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Comments regarding the June 20, 2018 Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act

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") June 20, 2018 Advance Notice of Proposed Rulemaking—Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act ("NEPA") (the "Notice").[2] EWAC appreciates that CEQ is considering an update to its NEPA implementing regulations and for the extension of time to allow for meaningful review and opportunity to provide comments on the proposed changes.[3] EWAC notes that the comments provided herein are not intended to be exhaustive; rather, due to the breadth of the subject matter, EWAC has focused its comments on those issues that may significantly affect the electric power sector or for which EWAC offers particular expertise.

EWAC has organized these comments by repeating verbatim (**bold and underlined**) certain of the questions posed in the Notice and then providing in non-underlined text EWAC's responses to those specific questions. To the extent practicable, EWAC provides specific regulatory language the CEQ could consider when undertaking a review of the agency's NEPA implementing regulations ("NEPA Regulations").[4] Where EWAC suggests additions to the current language of the relevant NEPA Regulation, suggested new language is *italicized*. Where EWAC suggests deletions to language contained in the current NEPA Regulations, EWAC indicates those deletions using ~~strikethrough~~.

I. NEPA Process

A. Potential Revision No. 2: Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier federal, state, tribal or local environmental reviews or authorization decisions, and if so, how?

Though already included in current regulations under the concept of "incorporation by reference" at 40 C.F.R. § 1502.21, EWAC supports improving NEPA processes by incorporating environmental studies and analyses conducted, and decisions made, during earlier federal, state, tribal, and local public review processes. Allowing the lead agency to both consider and incorporate, where appropriate, information from such earlier reviews would prevent duplicative processes and would ensure that the agency preparing the ultimate NEPA document had a full and complete picture of the underlying purpose, need, setting, and context of the action, as well as access to relevant and specific information gathered or obtained by federal, state, and local agencies and tribes with particular expertise in the matter. At the same time, EWAC is also mindful that earlier federal, state, or local reviews may have resulted in analyses or outcomes with which a project proponent has concerns for any number of reasons (e.g., the prior review

[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.
[2] 83 Fed. Reg. 28,591 (Jun. 20, 2018).
[3] 83 Fed. Reg. 32,071 (July 11, 2018).
[4] 40 C.F.R. pt. 1500, et seq.

suggested or analyzed unreasonable measures or restrictions unrelated to the review undertaken by that agency and about which that agency had no jurisdiction, or the information or analyses are now outdated). In those cases, project proponents may not wish to incorporate such prior reviews, and should be given the choice whether any such prior review is incorporated. With the foregoing in mind, EWAC offers in the following paragraphs several suggestions for achieving greater efficiency and effectiveness in the NEPA process. While the majority of the regulatory language for which EWAC provides specific revisions applies to environmental impact statements, EWAC urges the CEQ to make similar changes to NEPA Regulations governing environmental assessments.

First, EWAC recommends that 40 C.F.R. § 1501.7—Scoping—should be revised to add new subsection (a)(1), provided below, and subsequent subsections should be renumbered accordingly:

> (a) As part of the scoping process the lead agency shall:
>
> *(1) Invite any federal, tribal, state, or local governmental agency to submit to the lead agency any previously conducted or created environmental studies, analyses, and decision documents, and any public comments previously developed or received specifically for the proposed action. For purposes of this Chapter, "prior reviews" means any studies, analyses, decision, documents, and public comments and responses thereto prepared by a federal, state, or local government in connection with the specific proposal subject to review under this Chapter. Prior reviews do not include general work or reviews or other materials not prepared specifically in connection with the proposal under review by the lead agency pursuant to this Chapter,*

Second, EWAC recommends the following revisions be made to NEPA Regulations found at 40 C.F.R. § 1502.2—Implementation:

