November 22, 2021

Ms. Brenda Mallory, Chairman
Ms. Amy B. Coyle, Deputy General Counsel
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: NEPA Implementing Regulations Revisions; CEQ–2021–0002.

Dear Chairman Mallory and Deputy General Counsel Coyle:

Thank you for the opportunity to provide comments on the Council on Environmental Quality's ("CEQ") Notice of Proposed Rulemaking regarding changes to the National Environmental Policy Act ("NEPA") implementing regulations. The Permitting Institute ("TPI") strongly supports policies and rules that protect the environment and allow America to build needed infrastructure projects. TPI submits these comments because it is concerned that the proposed revisions to CEQ's NEPA regulations will create regulatory barriers to infrastructure development without providing additional benefits to the environment.

Introduction:

TPI, a Washington D.C.-based non-profit, non-partisan organization actively engaged nationwide at all levels of government, serves as a central resource and leading advocate for accelerating investment in rebuilding, expanding, and modernizing America's aging infrastructure while preserving our environmental, cultural, and historic resources. TPI believes the permitting process should be more efficient than it is today while fostering meaningful public engagement and improving the quality of decisions made. Current permitting processes are marred by contradictory and overlapping statutory and regulatory requirements, timelines, and policies that continue to cause avoidable process delays, cost overruns, and in some cases, project abandonment. These costs are simply too high, undermining new infrastructure initiatives in the Administration, Congress, states, cities, counties, Tribal Nations, and local communities across America. There is a better way, and TPI is grateful for the opportunity to provide comments on "Phase 1" of CEQ's NEPA implementing regulations revisions.

Background:

On October 7, 2021, CEQ published a Notice of Proposed Rulemaking ("NOPR") in the Federal Register to revise the NEPA implementing regulations that were last updated in 2020.[1] The primary revisions CEQ proposed making to the NEPA implementing regulations would alter the

[1] 85 FR 1684 (Jan. 10, 2020).

definitions of "Purpose and Need" and "Reasonable Alternatives", provide new direction to federal agencies who are updating their NEPA implementing regulations, and return the NEPA implementing regulations' definition of "effects" to pre-2020 language.[2]

Executive Summary:

TPI provides the following comments on the NOPR to support CEQ's assessment of the technical impacts of the regulatory changes it is proposing without issuing an opinion on whether CEQ can or should implement the changes it has proposed to the NEPA implementing regulations. First, TPI will comment on how proposed revisions to Purpose and Need interplay with updates to Reasonable Alternatives and how the revisions may combine to slow permitting of all infrastructure projects, particularly renewable development, and exacerbate climate change. Second, TPI will comment on the discretion CEQ is granting federal agencies to surpass its NEPA requirements in their agency implementing regulations and the potential to create unintentional barriers, regulatory inconsistencies, and regulatory redundancies. Finally, TPI will comment on the difference between the "Reasonableness" standard used in the 2020 NEPA implementing regulations and CEQ's NOPR restoration of the definition of "effects" or "impacts" to explicitly include "direct", "indirect", and "cumulative" effects and whether the change will result in substantially or measurably different outcomes in either interpretation.

Revisions to Purpose and Need and Reasonable Alternatives:

I. Statutory and Case Law Interpretation

CEQ's NOPR proposes to revise the 2020 NEPA regulations definition of Purpose and Need and Reasonable Alternatives by removing references to applicant goals and acting within an agency's statutory authority. As support for removing reference to the applicant's goals in developing a Purpose and Need statement, CEQ sites its previous misinterpretation and application of *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). To support removing consideration of an agency's statutory authority from a Purpose and Need statement, CEQ states that such a consideration is confusing. As CEQ's NOPR analysis continues it frequently cites statutes and case law as support for these changes, and these interpretations conflict with what CEQ finalized just last year.

TPI requests that CEQ clarify its statutory and case law interpretation on Purpose and Need and Reasonable Alternatives to reconcile the divergent application and interpretation of those cases and statutes in such a short time frame. TPI further seeks clarification as to how asking an agency to only act within its statutory authority when developing a Purpose and Need statement would confuse agencies that may only act within their statutory authority.

