI recommends that CEQ clarify the concept of "cumulative impacts" to be examined in an EIS. 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. Also, speculation regarding the future indirect impacts of a federal action is not a useful exercise.

Finally, we encourage CEQ to look for other means of streamlining the NEPA process. For example, a study of NEPA's interaction with state "mini-NEPAs" could lead to beneficial elimination of duplication between NEPA and state processes.

Conclusion

EEI appreciates the opportunity to provide input on the proposed CEQ guidance to other agencies about adopting and implementing categorical exclusions as a tool for implementing NEPA. We generally support the proposed guidance and encourage CEQ to take additional steps to improve the overall NEPA process, including use of categorical exclusions.

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