EWAC®
Energy and Wildlife Action Coalition

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Comments Regarding the October 7, 2021
Council on Environmental Quality
Notice of Proposed Rule: Revisions to Modify
National Environmental Policy Act Implementing
Regulations

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Attn: Docket No. CEQ-2021-0002
Council on Environmental Quality
730 Jackson Place NW
Washington, D.C. 20503

The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in response to the Council on Environmental Quality's ("CEQ") October 7, 2021 request for public input on CEQ's proposed rule ("Proposed Rule") to revise certain aspects of the agency's regulations for implementing the procedural provisions of the National Environmental Policy Act ("NEPA").[2] This Proposed Rule represents the first of two proposals to revise NEPA regulations.[3] In the preamble to the Proposed Rule, CEQ states that it intends to "generally restore"[4] certain aspects of the NEPA regulations as they existed prior to regulations finalized in July 16, 2020 ("2020 Regulations") under the Trump Administration.[5] Prior to CEQ's issuance of the 2020 Regulations, CEQ had not updated most of its NEPA implementation regulations since they were first promulgated in 1978 ("1978 Regulations").

EWAC commends CEQ for taking a phased approach to revising the 2020 Regulations and, specifically, for addressing a small number of provisions initially, rather than proposing a wholesale rescission of all the 2020 Regulations. We encourage CEQ, in any phase 2 rulemaking, to continue this measured approach. While some aspects of the 2020 Regulations may warrant re-visiting, many of the changes were well supported by caselaw, agency NEPA practice and implementing procedures, and longstanding practices within CEQ itself.

The Biden Administration has announced ambitious goals to increase generation, transmission, and distribution of renewable energy in order to slow and reverse the effects of climate change[6] and Congress has given similar direction. For example, through section 3104 of the Energy Act of 2020, Congress directed the Secretary of the Interior to "seek to issue permits that, in total, authorize production of not less than 25 gigawatts of electricity from wind, solar, and geothermal energy projects by not later than 2025, through management of public lands and administration of Federal laws."[7] EWAC believes NEPA is among the "Federal laws" the Secretary of the Interior and others must administer efficiently in order to meet these goals, and that these goals will not be met unless NEPA implementation is modernized to address the 21st century needs. EWAC believes this can be done without sacrificing substantive environmental considerations and without overburdening agencies who are understaffed, and notes that a delay in the environmental review process for the deployment of renewable energy, itself, has a climate-related cost. We encourage CEQ in any phase 2 rulemaking to take a careful look at each regulatory provision to determine

[1] EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

[2] 86 Fed. Reg. 55,757 (Oct. 7, 2021).

[3] *See* https://ceq.doe.gov/laws-regulations/regulations.html.

[4] 86 Fed. Reg. at 55,757.

[5] 85 Fed. Reg. 43,304 (July 16, 2020).

[6] *See, e.g.*, Executive Order 14008: Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Jan. 27, 2021); Executive Order 13990: Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021).

[7] *See* Consolidated Appropriations Act of 2020, Division Z (P.L. 116-260).

what specific changes should be made to address the policy goals of this Administration and not rush to return to the outdated framework as it existed under the 1978 Regulations.

With that in mind, EWAC provides these comments, informed by the knowledge and experience of its membership, to assist CEQ as it considers whether to adopt the changes provided in the Proposed Rule.

I. Proposed Revision to the Purpose and Need and Update to "Reasonable Alternatives" Definition

Unlike the 1978 Regulations, the 2020 Regulations require federal agencies, when reviewing applications for authorization, to consider both the goals of the applicant seeking the authorization and the agency's statutory authority in reviewing the same. In its Proposed Rule, CEQ proposes to revert to the language of the 1978 Regulations, removing explicit instructions to consider the goals of an applicant or the agency's statutory authority when reviewing applications for authorization.

In proposing this reversion, CEQ explains that the 2020 Regulations could be interpreted to require agencies to "prioritize applicant's goals over other relevant factors, including the public interest." CEQ further provides its view that federal agencies have discretion to base a purpose and need statement on a variety of factors including generalized environmental outcomes irrespective of whether the applicant has the ability to meet the desired outcomes or whether the agency with jurisdiction has the statutory authority required for a given outcome be achieved. Finally, CEQ indicates that referring to an agency's statutory authority relative to review of applications for authorization could be "confusing."