> (c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should ~~vary~~ *be commensurate* ~~first~~ with potential environmental ~~problems~~ *impacts* and ~~then with~~ *should also take into consideration* project ~~*size*~~ *complexity and the degree of public interest and/or controversy. To the extent prior reviews were submitted to the lead agency by federal, state, or local agencies, the lead agency shall not duplicate the efforts of any such prior reviews. The lead agency shall incorporate by reference in the environmental impact statement information and analyses contained in prior reviews, and shall make copies of those prior reviews available to the public pursuant to 40 C.F.R. § 1503.1. Notwithstanding the foregoing, where the federal action under review by the lead agency is the processing of an application for a permit, license, or other approval, prior reviews shall not be incorporated into the environmental impact statement without the consent of the applicant. Prior to incorporating prior reviews, the lead agency must make a determination that such prior reviews comply with the standards set forth in § 1500.1(b) of this chapter relating to the quality of information considered and analyzed under this Chapter. Incorporation of prior reviews shall not change any statutes of limitations that may apply to such prior reviews.*

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the *lead and any cooperating agencies* ~~ultimate decisionmaker~~ *and which the lead and any cooperating agencies have the authority to implement; however, the environmental impact statement is not required to include a detailed analysis or discussion of any alternatives considered but rejected in prior reviews, including those submitted by other federal agencies, unless the lead agency determines that any such previously rejected alternative merits further consideration and analysis.*

As we discuss in greater detail in section II(D)(1) below, EWAC also includes in its proposed revision to 40 C.F.R. § 1502.2 the concept of limiting the number and range of alternatives that a federal agency must examine.

Fourth, EWAC suggests the following revisions be made to 40 C.F.R. § 1502.14—Alternatives:

(a) Rigorously explore and objectively evaluate all reasonable alternatives *within the jurisdiction of the lead and any cooperating agencies that meet the purpose and need for the action*, and for alternatives which were eliminated from detailed study*, including those that were eliminated from detailed study in prior reviews, and* briefly discuss the reasons for their having been eliminated.

Fifth, EWAC recommends making the following changes to 40 C.F.R. § 1502.16—Environmental Consequences:

…This section should not duplicate discussions in § 1502.14 or discussions *set forth in prior reviews which the lead agency has accepted.*

Sixth, EWAC recommends adding new subsection (d) to 40 C.F.R. § 1503.4—Response to comments:

(d) An agency preparing a final environmental impact statement may, where appropriate, provide an abbreviated response to comments where such comments are substantially similar to those raised, and to which the prior agencies responded or addressed, in prior reviews. An abbreviated response includes, but is not limited to, referencing responses set forth by agencies in connection with the prior reviews. Where the lead agency elects to provide an abbreviated response, the lead agency shall indicate in the final statement where the public may find the response to such comment in such prior reviews. Notwithstanding the foregoing, where the decision subject to review under this Chapter is the processing or approval of an application for a permit, license, or other authorization by a non-federal project proponent, the agency preparing a final environmental impact statement must obtain the consent of the project proponent prior to incorporating comment responses from any prior reviews.

Finally, EWAC recommends that new subsection (e) be added to 40 C.F.R. § 1506.2—Elimination of duplication with state and local procedures:

(e) Nothing in this section shall be construed as limiting the ability of the lead agency to consider prior reviews.

II. Scope of NEPA Review

A. Potential Revision No. 4: Should the provisions in CEQ's NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?

EWAC generally supports making the NEPA process more efficient by incorporating time- and page-limits for NEPA documents as such limitations may alleviate delays associated with NEPA compliance and may result in more concise, understandable NEPA documents. However, it has been EWAC's experience that the page-limits set forth in 40 C.F.R. § 1502.7 have largely been ignored. This is often a result of the technical complexity of projects subject to NEPA review, as well as existing case law, which has not provided substantial clarity on precisely the amount of information required for a NEPA document to withstand a challenge brought under the Administrative Procedure Act.[5] Indeed, imposition of strictly enforced time- or page-limits may make certain NEPA documents more susceptible to challenge where, for example, an agency needs additional space or time to explore fully the range of alternatives, environmental consequences, or mitigation associated with a complex project or one that faces staunch public opposition.