[2] 43 FR 55978 (Nov. 23, 1978).

These requested clarifications are essential to ensuring CEQ is not simply reverting to language that will continue to propagate previous confusion amongst NEPA practitioners, as evidenced by legal complaints or confusing, if not contradictory, case law. TPI further requests that CEQ provide clarification and reduce uncertainty and legal risk for NEPA practitioners representing the Federal government and infrastructure developers, alike - beyond what reverting to the previous language would accomplish.

II. Purpose and Need

Statutory Authority

CEQ's NOPR proposes to remove the 2020 NEPA regulations provision that the Purpose and Need should be constrained to the statutory authority of the agency to review an application for authorization, stating it was confusing because it implies that an agency's authority is only relevant when an agency proposes to grant an authorization and that agencies must also appropriately consider the scope of their authority when evaluating other agency actions, including those that do not involve specific authorizations. CEQ's NOPR states that Purpose and Need statements have always been informed by the scope of the agency's statutory decision-making authority and that this clarification is, therefore, unnecessary.

However, silence on this matter will likely continue to engender confusion. Purpose and Need statements determine the scope of the reasonable range of alternatives to be analyzed, which requires a delicate balance between statements that are too narrow or too broad. CEQ should ensure revisions to the 2020 NEPA regulations provide clear direction to agencies as to whether agencies must consider alternatives outside their jurisdiction, be that only for agencies with jurisdiction by law to issue an authorization or also to develop or enforce environmental standards relevant to the proposed action.

CEQ should also consider the potential for confusion and opportunity to provide clarification in light of the Infrastructure Investment and Jobs Act ("IIJA") which was signed into law on November 15, 2021, codified One Federal Decision ("OFD") for transportation projects, and made permanent the Federal Permitting Improvement Steering Council ("FPISC"). FPISC is required to "carry out the obligations of the agency with respect to a covered project under any other applicable law concurrently, and in conjunction with, other environmental reviews and authorizations being conducted by other cooperating or participating agencies, including environmental reviews and authorizations required under NEPA, unless the agency determines that doing so would impair the ability of the agency to carry out the statutory obligations of the agency." Where multiple agencies must now utilize a single NEPA document to carry out their various agency actions, there are new questions for practitioners to address when preparing the Purpose and Need. For example, is only one Purpose and Need required for all the agencies, as in the case of the Federal Energy Regulatory Commission (FERC) where a single Purpose and Need statement is determined by FERC as the lead agency and/or negotiated with all cooperating

agencies, or is a separate Purpose and Need required for each agency? Utilization of one versus multiple Purpose and Needs is currently not consistent even within a single agency (e.g., the Department of the Interior). Specifying agencies' Purpose and Need must correlate with their statutory jurisdictions will also help clarify which agency should have deference on relevant aspects of the NEPA analysis when more than one agency brings experts on the same resource to develop the analysis, such as which agency has the decision-making authority over what portion of a lease area is available for development.

TPI further requests CEQ to consider the frequency with which it fields questions about the scope of Reasonable Alternatives to be analyzed regarding jurisdictional limits. Guidance on this question is repeatedly published in both Federal documents and trainings geared towards NEPA practitioners. CEQ determined this was an important enough topic to address in its "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" memorandum, which directs agencies to consider alternatives that may not be within the jurisdiction of their agency because "a potential conflict with local or federal law does not necessarily render an alternative unreasonable" and "alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies."

This guidance does not specify whether such Reasonable Alternatives should be limited to Federal government sponsored actions rather than non-governmental sponsored actions, given the rationale's linkage to Congressional approval and funding. There is also no guidance as to when such alternatives should be included within the No Action Alternative rather than a separate Alternative. Different interpretations of reasonability being subject to existing jurisdictional limits among agencies, both Federal and State, is a reasonably foreseeable outcome. For example, Section 15126.6(f)(1) of the California Environmental Quality Act ("CEQA") Guidelines (clarified in the Guidelines because CEQA itself does not specifically address whether or not a lead agency must consider alternatives outside its jurisdiction) suggests that an agency may reject an alternative as infeasible if it is outside of its jurisdiction.

