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Energy and Wildlife Action Coalition

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Comments Regarding the July 31, 2023 Proposed Rule Regarding Phase 2 of the Revisions to Regulations Implementing the National Environmental Policy Act

Council on Environmental Quality

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

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Council on Environmental Quality
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The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in response to the Council on Environmental Quality's ("CEQ") July 31, 2023 request for public input on CEQ's proposed rule ("Proposed Rule") to revise certain aspects of CEQ's regulations for implementing the procedural provisions of the National Environmental Policy Act ("NEPA").[2] EWAC appreciates CEQ's consideration of these comments, which are informed by the knowledge and experience of EWAC's membership, and are intended to assist CEQ as it considers whether to adopt the regulatory changes provided in the Proposed Rule.

EWAC commends CEQ for recognizing the importance of an "effective environmental review process" that promotes efficiency, regulatory certainty, and better decision making.[3] The modernization of the NEPA regulations is a rare example of a shared, bipartisan priority,[4] and is crucial to realizing many Biden-Harris Administration priorities, including those supporting the development of renewable energy and related electric transmission and distribution infrastructure.[5] EWAC believes effective implementation of NEPA can ensure lawful consideration of impacts to the human environment associated with major federal actions without delaying the deployment of the significant energy infrastructure required to achieve a decarbonized future (which, in itself, incurs a real environmental cost).

In this letter, EWAC: (1) provides support for aspects of the Proposed Rule that will promote greater efficiency and clarity in the NEPA review process; (2) identifies provisions of the Proposed Rule that may create unintended consequences that impede NEPA review and offers recommendations as to how those provisions could be refined; and (3) identifies issues not

[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] *National Environmental Policy Act Implementing Regulations Revisions Phase 2*, 88 Fed. Reg. 49,924 (July 31, 2023). The Proposed Rule is also referred to as the Bipartisan Permitting Reform Implementation Rule, *see* The White House, Biden-Harris Administration Proposes Reforms to Modernize Environmental Reviews, Accelerate America's Clean Energy Future, and Strengthen Public Input (July 28, 2023) https://www.whitehouse.gov/ceq/news-updates/2023/07/28/biden-harris-administration-proposes-reforms-to-modernize-environmental-reviews-accelerate-americas-clean-energy-future-and-strengthen-public-input/#:~:text=CEQ%27s%20Bipartisan%20Permitting%20Reform%20Implementation,security%2C%20and%20advance%20environmental%20justice.

[3] Proposed Rule at 49,924.

[4] As demonstrated by the passage of the Fiscal Responsibility Act of 2023. Pub Law No. 118-5 (2023).

[5] *See, e.g.*, Exec. Order No. 14,008: *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7619 (Jan. 27, 2021); Exec. Order No. 13,990: *Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7037 (Jan. 25, 2021). We note that Congress also has prioritized efficient permitting and delivery of renewable energy. For example, in 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. Consolidated Appropriations Act of 2020, Division Z. Pub. Law No. 116-260 (2020).

addressed by the Proposed Rule, but which we believe would benefit from further regulatory certainty.

I. Comments in Support of Proposed Rule

EWAC commends CEQ for retaining or expanding on provisions set forth in the changes to the NEPA regulations published on July 18, 2020 ("2020 Regulations")[6] that reflected longstanding agency practices, procedures, and guidance, and were supported by caselaw. EWAC also appreciates CEQ's prompt effort to incorporate the NEPA amendments established through the Fiscal Responsibility Act of 2023 ("FRA"). Below, we identify specific components of the Proposed Rule that EWAC supports.

A. Support for Greater Use of Categorical Exclusions

EWAC has long advocated that agencies make more frequent use of categorical exclusions ("CEs"). We appreciate the attention paid by CEQ in the Proposed Rule to ways agency development of and reliance on CEs could be made more efficient.

In our comments on the 2020 Regulations, EWAC suggested that CEQ consider establishing a list of examples of the types of projects likely to qualify for CEs, and making the list publicly available so that agencies could gain confidence in making CE determinations. EWAC is pleased that the Proposed Rule incorporates this suggestion at 40 C.F.R. § 1501.4(d).[7]

EWAC also appreciates the Proposed Rule's incorporation of provisions in the FRA that encourage use of CEs,[8] including, but not limited to:

- Encouraging agencies to "borrow" or "apply" the CEs of other agencies rather than requiring agencies to develop CEs from scratch for new programs;[9]

- Clarifying that agencies may establish CEs individually or jointly with other agencies, particularly for activities that the agencies routinely work on together "where having a CE would create efficiency in project implementation;"[10]

- Expanding the mechanisms by which agencies can establish CEs (for example, through land use plans and decision documents supported by a programmatic environmental impact statement ("EIS") or environmental assessment ("EA")) rather than requiring CEs to be established only via agency-specific NEPA regulations;[11] and