In the context of renewable energy generation and electric transmission and distribution, federal involvement is often limited to review of an application for one or a small number of federal authorizations that may cover only a limited portion of a larger project—such as an application for an incidental take permit under the Endangered Species Act or approval of a right-of-way crossing federal lands. These federal authorizations are not always a precondition for project construction or operation (i.e., the project could proceed without the authorization, albeit perhaps not as efficiently or at greater cost). Courts have recognized that when an agency is responding to an application, it is appropriate for the purpose and need statement to define objectives in light of both an applicant's goals and the agency's statutory authority.[8]

Until the 2020 Regulations were finalized, agency practice had been inconsistent on this point, with some agencies regularly failing to identify or even acknowledge the applicant's reasons for seeking authorization from a federal agency. This is a critical issue because the purpose and need statement informs the range of alternatives described in the NEPA document. For example, where a non-federal project seeks federal authorization but could proceed without it, the federal agency should be clear that the "no action" alternative is not tantamount to "no project"; rather, the "no action" alternative should instead be described as no federal authorization. Appropriately constraining purpose and need statements will enhance the efficiency and relevance of

[8] *See, e.g., Alaska Survival v. Surface Transportation Board*, 705 F.3d 1073, 1086 (9th Cir. 2013).

environmental assessments and environmental impact statements and allow the public to review and comment on NEPA documents in a more effective manner.

Where a purpose and need statement does not clearly recognize an applicant's objectives, the agency is more likely to identify and analyze alternatives that are not viable. In this context, alternatives may not be viable because they would not meet the applicant's needs, are not technically and economically feasible, or simply are unavailable to the applicant. CEQ recognizes this fact in the Proposed Rule, but then states that an agency may wish to consider other interests such as "desired conditions on the landscape or other environmental outcomes, and local economic needs" in addition to an applicant's goals.[9] Agency failure to appropriately constrain the purpose and need statement ultimately results in NEPA documentation that is voluminous, unhelpful in assessing the actual environmental impacts of relevant alternatives, and potentially confusing to the general public. It can also have the practical effect of putting an applicant in the odd position of needing to comment on draft NEPA documents for its own application, which is inefficient for the applicant, public and the agency, and can lead to resources spent on revising inaccurate or infeasible scenarios evaluated in draft NEPA documents. It is appropriate for federal agencies to solicit input from the applicant when developing the purpose and need statement. In fact, requiring detailed information from an applicant on its particular goals and limitations helps the action agency properly define the purpose and need statement and assess alternatives, including any mitigation options proffered by the applicant to adjust the effects of its proposed action. Agencies should recognize that such coordination does not result in inadequate or inappropriate environmental review. To the contrary, it leads to better-informed decision-making and, in turn, a better-informed public.

In the 2020 Regulations, CEQ recognized that *Citizens Against Burlington, Inc. v. Burlington*[10] requires federal agencies reviewing applications for authorizations to base their purpose and need statements on the goals of the applicant and the agency's statutory authority.[11] However, in the Proposed Rule, CEQ reverses course and argues that *Citizens Against Burlington* does not, in fact, require the agency to base the purpose and need statement on an applicant's goals or the agency's statutory authority. Instead, CEQ indicates *Citizens Against Burlington* merely "held that the agency's consideration of the applicant's goals…was not arbitrary and capricious."[12]

While EWAC acknowledges *Citizens Against Burlington* does not *require* an agency to formulate a purpose and need statement in accordance with an applicant's goals, the court in that case nevertheless stressed that agencies *should* do so. Further, the court stated plainly that an agency "should always" consider the extent of its jurisdiction when writing a purpose and need statement. Specifically, the court explained:

> Nor may an agency frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of possibilities.

[9] 86 Fed. Reg. at 55,760.
[10] 938 F.2d 190, 196 (D.C. Cir. 1991).
[11] 85 Fed. Reg. at 43,330.
[12] 86 Fed Reg. at 55,760.

> Instead, agencies must look hard at the factors relevant to the definition of purpose. ***When an agency is asked to sanction a specific plan…the agency <u>should</u> take into account the needs and goals of the parties involved in the application…Perhaps more importantly, an agency <u>should always</u> consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act…***[13]

It is true, as the preamble to the Proposed Rule indicates, that the court in *Citizens Against Burlington* found the Federal Aviation Administration's particular purpose and need statement not to be arbitrary and capricious. However, *Citizens Against Burlington* also held that an applicant's goals "***should***" and the statutory authority of an agency "***should always***" be taken into account. Myriad federal courts have affirmed this viewpoint.[14]

CEQ should reconsider its proposal to remove from its regulations language directing federal agencies to consider both their statutory authority and an applicant's goals and objectives in the context of federal agency review of an application for authorization, as such considerations are both appropriate and necessary. An agency's consideration of an applicant's goals does not mean that such goals are the only thing an agency must consider in the decision-making process; rather, consideration of such goals becomes one of any other number of factors an agency must consider in formulating alternatives and, ultimately, coming to a decision on a given application.