Applicant's Goals and the Public Interest

CEQ's NOPR proposes to revise the 2020 NEPA regulations definition of Purpose and Need by removing an applicant's goal as a primary consideration in developing a Purpose and Need statement. The stated reason is to ensure that agencies do not construe the previous language to mean that agencies must prioritize the applicant's goals over other relevant factors, including government interest.

CEQ states that "agencies should have discretion to base the purpose and need for their actions on a variety of factors, which include the goals of the applicant, but not to the exclusion of other factors. For example, agencies may consider regulatory requirements, desired conditions on the

landscape or other environmental outcomes, and local economic needs, as well as an applicant's goals." However, TPI suggests that further nuance should be captured in the proposed NEPA regulations to address the two real world aspects of Purpose and Need: the Federal agency's Purpose and Need for its action and the Purpose and Need of the proposed project, particularly where that project is sponsored by a non-governmental entity.

TPI agrees that "always tailoring the Purpose and Need to an applicant's goals when considering a request for an authorization could prevent an agency from considering alternatives that better meet the policies and responsibilities set forth in NEPA merely because they do not meet an applicant's stated goals." However, the Purpose and Need should include measurable objectives for the proposed action, including a reasonable expectation of commercial viability, especially when the sponsor is a non-governmental entity. This is especially true when a proposed action is already being reviewed as part of a tiered NEPA review or where the government has already made a decision supporting compatibility of an area with development, as is the case for a proposed project seeking to develop a lease (that already underwent NEPA review) or develop an area identified as a Development Focus Area, or similar, as in the Department of the Interior's Desert Renewable Energy Conservation Plan (that already underwent NEPA review).

CEQ states the proposed revision will "reaffirm agency discretion to develop and rely on statements of Purpose and Need that are consistent with the agency's decision-making responsibilities while considering multiple relevant factors, including the public interest and the goals of an applicant. This restoration would confirm that agencies should consider a range of alternatives that are technically and economically feasible and meet the Purpose and Need for the proposed action but that are not unreasonably constrained by an applicant's stated goals." However, agency interpretation of economically feasibility does not account for overall feasibility, as does the definition for feasibility in CEQA, which is defined by the Guidelines as ". . . capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors."

TPI recommends that CEQ consider providing more context in the revised NEPA regulations to clarify that the Purpose and Need should incorporate both an applicant's goals and the agency's need to act to review and/or authorize a project in light of the public good (and the agency's statutory authorities). The applicant can work with the agencies to develop the proposed project's goals, which often occurs during pre-application processes, and include those goals in their application(s). Measurable objectives that would establish a reasonable expectation of commercial viability should include items that fulfill third party needs, such as Federal or State targets or requirements, Power Purchase Agreements (PPAs), or similar. This greater degree of clarity would also help agencies coordinate and resolve their disagreements on the scope of analysis per new statutory requirements in the IIJA.

There is significant likelihood of new financial burdens on project proponents derived from theoretical unconstrained expansive analysis on unrelated and economically inviable prospected

alternatives. For example, there is no reason a hydropower company should have to pay for the Federal government to identify and analyze a solar project, which has no reasonable likelihood of being built or built in a reasonable period of time, in lieu of a proposed hydropower project, to the same degree of detail as alternatives regarding the siting, design, and operation of the proposed hydropower project, and at the expense of the hydropower company. Instead, CEQ has the opportunity to specify that such unrelated, theoretical alternatives can be captured in the No Action Alternative to address the Federal agency's Purpose and Need for the Federal action.

These suggestions would bring discipline to the alternatives analysis, where other considerations, necessary for agencies to evaluate the public interests, are instead included within the No Action Alternative. This is even more important when agencies exercise cost recovery authorities, where the applicant pays for the government to perform the analysis, and could have a disproportionate effect on costs for small businesses.