- Providing that agencies may establish CEs for a limited duration in order "[t]o promote experimentation and evaluation."[12]

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[6] *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,304 (July 16, 2020).
[7] Proposed Rule at 49,938.
[8] *See* 42 U.S.C. §§ 4336, 4336(c), 4336(e).
[9] Proposed Rule at 49,939.
[10] *Id.* at 49,938.
[11] *Id.*
[12] *Id.*

EWAC believes that, due to the lack of sufficient guidance on the use of CEs in the past, CEs have been underutilized. There are myriad types of projects that, typically, would not be expected to significantly affect the quality of the human environment and should be eligible for treatment pursuant to a CE. The provisions of the Proposed Rule encouraging development and use of CEs is an important first step toward more expeditious project review, which will benefit the regulated community and federal agencies alike. EWAC encourages CEQ to further support federal agency use of CEs by issuing formal guidance on the development and utilization of CEs, and submitting the same to public notice and comment.

EWAC also supports the Proposed Rule's new provision to allow agencies to establish CEs outside their usual NEPA procedures.[13] If in the course of creating a non-NEPA document, such as a long-term land use plan, an agency discovers that a type of project is not likely to significantly affect the quality of the human environment, it is practical to allow agencies to make use of that information when assessing a project under NEPA.

B. Support for Greater Clarity on Use of Mitigated Findings of No Significant Impact

EWAC appreciates that CEQ proposes to retain the 2020 Regulations' codification of the longstanding agency practice of relying on mitigation to reach a finding of no significant impact ("FONSI") and to make clear when such reliance is appropriate.[14] Mitigated FONSIs are a useful tool that allow project proponents to mitigate impacts associated with their proposals, and achieve the dual goals of avoiding any significant environmental effects and shortening the NEPA review process.

C. Support for Clarification that an EIS is Not Required Where Significant Effects are Beneficial

EWAC appreciates CEQ's clarification that an agency need only prepare an EIS for major federal actions with significant adverse effects and that no EIS is required where an action's significant effects are solely beneficial.[15] In particular, EWAC supports the language in the preamble to the Proposed Rule ("Preamble") that uses the example of a renewable energy project to explain when preparation of an EIS may not be required.[16] The example posits that the short-term greenhouse gas emissions emitted while constructing a project may not be significant when considered in the context of how the project itself would reduce overall greenhouse gas emissions compared to a traditional power source.[17] In EWAC's experience, agencies have given little weight to the individual and cumulative long-term benefits of renewable energy development projects, and instead focus on potential short-term negative effects. EWAC therefore supports CEQ's clear instruction that agencies should consider significant beneficial effects, and is hopeful that it will

[13] *Id.*
[14] *Id.* at 49,940.
[15] *Id.* at 49,936, 49,964.
[16] *Id.* at 49,936.
[17] *Id.* (explaining "an agency should consider short-term construction-related [greenhouse gas] emissions from the project in light of long-term reductions in [greenhouse gas] emissions when determining the overall intensity of effects").

provide greater clarity for NEPA review associated with decarbonization solutions including renewable energy, transmission, and distribution projects, and could result in more projects satisfying NEPA using a CE or EA-level NEPA review.[18] EWAC also supports the example in the Preamble regarding weighing potential short-term adverse impacts to species that could occur as part of forest restoration projects (such as species displacement during project implementation) against the long-term beneficial impacts to species achieved by reducing the risk of a severe wildfire that would destroy the habitat altogether.[19] EWAC members applying for rights-of-way permits to clear fire-hazards from the paths of power lines often cite to this careful balancing during the permit application process, and we are pleased CEQ recognizes the importance of long-term planning to protect lives and the environment.

D. Support for Encouraging Use of Programmatic NEPA

EWAC commends CEQ for encouraging the use of programmatic NEPA documents to "facilitate more efficient environmental reviews and project approvals."[20] In particular, we support CEQ's proposal to "encourage the use of programmatic environmental documents," to specifically recognize that EAs may be used as programmatic review documents, and for providing agencies with examples of what types of actions may be appropriate for programmatic review or tiering.[21]

II. Concerns Regarding Provisions in Proposed Rule

A. Major Federal Actions

Although EWAC supports some aspects of the Proposed Rule's treatment of major federal actions, it nonetheless has concerns with these provisions and the related discussion in the Preamble. EWAC appreciates the clarity provided in the Proposed Rule regarding the types of activities that meet the definition of "major federal actions" and the types of activities that are excluded from that definition.[22] It has been the experience of EWAC's members that federal agencies often employ a definition of major federal action that goes beyond the statutory definition of "an action that is subject to substantial Federal control and responsibility"[23] and use NEPA review to evaluate the potential environmental impacts of an entire project, when doing so is not proper.[24] NEPA reviews can therefore become sprawling endeavors that unnecessarily bog down projects for years, and, in some cases, prevent the projects from being completed at all.