For example, in the context of the U.S. Fish and Wildlife Service's ("Service") review of an application for an incidental take permit under the Endangered Species Act, there are many circumstances in which the agency's "no action" alternative should be "no permit" rather than "no project" because the project at issue could move forward—albeit perhaps with a different

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[13] 938 F.2d at 196 (emphasis added).

[14] *See, e.g., Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 73 (D.C. Cir. 2011) (citing Citizens of Burlington and holding as reasonable a Bureau of Land Management EIS that described its purpose and need as acting on an application and if so, to what degree); Nat'l Parks Conservation Ass'n v. United States, 177 F. Supp. 3d 1, 15 (D.D.C. 2016) ("In evaluating the needs and goals of the parties involved in [an] application, an agency necessarily must take into account at least two considerations. First, it must consider the requesting party's interest in the project, and second, it must consider the extent of the agency's authority to approve or modify the project."); Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1070 (9th Cir. 2010) ("Instead, as the Burlington court held: '[A]gencies must look hard at the factors relevant to the definition of purpose.... Perhaps more importantly [than the need to take private interests into account], an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives.' We agree.") (internal quotations omitted); Stand Up for California! v. U.S. Dep't of the Interior, 204 F. Supp. 3d 212, 306 (D.D.C. 2016) ("When an agency is asked to sanction a specific plan ... the agency should take into account the needs and goals of the parties involved in the application … [t]he agency should also always consider the views of Congress to the extent they are discernible from the agency's statutory authorization and other directives.") (internal quotations omitted), aff'd sub nom. Stand Up for California! v. United States Dep't of Interior, 879 F.3d 1177 (D.C. Cir. 2018); Citizens for Smart Growth v. Sec'y of Dep't of Transp., 669 F.3d 1203 (11th Cir. 2012) ("[A]gencies must take a hard look at the factors relevant to the definition of purpose" and "should take into account the needs and goals of the parties involved in the application."); Webster v. U.S. Dep't of Agric., 685 F.3d 411, 422 (4th Cir. 2012) ("In deciding on the purposes and needs for a project, it is entirely appropriate for an agency to consider the applicant's needs and goals.").*

configuration or parameters—without the permit being sought (i.e., without the need for incidental take coverage). Similarly, a modified alternative derived from an informed purpose and need statement may be a permit with different or additional conservation measures, based on additional avoidance, mitigation or conservation opportunities identified through coordination with the applicant. Oftentimes, however, federal agencies fail to acknowledge that a given project could move forward without the requested authorization (or with a modified authorization) and describe the agency's no action alternative synonymously as "no project."

In anticipation of future NEPA regulatory changes as announced by CEQ, EWAC recommends that future revisions to NEPA regulations affecting the definition and implementation of "reasonable alternative" should clarify that any "reasonable alternative" must be technically and economically feasible, must achieve the objectives of the identified need, and be within the jurisdiction of the reviewing agency.

II. Proposed Revision to Terminology Associated with Effects Analyses

The 2020 Regulations altered terminology relative to an agency's effects analysis—removing the explicit distinction between direct and indirect effects, eliminating the requirement to address "cumulative effects," and instead, required analysis of only those effects that are "reasonably foreseeable" and have a "reasonably close causal relationship" with the agency's proposed action.[15] These same regulations explained that a "but for" causal relationship is insufficient to make an agency responsible for a given effect under NEPA, that effects that are remote in time or geography or the product of a lengthy causal chain are generally excluded from NEPA analysis, and that effects an agency has no ability to prevent due to limited statutory authority or that would occur regardless of a proposed action should not be addressed.[16] CEQ has announced its intention, through the Proposed Rule, to walk back changes made in the 2020 Regulations and to once again require analysis of direct, indirect, and cumulative effects of an action, with an emphasis on considering the "appropriate universe" of effects.[17] CEQ describes this universe as including various forms of pollution, greenhouse gas emissions contributing to climate change, and effects to communities with environmental justice concerns. EWAC encourages CEQ to carefully consider whether a wholesale rescission of the language relative to effects in the 2020 Regulations is necessary, and we provide additional recommendations below.