In CEQ's stated approach to determine and prioritize the public interest, CEQ cites as its example an application for a right-of-way on federal land and invokes the public interest to support its position in the next paragraph. TPI believes CEQ has conflated this example and may be inappropriately narrowing its meaning of public interest in a way that will ultimately harm the nation's ability to efficiently site and permit renewable energy facilities and their accompanying transmission infrastructure.

If an applicant were to propose a utility-scale solar facility with an associated long-haul high-voltage transmission line that crosses a state line and is at least partially sited on federal land, the applicant will require authorizations beyond a U.S. Forest Service or Bureau of Land Management right-of-way permit. The applicant will require an authorization from the Federal Energy Regulatory Commission ("FERC") and at least two state's public utility commissions. In this example, FERC and the state utility commissions will be required to authorize the project based on some variation of a "public convenience and necessity" or "public interest" standard. FERC and state utility commissions determine the public interest by considering more than just public comments. They broadly consider generation needs, grid resiliency, decarbonization, grid redundancy, back-up power, grid modernization, serving rural communities, and of course, public input.

By narrowing what is considered to be in the public's interest to what is stated on the record during a public scoping or comment period, or what a federal land management agency perceives to be in the public's interest, CEQ runs the risk of harming the public interest and slowing the renewable energy transition. As proposed, the NOPR risks ignoring a host of public interest factors that are absolutely essential to ensuring that renewable energy and transmission lines are permitted in a timely fashion and risks ignoring public interest determinations made by FERC and state utility commissions.

Accordingly, TPI asks CEQ to clarify how limiting the influence of an applicant's goals in the development of a Purpose and Need statement will ensure renewable energy deployment and how the revision considers co-lead, cooperating, or participating regulatory agency's public interest determinations.

TPI requests that CEQ consider these opportunities to provide additional clarification and avoid inadvertently making the federal permitting process less efficient and slowing the deployment and repair of roads, railways, bridges, and renewable energy projects, particularly in light of President Biden's Executive Order on Tackling the Climate Crisis at Home and Abroad, which states that this Administration will help to catalyze private sector investment into, and accelerate the advancement of America's industrial capacity to supply, domestic clean energy, buildings, vehicles, and other necessary products and materials, and directs CEQ to identify steps that can be taken, consistent with applicable law, to accelerate the deployment of clean energy and transmission projects in an environmentally stable manner.

III. Reasonable Alternatives

The heart of any NEPA analysis is the development of Reasonable Alternatives to the proposed action compared against an environmental baseline, or No Action Alternative. TPI poses the following considerations and questions for CEQ to further consider in its proposal to remove from the definition of Reasonable Alternatives the requirement that an alternative meet the goals of an applicant for federal authorization.

An applicant applying for federal approval has almost always conducted environmental studies, sought agency and public input through preplanning and scoping, and has proposed an action and alternatives that consider both the environment, the public's feedback, and technical and economic feasibility. This generally multi-year, robust pre-Notice of Intent ("NOI") work by applicants is informed by extensive coordination and consultation, often through formalized agency pre-application processes and required information fields in various permit applications – and is why TPI is concerned by CEQ's desire to remove an applicant's goals from consideration in developing a Purpose and Need statement and downplaying an applicant's goals in developing Reasonable Alternatives.

TPI is encouraged to see that CEQ will continue to consider an applicant's input for technical and economic feasibility but remains concerned that the NOPR inappropriately shelves the applicant's role in developing Reasonable Alternatives based on language choices made in the NOPR.[3]

[3] See TPI's comments in the Purpose and Need – Applicant's Goals section for questions, suggestions, and requests for clarification on this topic.

A reasonable reading of the NOPR allows the reader to draw the conclusion that it is the intent of CEQ to allow federal agencies to develop project alternatives on their own, regardless of the intent of the project and the applicants pre-NOI work. This language creates a dynamic wherein an agency can ignore information presented to it by an applicant and develop its desired alternatives in a vacuum and with its own determination of economic feasibility that may or may not be based in the realities of the market and commercial economic viability. An example is when agency staff redraws the location of a given proposed project (e.g., wind turbine location) without any input from that agencies' own engineers, the staff of the lead agency, and without any discussion with the applicant, and then proposes it as a Reasonable Alternative.