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[18] *Id.*
[19] *Id.*
[20] *Id.* at 49,943.
[21] *Id.* at 49,943–44.
[22] *Id.* at 49,987.
[23] *See* 42 U.S.C. § 4336(e).
[24] Federal agencies are aware of the importance of properly defining a major federal action under NEPA. *See, e.g.*, U.S. Fish and Wildlife Service and National Marine Fisheries Service, *Habitat Conservation Planning and Incidental Take Permit Processing Handbook* ("HCP Handbook") at 13-1 ("It is critical to the NEPA process that [the Services] carefully define the proposed Federal action to ensure that we properly address impacts and alternatives and that we do not unnecessarily analyze impacts that are not a result of our action and over which we do not have regulatory authority.").

The above aside, EWAC also supports proposed sections 40 C.F.R. §§ 15081.(u)(2)(iii) and (iv), which would exclude:

> loans, loan guarantees, or other forms of financial assistance where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effects of the action . . . [which] would include the exclusion of certain business loan guarantees provided by the Small Business Administration.[25]

EWAC agrees with CEQ that these exclusions are consistent with section 111(10)(B) of NEPA.[26] However, EWAC does not agree with CEQ's proposal to strike the example of Farm Service Agency ("FSA") loan programming from this section,[27] as FSA loans are not subject to federal control to the extent that they warrant NEPA review. Furthermore, FSA loans can be critically important to renewable energy siting, construction, operation, and deployment; unnecessarily subjecting them to NEPA review could impede America's clean energy future.

EWAC does not support CEQ's proposal to revise the existing list of examples of actions that are typically considered "major federal actions" subject to NEPA review found at 40 C.F.R. § 1508.1(u)(1)(vi) to include the provision of:

> financial assistance, including through grants, cooperative agreements, loans, loan guarantees, or other forms of financial assistance where the agency has the authority to deny in whole or in part the assistance due [sic] environmental effects, impose conditions on the receipt of the financial assistance to address environmental effects, or otherwise has sufficient control and responsibility over the subsequent use of the financial assistance or the effects of the activity for which the agency is providing financial assistance.[28]

EWAC is concerned that the provision, as written, is overly broad and could be interpreted to encompass virtually any federal grant or loan program, including those that are not currently subject to NEPA review. Retaining the provision without significant revision could stymie the purpose of the Inflation Reduction Act[29] and the NEPA amendments contained in the FRA. This would cause a delay in the deployment of billions of dollars meant to support new infrastructure investments, including those associated with the continued generation and transmission of clean reliable, and affordable energy. EWAC recommends the provision in section 1508.1(u)(1)(vi) of the Proposed Rule be removed. Should CEQ retain this provision in any final rule, EWAC urges CEQ to revise this language to make clear that it applies only where the relevant agency has the ability to condition the funding based on the scope of the agency's authority and where the agency

[25] Proposed Rule at 49,962.
[26] 42 U.S.C. § 4336(e).
[27] Proposed Rule at 49,962 (proposing to strike the example currently in 40 C.F.R. § 1508.1(q)(1)(vii) for farm ownership and operating loan guarantees by the FSA).
[28] Proposed Rule at 49,962, 49,987.
[29] Pub. Law No. 117-169 (2022).

has the ability to significantly influence the placement, design, or other meaningful aspects of a proposed activity.

B. Innovative Approaches to NEPA Review

The Proposed Rule introduces a new provision at 40 C.F.R. § 1506.12 that aims to employ innovative approaches to NEPA to address "extreme environmental challenges."[30] While EWAC understands the urgency of the Biden-Harris Administration in ameliorating the impacts of climate change, as proposed, the new provision lacks specificity, making it difficult to anticipate how the provision will be applied by CEQ and other federal agencies.

If CEQ opts to retain the provision, EWAC recommends that CEQ set parameters on the types of innovative approaches that can lawfully be required pursuant to NEPA, and to publish those parameters for public review and input. EWAC cautions that the effort to "maximize agency flexibility"[31] should not be read to mean that agencies may exceed the authority granted to them under NEPA. EWAC's concern is heightened given CEQ's proposal to remove language explicitly stating that NEPA is procedural, rather than substantive, in nature.[32] Any final rule should clarify that agencies' innovative approaches to addressing climate change under NEPA must not: (1) go beyond what is permissible under NEPA and any other applicable operating statute; (2) limit a project proponent's participation in the NEPA process; or (3) result in delays in completing the NEPA process. Additionally, EWAC recommends that CEQ consider strengthening the language proposed at 40 C.F.R. § 1506.12(d) maintaining CEQ's authority to evaluate and either approve or reject agencies' proposed innovative approaches, to ensure the appropriate level of oversight.[33]