Eliminating Causation Language

The 2020 Regulations provided a clear framework on whether a given effect should be considered in a NEPA document. That framework is beneficial for project proponents, federal agencies, and the public because it reduces confusion on how far down the causal chain one must look to determine effects and helps to ensure that a given NEPA analysis is focused on information that is useful to the agency's decision-making process.[18]

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[15] 40 C.F.R. 1508.1(g) (2020).
[16] *Id*. at (g)(2).
[17] 86 Fed. Reg. at 55,763.
[18] *See, e.g., Dep't of Transp. V. Public Citizen*, 541 U.S. 752, 767-8 (2004) (finding that in order to make an agency responsible for a given effect, NEPA requires a reasonably close causal relationship between environmental effect and alleged cause and employing a "rule of reason" in determining whether preparation of an EIS is required);

EWAC encourages CEQ to maintain an effects framework that requires analyses focused on effects that are both reasonably foreseeable and proximately caused by the action under review. Confirming the appropriate scope of review is critical to efficient and timely review under NEPA. Because CEQ has proposed a wholesale rescission of the effects framework provided by the 2020 Regulations, agencies may believe that, in addition to climate change implications, they are also required to analyze effects with an attenuated causal connection to the action under review. This, in turn, will result in NEPA documents that are unnecessarily complex and speculative, with questionable value to the agency decision-maker and the public.

Direct and Indirect Effects

Given that, until promulgation of the 2020 Regulations, federal agencies have been distinguishing between direct and indirect effects in NEPA documents since 1978, EWAC understands CEQ's desire to revert back to familiar terminology and is not opposed, in theory, to the same.

However, EWAC is troubled by some of the language in the preamble to the Proposed Rule, which appears to indicate CEQ may be taking a much broader view of the causal connection between an action and its reasonably foreseeable effects.

EWAC recommends CEQ maintain language addressing how agencies should view causation and should clarify in any final rule that proposals that meet statutory and regulatory requirements cannot be rejected because of theoretical effects that can neither be quantified nor tied directly to a proposed federal action. Requiring agencies to quantify, analyze, and disclose speculative effects adds significant time and cost to the NEPA process without providing clear informational value to decision-makers or the public.

We applaud CEQ's recognition in the Proposed Rule that the effects of an action can have short- and long-term beneficial effects that should be included in any NEPA analysis,[19] and encourage CEQ to retain and even expand such language in any final rule, and specifically include in any final regulation that beneficial effects are among those that should be considered by an agency.

Cumulative Effects

EWAC does not take a position as to whether or not CEQ should reinstate the specific requirement to analyze "cumulative impacts" in any final rule; however, to the extent the specific requirement to analyze cumulative impacts is reinstated, we urge CEQ to provide concrete, sensible direction to federal agencies on how to ascertain the breadth of the analysis. In that regard, we appreciate CEQ's reference to the U.S. Supreme Court's decision in *Kleppe v. Sierra Club*,[20] which recognized the concept of cumulative impacts, but also appeared to implicitly recognize that the concept would be cabined in some way. In that case, the Court held that

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Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 776 (noting that the scope of a given agency's NEPA inquiry "must remain manageable" in order to meet NEPA's goal of "ensuring a fully informed and well considered decision") (internal citations omitted).

[19] 86 Fed. Reg. at 55,763.

[20] *Id*. at 55,765 citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

"…when several proposals…that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together."[21] Additional guidance from CEQ relative to analysis of past, present, and reasonably foreseeable future actions together with the effects of a single proposed action would also be useful.

Should CEQ ultimately finalize its proposal to reinstate the specific requirement that agencies analyze "cumulative impacts" associated with federal actions, EWAC encourages CEQ to consider providing specific direction to agencies on what types of impacts should be examined in a given NEPA document. CEQ might look to the description of cumulative impacts as set forth in *Kleppe v. Sierra Club* to inform such direction, keeping in mind that resolving issues of technical expertise will continue to be "properly left to the informed discretion of the responsible federal agencies."[22] For example, to constitute a cumulative impact subject to review in a given NEPA document, an effect should be part of a proposal that is reasonably foreseeable rather than merely contemplated,[23] and should be capable of estimation or quantification (i.e., not merely speculative or hypothetical).[24]

III. Proposed Revisions to Regulations Governing Agency-specific NEPA Rules

The 1978 Regulations encouraged federal agencies to develop agency-specific NEPA procedures that met or exceeded the degree of environmental review required by CEQ's rules. The 2020 Regulations, however, indicated that where agency NEPA procedures are "inconsistent with" the 2020 Regulations, the 2020 Regulations will control and prohibited agencies from imposing additional procedures beyond those provided by the CEQ's regulations. In the Proposed Rule, CEQ explains that agencies have the flexibility and discretion to develop NEPA procedures that go beyond the CEQ's NEPA regulations, and indicates CEQ regulations should serve as a floor to environmental review rather than a ceiling.