NEPA ensures agencies consider the significant environmental consequences of their proposed actions and inform the public about their decision making when NEPA is required to evaluate an applicant's proposal and associated environmental and societal consequences. But it should remain an evaluation of that proposal and modifications to the siting, design, construction, and operation that still meet critical applicant goals, with decisions made accordingly – including choosing to NOT grant an authorization.

TPI urges CEQ to ensure that its changes to the definition of Reasonable Alternatives, in conjunction with the changes to the Purpose and Need statement regulations, ensure that applicants and the federal government can work as partners, and not foes, to prevent undue delays and burdens in the already cumbersome federal permitting process.

IV. Revisions to Agency Level NEPA Implementing Regulations Requirements:

CEQ's NOPR seeks to revise the 2020 NEPA regulations by explicitly granting federal agencies the discretion to develop agency-specific NEPA procedures beyond what is required by CEQ's NEPA regulations. The NOPR describes the 2020 regulations as setting a "ceiling" for agency implementing regulations while the NOPR proposes a "floor" for environmental procedures. Whether CEQ considers the regulations to be a floor or ceiling threshold is less important than the fact that project developers must comply with all federal and state environmental statutes and regulations.

The concern with CEQ's proposed shift in frame of reference arises when considering that the NOPR would allow federal agencies the leeway to create NEPA compliance procedures that are inconsistent with each other's, particularly in light of the codification of OFD and establishment of FPISC as permanent in the IIJA. It seems inconsistent for CEQ to encourage inconsistent NEPA compliance procedures when Congress, and the President, just directed agencies to coordinate and align such reviews and authorizations. Any project developer seeking to build a renewable energy facility with associated transmission lines runs the substantial risk of having to comply with a patchwork of federal NEPA procedures that somehow need to be deconflicted in a single NEPA document – which will almost certainly slow the renewable energy transition. Such a patchwork will burden the federal permitting process without producing additional

environmental protections or better inform the public or federal decisionmakers of the environmental impacts of the proposed federal action. Creating divergent NEPA procedures between agencies also sets the table for conflict between those agencies when their procedures disagree with each other's or when their scope of review is not aligned. Within this renewable energy example, CEQ is setting the stage for project developers to comply with numerous and potentially divergent NEPA procedures.

Where such a patchwork results in multiple technical analyses needing to be conducted according to agency-specific methodologies to answer the same question (such as impact on greenhouse gas emissions), it is incumbent upon CEQ to analyze the economic costs for small businesses and tribes to conduct additional, highly technical analyses that will likely require extensive upstream and downstream emissions research and modeling.

There is also the question of what agencies are to do for projects currently under review, prior to new NEPA regulations being established. TPI would also like CEQ to inform commenters regarding how many agencies have completed their own agency implementing regulations under the 2020 regulations, how many agencies have internal and external NEPA guidance documents that are out of date, and what process agencies follow to resolve such inherent intra- and inter-agency conflicts.

TPI seeks clarification from CEQ regarding how it will solve procedural and scope for review disputes between federal agencies collaborating on the same NEPA review. TPI also requests that CEQ, as part of a final rule, detail an elevation schedule for federal agencies and project developers to utilize when each need to efficiently resolve disagreements between agencies. Without such a schedule, federal permitting will be unnecessarily burdened.

Reasonableness vs. Direct, Indirect, and Cumulative Effect:

CEQ's NOPR proposes to revise the 2020 NEPA regulations to reflect the text in the 1978 NEPA regulations by reintroducing the terms direct, indirect, and cumulative back into the definition of effects, or impacts. The 2020 NEPA regulations redefined effects, or impacts, based on the case law developed by the United States Supreme Court in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) ("Public Citizen").