C. Expanded Endangered Species Act Habitat Intensity Factor

In determining whether a major federal action rises to the level of "significance," NEPA regulations require agencies to apply "intensity factors."[34] Through the Proposed Rule, CEQ has indicated its intent to reinstate some of the intensity factors that had been removed under the 2020 Regulations. One of the intensity factors that CEQ has proposed to reinstate relates to the effects of an action on species listed as threatened or endangered under the Endangered Species Act ("ESA") and on any designated critical habitat of such species.[35] However, CEQ has proposed to expand this intensity factor to require that agencies consider the effects on ***any habitat*** utilized by a listed species,[36] rather than limiting the factor to considering effects on formally designated critical habitat.

It is EWAC's position that the final rule should not include this factor at all, because section 7 of the ESA already requires that actions funded, authorized, or carried out by federal agencies will

[30] Proposed Rule at 49,957.
[31] *Id.*
[32] *Id.* at 49,930 (stating "CEQ is proposing to remove the language that describes NEPA as a purely procedural statute because, while correct, CEQ considers the language to be an inappropriately narrow view of NEPA's purpose").
[33] *Id.* at 49,958.
[34] 40 C.F.R. § 1501.3(d)(2).
[35] Proposed Rule at 49,958 (explaining "[t]his would be an expansion of an intensity factor from the 1978 regulations, which only addressed critical habitat.").
[36] *Id.* at 49,936.

not jeopardize listed species or result in the destruction or adverse modification of any designated critical habitat of such species.[37] Project proponents frequently commit to substantial minimization and mitigation measures in order to reduce impacts on listed species and critical habitat associated with the project at issue. Given the substantive nature of section 7 of the ESA, there is little to be gained by heightening NEPA scrutiny over the same impacts, and, conversely, this addition could hamper the deployment of renewable energy generation and electric infrastructure that is critical to the nation's climate goals.

If CEQ opts to reinstate the listed species and critical habitat intensity factor, EWAC urges CEQ not to expand the intensity factor to include consideration of habitat that has not been formally designated as critical habitat by the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (collectively, "Services"). Presently, there is no accepted definition of what may constitute "habitat" for listed species, and the Proposed Rule does not elucidate what is meant by "habitat" (for example, whether the area must constitute actual, utilized habitat or whether an area must simply contain one or more features essential for species survival).[38] Requiring federal agencies to consider the intensity of effects on any areas where a listed species could potentially be present would drastically expand the scope of the significance determination and could lead to serious project delays and siting challenges, and further impact the development of renewable energy generation and critical electric infrastructure. Given the Services themselves—the expert federal agencies with regard to the ESA—do not have a regulation setting forth the definition of "habitat," it is not advisable to require other federal agencies to consider this complex topic. Applying the habitat intensity factor would be particularly problematic where a listed species is widespread and the primary threat to the survival of the species is not habitat curtailment.[39] EWAC urges CEQ to reconsider this proposed language.

D. Consideration of Incomplete or Unavailable Information

NEPA does not require agencies to undertake new research unless that research is "essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining [the information] are not unreasonable."[40] Current NEPA implementing regulations further clarify that

[37] 16 U.S.C. §§ 1531 et seq.

[38] Courts, including the United States Supreme Court, have pointed out that the ESA does not define the term "habitat," and that the designation of critical habitat turns upon this definition. *See Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, 827 F. 3d 452 (5th Cir. 2016) vacated on other grounds by 139 S. Ct. 590 (2018) in light of *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361 (2018). Although USFWS published a rule defining habitat in December 2020, that rule was later rescinded by the agency in 2022, and no replacement definition has been published. *See Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat*, 85 Fed. Reg. 81,411 (Dec. 16, 2020) rescinded by *Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat*, 86 Fed. Reg. 59,343 (Oct. 27, 2021).

[39] Consider, for example, various endangered bat and insect species (e.g. the Northern long-eared bat and the rusty patched bumble bee) that are found in multiple states, and that are primarily threatened by pathogens or other non-anthropogenic causes. *See* U.S. Fish and Wildlife Service, ECOS – Environmental Conservation Online System, online profiles for these species, available at https://ecos.fws.gov/ecp/species/9045 and https://ecos.fws.gov/ecp/species/9383.

[40] 42 U.S.C. § 4336.