This opens the door to a patchwork quilt of different procedures and substantive requirements across federal agencies, heightening the risk of inconsistent application of NEPA and further complicating large projects subject to multiple federal agency approvals. For larger projects, it is fairly common for one federal agency to take the lead, with other agencies signing on as cooperating agencies in the NEPA process. However, if each agency develops different procedures and requirements, it will be challenging for the various agencies to collaborate on a single environmental impact statement or jointly participate in one overall NEPA process.

To the degree CEQ returns to the framework provided under the 1978 Regulations, CEQ should clarify that for multi-agency NEPA reviews, agencies should follow the NEPA procedures of the lead federal agency or the NEPA procedures of another agency or agencies as agreed to at the

[21] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 [1976]).
[22] *Id*. at 412.
[23] *Id*. at footnote 20.
[24] *See, e.g., Wyoming v. U.S. Dep't of Agric*., 661 F.3d 1209, 1253 (10th Cir. 2011) ("cumulative impacts that are too speculative or hypothetical to meaningfully contribute to NEPA's goals of public disclosure and informed decision-making need not be considered"); *Safeguarding the Historic Hanscom Area's Irreplaceable Res., Inc. v. FAA*, 651 F.3d 202, 218 (1st Cir. 2011) ("For NEPA purposes, an agency need not speculate about the possible effects of future actions that may or may not ensue").

start of the relevant NEPA process. Doing so would reduce confusion and delay in the NEPA process and would provide certainty to applicants where multiple cooperating agencies are involved.

Additionally, EWAC encourages CEQ to clarify that while an agency's NEPA procedures should be tailored to the specific programs implemented by that agency, such procedures should not require analyses that exceed those required under NEPA, CEQ regulations, or the statutes the agency is charged with overseeing. Agency-specific NEPA implementing regulations should encourage efficiency (agencies should be allowed to implement stricter time limits for NEPA review than provided by CEQ regulations) rather than additional, redundant review processes. For example, EWAC encourages CEQ to clarify that changes to regulations governing agency-specific NEPA implementation are not intended to *extend* the time by which agencies must complete their NEPA reviews found in current 40 C.F.R. 1501.10, but rather that agencies may promulgate regulations providing for *shorter* timeframes than those required under the same provision. As noted briefly above, delay in deployment, distribution, and transmission of renewable energy has negative impacts to public health and reducing the effects of climate change, and agencies should be encouraged to promulgate regulations that provide for the greatest degree of efficiency possible. To the extent CEQ is considering changes to the mandatory NEPA timelines set forth in 40 C.F.R. 1501.10 in a future phase 2 rulemaking, we encourage CEQ to maintain those timelines.

Finally, to the degree that CEQ is contemplating changes to its regulations governing the relationship between lead and cooperating federal agencies in a phase 2 rulemaking, EWAC suggests the future rulemaking clarify that if an action is reviewing impacts under the jurisdiction of another agency, the action agency should be able to defer to the other agency's prior decision-making or other analyses relevant to the same project (e.g., the U.S. Fish and Wildlife Service's analysis of effects under an Endangered Species Act [ESA] section 7 consultation or NEPA document associated with issuance of an incidental take permit under ESA section 10 in connection with the same project).

IV. Conclusion

EWAC appreciates CEQ's consideration of these comments and would welcome the opportunity to meet with CEQ staff and others within the Administration to provide additional context. The bulk of the 1978 Regulations were more than 40 years old and are out of step with modern NEPA practice. Ambiguities and gaps in those rules had become obvious over the last four decades, and there was a very real need to update the rules to address a host of confusing concepts and inefficient steps and to bring the regulations in line with decades of caselaw. While perhaps imperfect, the 2020 Regulations modernized the NEPA by consolidating case law and agency practice.

EWAC supports regulations that make the NEPA process more efficient and workable for federal agencies and the regulated community and cautions that a wholesale return to the 1978 Regulations would be a true disservice to federal agencies, project proponents, and the public and urge the agency to take a measured approach in its current amendments.

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