The holding in *Public Citizen* endorses the "rule of reason" when effects and essentially advances a proximate cause standard for determining whether an environmental effect of a proposed federal action merits further review under NEPA. In sum, *Public Citizen* and the 2020 NEPA regulations require agencies to fully consider an environmental impact from a proposed federal action if it is reasonable to consider that impact and that impact is not the result of a lengthy causal chain that is too remote in time or distance to be considered reasonable (i.e. – proximate cause, not but for causation).

The 2020 NEPA regulations made this change because it is the law of the land, per the Court, is user friendly for federal agencies to apply, and federal judges, particularly those without a background in environmental law, are familiar with the proximate cause standard. The reasonableness standard creates a judicial efficiency that did not exist in the 1978 regulations, and the diversity of holdings and case law developed under the 1978 standards for direct, indirect, and cumulative impact show this assertion to be correct. Moreover, adding the terms direct, indirect, and cumulative back into the definition of effects does not eliminate the holding in *Public Citizen* and does not change federal agencies burden to operate under the rule of reason, or a proximate cause standard, when determining what environmental effects merit detailed review in which context.

For example, if the Forest Service were presented with an application to grant a right-of-way to a developer seeking to construct and operate a natural gas pipeline in a National Forest, the agency would be presented with the choice to consider climate change and greenhouse gas emissions as an environmental impact of the project. Under the 1978 NEPA regulations and the NOPR, the agency would look to the definition of cumulative effect to determine whether it is reasonable to examine the effects of climate change and greenhouse gases on the environment, using the *Public Citizens* case as a judicial guardrail on a regulatory definition. Under the 2020 NEPA regulations, and in the same context, the agency would simply weight whether it is reasonable to consider the impacts of a climate change and greenhouse gas emissions on the environment under the reasonableness standard, or proximate cause, from *Public Citizen*.

Reintroducing the 1978 effects language is very unlikely to change the outcome of the reasonableness determination an agency would be asked to make. Climate change and greenhouse gas emissions generally require consideration under NEPA regardless of the definition used in the regulations when dealing with a natural gas pipeline. However, the 2020 rule provides for review without using terms that are unfamiliar to district court and appellate judges that do not have a background in environmental law. This sort of impact analysis is replicable with nearly every project type under nearly every scenario.

CEQ also has an opportunity to specify how such greenhouse gas emissions should be evaluated in the context of NEPA, and in relation to the No Action Alternative, given the timeline over which climate change impacts occur. For example, FERC recently published in its analysis that it was unable to determine the significance of its greenhouse gas analyzed impacts. This leaves TPI to question whether impacts to be evaluated against a No Action Alternative that account for global emissions, where export of natural gas reduces coal usage overseas. TPI also questions whether emissions created in the construction of offshore wind turbines or mining operations for critical minerals used for solar panel are “offset” by the resulting decrease in conventional energy source emissions must be considered. As another example, agencies often struggle with how to approach the affected environment and the No Action Alternative when the existing affected environment represents a degraded ecosystem. In this case, a restoration project may be found to “adversely” affect some resources in that existing, albeit degraded ecosystem despite

the fact that a proposed project would restore it to a healthier ecosystem, only over a time duration that agencies may or may not take fully into account.

Accordingly, TPI is concerned that reintroducing the terms direct, indirect, and cumulative to the definition of effect, or impact, will create judicial inefficiencies that further encumber the federal permitting process without providing additional environmental safeguards. TPI seeks further clarity regarding how CEQ believes its revisions provide additional environmental protections without further encumbering the federal permitting process.

Conclusion:

TPI reiterates that it is grateful for the opportunity to provide comments on the NOPR to ensure that any changes to the CEQ NEPA implementing regulations result in a more efficient permitting process that protects the efficiency and efficacy of the review process while accelerating development of our nation's critical infrastructure without sacrificing environmental, cultural, and historical stewardship. We stand ready to assist CEQ with implementing NEPA regulations that help America Build Back Better and achieve the Biden-Harris Administration's goals.