> "[i]f the incomplete but available information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable, the agency shall include the information in the environmental impact statement."[41]

CEQ now proposes to remove the qualifying words "but available" from the current NEPA regulations when describing the information agencies must consider when making NEPA determinations.[42] In the Preamble, CEQ explains that the "but available" qualifier could be read as considerably narrowing the obligations of agencies to obtain information even when the information is easily attainable and the costs to obtain the information are reasonable.[43]

EWAC disagrees that it is "vital to the NEPA process for agencies to undertake studies and analyses where necessary rather than relying solely on available information."[44] Rather, EWAC finds the use of the words "but available" serve as an important, common sense limitation on the burden on agencies to locate or create data and information in connection with NEPA review. There are several problems that could arise if CEQ removes the words "but available" from the provision regarding use of information, such as:

- *Improper expansion of the NEPA review timelines*. Implying to agencies that they may need to seek out or develop additional information could unnecessarily lengthen timelines for completing NEPA review. While the FRA contains—and the Proposed Rule adopts—time limits for completing NEPA review, agencies could nevertheless create unreasonable delays in the completion of NEPA review by not starting the clock on timelines until exhaustive (rather than thorough but adequate) information is collected that may be relevant to the NEPA analysis.

- *Requiring project proponents to undertake expensive or superfluous studies.* Agencies could require project proponents to undertake expensive studies that may not be "essential" to the decision making process.

- *Risk of reliance on poor quality information*. To the extent a federal agency seeks to obtain new information or data within the time limits prescribed by the FRA, there is an increased risk that the quality of the data could be poor or unreliable. For example, even if new studies could be conducted within the time limits prescribed by the FRA, it is possible (in fact, probable) that there would be insufficient time for such studies to be validated through proper peer review—calling into question the value of such studies as "best available" data.

- *Increased risk of litigation*. The proposed change could make projects vulnerable to litigation challenges, where third parties assert the agency did not require sufficient additional studies prior to issuance of a FONSI or record of decision ("ROD").

- *Strain on agency resources*. Many federal agencies are already under pressure to complete project reviews within the various statutory and regulatory frameworks to which those

[41] 40 C.F.R. § 1502.21(b).
[42] Proposed Rule at 49,950.
[43] *Id.*
[44] *Id.*

agencies are subject and within the agency's budget. Placing additional burden on agencies to conduct or oversee new studies could further strain agency resources and stymie project review.

EWAC also urges CEQ to keep in mind that the goal of the NEPA amendments contained in the FRA was to reform the NEPA process and timelines to eliminate unnecessary delays. This provision seems to do the exact opposite, thereby undermining congressional intent. The purpose of NEPA is to require agencies to take a "hard look" before they commit to a proposed action,[45] and this purpose is reflected in the informational standard that is clearly laid out in the statute and the current implementing regulations: agencies are tasked with examining information that is essential to making an informed decision about the reasonably foreseeable effects of a project. EWAC therefore encourages CEQ to retain the phrase "but available" in 40 C.F.R. § 1502.21(b).

However, if CEQ elects to eliminate the phrase, EWAC requests CEQ clarify that agencies should not delay the NEPA process by seeking information that would be nice to have but is not "essential" to the decision making process and should only require the production of additional information where the agencies would not be able to make an informed decision about the reasonably foreseeable effects of a project otherwise.

EWAC is concerned that this provision improperly shifts the focus to mandate specific results, rather than the procedural requirements for analyzing the environmental effects of proposed actions. As made clear by the legislative history and subsequent caselaw, "it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."[46] Any provision in the Proposed Rule or language in the preamble stating or implying that NEPA mandates the selection of a particular alternative is inconsistent with the fundamental purpose of NEPA and must be reconsidered.

E. Monitoring and Compliance Plans in Mitigated FONSIs

Given that NEPA is a procedural statute, EWAC believes CEQ goes beyond its statutory authority by proposing to require that mitigated FONSIs include monitoring and compliance plans. Not all federal agencies have the authority to prescribe monitoring and compliance plans, and NEPA does not contemplate the imposition of this kind of requirement.[47] EWAC is particularly concerned about any requirement for monitoring and compliance plans given CEQ's proposed removal of language clarifying that NEPA is a procedural statute. EWAC recommends excluding this monitoring and compliance plan requirement from the final rule.

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[45] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

[46] *Id.* citing to *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–228 (1980) (per curiam); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

[47] By contrast, some statutes, such as the ESA and the Clean Water Act do provide authority for requiring mitigation and other necessary measures in connection with those statutes' permitting frameworks. The agencies implementing those permitting frameworks long have interpreted such other necessary measures to include short- and long-term monitoring and compliance.

F. Environmentally Preferable Alternative

EWAC recommends CEQ reconsider its proposal requiring federal agencies to identify an "environmentally preferable alternative" in draft and final EISs and not include this requirement in any final rule.[48] The environmentally preferable alternative is already provided to the public in an agency's ROD. Duplicative identification of an environmentally preferable alternative in the draft and final EIS would not add any meaningful benefit and could instead create troubling consequences. For example, inclusion of the environmentally preferable alternative in a draft EIS may unintentionally mislead the public to believe that NEPA requires the agency to select the environmentally preferable alternative, which in turn has the potential to cause the public to disproportionately focus on the environmentally preferable alternative in the public comments and unfairly skew public opinion about a project. For this reason, we suggest the elimination of this proposed requirement in any final rule.

Should CEQ include a definition of environmentally preferable alternative in a final rule, EWAC further recommends CEQ specify that the environmentally preferable alternative must be technically and economically feasible in order to be considered by a federal agency during NEPA review. Consistent with the NEPA amendments in the FRA,[49] CEQ codifies the long-standing regulatory definition of "reasonable alternatives" to reflect that, in order to be reasonable, the alternatives must be "technically and economically achievable" and "meet the purpose and need of the proposed action."[50] These requirements should also apply to the environmentally preferable alternative. However, CEQ does not include these necessary parameters for the Proposed Rule's definition of "environmentally preferable alternative." CEQ should revise this definition to make clear that environmentally preferable alternatives are limited to alternatives that are reasonable.[51]

G. Five-year Reevaluation Periods for Programmatic NEPA

As noted in section I(D), above, EWAC supports the emphasis in the Proposed Rule on the benefits of programmatic NEPA review. In order to ensure efficiency in the programmatic NEPA context, we suggest that CEQ clarify in any final rule that the reevaluation procedure for agency renewal of programmatic NEPA documents set forth in 40 C.F.R. § 1502.9(e)[52] should not be unduly lengthy or burdensome, and that agencies should focus their limited resources on cases where circumstances have changed significantly since the issuance of the relevant EIS and ROD. EWAC further recommends that CEQ clarify that project proponents may continue to tier off of existing programmatic documents while reevaluation is ongoing, and that projects will not risk noncompliance for reliance on the previous versions of a programmatic document should a new version be issued subsequent to the commencement of project activities.[53]

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[48] Proposed Rule at 49,949.
[49] FRA at § 321(a)(3)(B)(iii).
[50] Proposed Rule at 49,985, consistent with section 102(F) of NEPA.
[51] *See* section 321 of the FRA.
[52] Proposed Rule at 49,947.
[53] This approach would mimic other, existing federal permitting frameworks. Consider, for example, the grace period afforded to project proponents during the reissuance of Nationwide Permits pursuant to section 404 of the Clean Water

H. Public Engagement and Exhaustion Requirements

The current NEPA regulations provide specificity regarding how agencies should conduct scoping through a notice of intent, require agencies to summarize in a draft EIS all information received during scoping and specifically seek comment on that information, require agencies to certify in the ROD that the agencies have considered all alternatives, information, and analyses submitted by the public, and state that any comments not submitted within the relevant public comment period are forfeited as exhausted ("exhaustion requirements").[54] CEQ has proposed to remove these requirements due to CEQ's current view that the process is unnecessarily stringent and would hinder the public and federal agencies. EWAC recommends that CEQ reconsiders some of the changes in the Proposed Rule relating to public engagement, which, if finalized, could lead to an increase in litigation and unnecessarily delay completion of the NEPA process.

i. Exhaustion requirements

EWAC suggests that CEQ consider maintaining specific exhaustion requirements in any final rule, even if they are not as extensive as those set forth in current regulations. EWAC is concerned that eliminating these requirements altogether could lead to unnecessary uncertainty for federal agencies, project proponents, the courts, and the general public. At a minimum, CEQ should provide additional clarification about what it means to "meaningfully" engage in the public comment process,[55] as this term is exceedingly vague and could be subject to a wide range of interpretations.

ii. Standardizing public comment requirements

Along these same lines, EWAC recommends that even if CEQ removes the language from the current NEPA regulations clarifying the level of detail required in public comments, the agency should fill the resulting gap by providing some new standards for the level of detail required. Rather than unfairly burdening public commenters, the creation of a standardized set of rules is likely to ensure the public is able to provide meaningful input. EWAC emphasizes that lack of public comment standards could delay projects due to avoidable litigation.

iii. Agency discretion over EAs

Finally, EWAC recommends that CEQ remove the Proposed Rule's new requirement that agencies open all draft EAs to public comment.[56] As stated in the Preamble,[57] most agencies already take this step, and codification is therefore likely to have limited utility. By contrast, there may be a situation where an agency decides it is imprudent to open a draft EA to public comment,[58] and the

Act. *See Reissuance and Modification of Nationwide Permits*, 86 Fed. Reg. 2744, 2747 (Jan. 13, 2021); *Reissuance and Modification of Nationwide Permits*, 86 Fed. Reg. 73,522, 73,525 (Dec. 27, 2021).

[54] 40 C.F.R. § 1500.3(b).

[55] The term "meaningful" is used throughout the Proposed Rule when referring to input from the public. *See e.g.*, Proposed Rule at 49,932 ("meaningful engagement"), 49,951 ("meaningfully participate"), 49,975 ("meaningful public comment").

[56] Proposed Rule at 49,940.

[57] *Id.*

[58] Perhaps an agency may make this determination to expedite review, for example, where it is obvious the threshold of significance has been exceeded and a full EIS will be necessary.

agency would be unduly hindered by this new requirement. For these reasons, in accordance with longstanding practice and guidance, EWAC recommends that CEQ allow agencies to retain discretion over how they manage public involvement for EAs.

I. Sponsor-Prepared NEPA Documents

EWAC recommends that CEQ clarify in any final rule that codifying the ability of project sponsors to prepare NEPA documents is not adding a new process agencies must implement in order to utilize sponsor-prepared documents. Many agencies have accepted sponsor-prepared documents for years, and have already established processes that work for all involved. EWAC does not object to an agency changing its process or implementing additional procedures, but believes this choice should be left to the agency, and should not be initiated due to a real or perceived mandate under CEQ's NEPA regulations.

J. Environmental Justice

EWAC understands that environmental justice is a significant priority for the Biden-Harris Administration and that CEQ's proposed changes to emphasize environmental justice considerations in the Proposed Rule reflect this prioritization.[59] If and when CEQ finalizes the proposed regulatory language relating to environmental justice, EWAC respectfully reminds the agency that NEPA is a procedural statute, and that any changes should be made within the limits of CEQ's authority under NEPA. Additionally, EWAC suggests that CEQ consider including a more specific definition of an "environmental justice community" to better guide federal agencies in how to identify these communities.

III. Additional Recommended Changes

Based on the experience of our membership, EWAC offers the following suggestions regarding additional revisions to current NEPA regulations that were not addressed in the Proposed Rule, but would clarify and streamline NEPA review.

A. NEPA Review Where There is Limited Federal Involvement

Non-federal projects are often subject to some level of review under NEPA based on limited federal involvement (for example, issuance of a permit under Clean Water Act section 404 for portions of a larger project). Where federal involvement is limited to only a portion of a larger project, the scope of NEPA review must address the environmental impacts of the specific activity subject to federal control and responsibility, rather than examining the environmental impacts of the entire project. EWAC urges CEQ to consider adding language to the NEPA regulations clarifying that federal agencies should work with project proponents to carefully define the scope of the proposed federal action subject to NEPA review. Language from the Services' *Habitat Conservation Planning and Incidental Take Permit Processing Handbook*,[60] is instructive:

[59] *See, e.g.*, Proposed Rule at 49,961.
[60] HCP Handbook at 13-1, note 23.

> It is critical to the NEPA process that [the Services] carefully define the proposed Federal action to ensure that we properly address impacts and alternatives and that we do not unnecessarily analyze impacts that are not a result of our action and over which we do not have regulatory authority.[61]

The U.S. Army Corps of Engineers' ("Corps") Clean Water Act section 404 regulations also recognize the limited scope NEPA plays in non-federal projects, as set forth in Appendix B to their regulations:

> In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the *specific activity* requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant [f]ederal review.[62]

Existing language within 40 C.F.R. § 1500.1 provides both support for the Corps' interpretation of the scope of NEPA review and the Services' instruction relating to the same set forth above,[63] and a logical place for additional language that would further encourage effective and efficient NEPA processes. Substantial federal caselaw also supports this interpretation.[64]

B. Limited Review of Alternatives

As a natural extension of the logic above regarding the limits of federal agencies, EWAC recommends that CEQ also include language to limit the review of alternatives to those that:

- Are within the control of the agency to implement;
- Would accomplish the purpose and need of the proposed action; and
- Could substantively alter the environmental impacts of the federal action under consideration.

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[61] *Id.* at 13-1.

[62] 33 C.F.R. § 325, Appendix B at (b)(1) (emphasis added).

[63] 40 C.F.R. § 1500.1 (explaining "[NEPA] is a procedural statute intended to ensure Federal agencies consider the environmental impacts of *their actions* in the decision-making process. . . it requires Federal agencies to provide a detailed statement on proposals for major Federal actions significantly affecting the quality of the human environment. The purpose and function of NEPA is satisfied if Federal agencies have considered *relevant* environmental information, and the public has been informed regarding the decision-making process." (emphasis added)).

[64] *See, e.g., Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269, 272 (8th Cir. 1980); *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698 (6th Cir. 2014); *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31 (D.C. Cir. 2015); *Sierra Club v. Bostick*, 787 F.3d 1043 (10th Cir. 2015); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, Civ. No. 16-1534, 2017 WL 2573994, *15 (June 14, 2017); *Montrose Parkway Alternatives Coalition v. U.S. Army Corps of Engineers*, 405 F.Supp.2d 587 (D. Md. 2005); *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189 (D.C. Cir. 2017); *Sierra Club v. Federal Energy Regulatory Commission*, 827 F.3d 36 (D.C. Cir. 2016).

Limiting the considered alternatives in this manner would prevent consideration of irrelevant alternatives, resulting in more efficient NEPA analyses and ensuring that information contained in NEPA documents is germane to the inquiry at hand.

C. Combining FONSIs with EAs

EWAC believes that the efficiency of EAs would be improved if FONSIs could be included in the EAs themselves, rather than requiring separate documentation. Forcing agencies to create a new document which re-summarizes the findings of the EA is unnecessarily duplicative, requiring additional time and resources but offering little to no benefit. Combining these documents is a simple and effective way to further streamline NEPA review without compromising the fundamental purpose of NEPA.

D. Considering Prior State and Local Reviews

Consistent with the Proposed Rule's promotion of collaboration among federal agencies, EWAC respectfully suggests that CEQ consider adding language to better incorporate state and local reviews into the NEPA process. Several states already require state and local agencies to evaluate proposed projects using robust, NEPA-style review. EWAC members' projects are often subject to these types of reviews, which are independent from the federal NEPA process. These state-level processes are critically important for informing the scope of projects that are necessary, reasonable, prudent, and meet the obligations utility companies have to serve their customers. Federal agencies should therefore have the explicit authority to consider prior state and local reviews where relevant, and to incorporate such reviews into NEPA documents. Allowing for this type of collaboration would avoid duplicative effort and expense and, in some cases, could meaningfully speed federal review of a project.

E. Abbreviated Responses to Comments that have Already been Addressed in Prior Reviews

CEQ should consider adopting regulations allowing federal agencies to provide abbreviated responses to comments raised in response to the publication of NEPA documents where: (1) new comments are substantially similar to comments raised during previous public review processes; and (2) the prior comments were adequately addressed in a previous response to comments. This consideration of previous comments should extend to state and local reviews as well as previous federal reviews.

F. Flexibility in Inter-agency EIS Adoption

Consistent with the Proposed Rule's emphasis on inter-agency collaboration, EWAC respectfully suggests that CEQ consider updating the inter-agency NEPA adoption procedure. Currently, an agency that wishes to adopt the EIS of another agency must re-circulate that agency's EIS prior to adoption. Given NEPA's extensive notice and comment requirements, this process can take several months. Unlike original EISs, which are being considered by the public for the first time during the notice and comment period, adopted EISs are unlikely to spark any new substantive input that has not been previously considered by the agencies involved. Given recirculation's limited utility and to avoid unnecessary delay, EWAC suggests that CEQ considers allowing an agency to issue its own ROD for review and comment, rather than requiring the re-circulation of the EIS. To the extent an agency elects to re-circulate an adopted EIS, the public review and comment period

should be limited to fifteen days. Adding this flexibility will make the EIS-adoption process much smoother, and may therefore encourage inter-agency collaboration. Allowing agencies to borrow from one another where appropriate has the potential to avoid duplicative work and streamline NEPA review, as CEQ has recognized in proposing to allow agencies to utilize one another's CEs.

G. Timelines for CE Determinations

Consistent with our comments on the 2020 Regulations, EWAC respectfully renews the request that CEQ consider adopting regulations prescribing a timeline by which federal agencies must make a determination as to whether a CE will apply to a given federal action. It has been the experience of EWAC's membership that even where an agency action clearly falls within an established CE, agencies may take several months (or longer) to confirm that the CE applies. By establishing a timeline for CE determinations, CEQ would support federal agency use of CEs, and could prevent unnecessary delay in project timelines for projects that do not have significant individual or cumulative effects on the human environment.

IV. Conclusion

EWAC supports regulations that make the NEPA process more efficient and workable for federal agencies and the regulated community, and believes such efficiency is key to achieving the Biden-Harris Administration's historic clean energy and infrastructure goals, in order to accelerate America's clean energy future.[65] The recommendations set forth in our comments are designed to align with the statutory amendments set forth in the FRA, as well as the aforementioned goals of this Administration. EWAC appreciates CEQ's consideration of these comments and would welcome the opportunity for further dialogue.

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[65] *See, e.g.*, Exec. Order No. 14,008: *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7619 (Jan. 27, 2021); Exec. Order No. 13,990: *Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7037 (Jan. 25, 2021).