EWAC recommends that the CEQ require federal agencies adopt or amend their existing agency-specific NEPA procedures to provide for shorter, more readable documents. More concise NEPA documents are likely to facilitate the purpose of 40 C.F.R. § 1500.1(b) which is to disclose environmental consequences of proposed federal actions to the public. By contrast, multi-volume, lengthy environmental documents may serve to overwhelm, rather than inform, the public, and thus work against the one of the fundamental purposes of NEPA itself, which is to better inform federal action agencies and the public concerning the potential impacts of a major federal action...

While such procedures should include both page and time limitations, there should be a clear process within each agency for receiving variances where, for example, the complexity of a federal action warrants a departure from the limitations that would otherwise apply, or where an applicant for a federal permit, license, or application requests a variance on the page and/or time limitations. Indeed, it is EWAC's position that where a non-federal project proponent requests a variance, a variance should be granted.

Finally, EWAC recommends that any revisions to the NEPA Regulations be purely prospective, in order to avoid the potential for delaying completion of NEPA documents already underway.

[5] 5 U.S.C. § 706

B. Potential Revision No. 5: Should CEQ's NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decision-makers and the public, and if so, how?

EWAC supports incorporating in the NEPA Regulations one or more provisions that would give federal agencies the tools to focus NEPA analyses and documents on issues that are both significant and relevant to the particular decision at hand. To that end, the *Habitat Conservation Planning and Incidental Take Permit Processing Handbook*,[6] jointly issued by the U.S. Fish and Wildlife Service ("USFWS") and National Oceanic and Atmospheric Association ("NOAA") Fisheries (collectively, the "Services"), includes a particularly insightful description of the purpose of NEPA in relation to the Services' issuance of incidental take permits under section 10(a)(1)(B) of the Endangered Species Act:[7]

> 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.[8]

Where federal involvement in a non-federal project is limited to permitting or authorization of only a portion of that project (such as the U.S. Army Corps of Engineers' ["Corps"] issuance of an individual permit authorizing discharge into waters of the United States under section 404 of the Clean Water Act in connection with a residential, energy, transmission, or other development project), EWAC believes CEQ regulations should recognize that NEPA plays a limited role. The Corps' Clean Water Act section 404 regulations specifically recognize this fact, 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.[9]

EWAC believes the Service's HCP Handbook also properly describes the limited role NEPA has in relation to that federal permit or authorization. Existing language within 40 C.F.R. § 1501.1—Purpose—provides both support for the Corps' interpretation of the scope of NEPA review and the Services' instruction relating to the same set forth above, and a perfect starting

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[6] Habitat Conservation Planning and Incidental Take Permitting Handbook ("HCP Handbook"); *found at*: https://www.fws.gov/endangered/what-we-do/hcp_handbook-chapters.html

[7] 16 U.S.C. § 1539(a)(1)(B).

[8] HCP Handbook at 13-1.

[9] 33 C.F.R. § pt. 325, Appendix B at (b)(1).

place for additional language that would further encourage effective and efficient NEPA processes. Substantial federal case law supports this interpretation.[10]

Specifically, EWAC recommends CEQ consider revising 40 C.F.R. § 1500.1(c) as follows:

> (c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. *Accordingly, a federal agency charged with leading the NEPA process and preparing documentation in accordance with NEPA and the procedures set forth herein must carefully define the proposed federal action or actions to ensure that the NEPA process does not become unwieldy and result in documents that unnecessarily analyze impacts beyond the decision at hand or alternatives over which the lead and/or cooperating agencies have no control.* The NEPA process is intended to help public officials make decisions that are based on understanding of the *relevant* environmental consequences *related to the agency action or actions under consideration*, and take actions *within their jurisdiction* that protect, restore, and enhance the environment.

C. Potential Revision No. 7: Should definitions of any key NEPA terms in CEQ's NEPA regulations, such as those listed below, be revised, and if so, how?

EWAC recommends revising the definition of "effects" set forth in 40 C.F.R. § 1508.8 to clarify that while indirect effects may include "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems," any such induced effects, in order to be considered as indirect effects under NEPA, must be proximately and foreseeably caused by the action under consideration. This recommendation is consistent with existing case law.[11] As such, EWAC suggests the following revision be made to 40 C.F.R. § 1508.8—Effects:

> (b) …Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems*, provided that the action under consideration is the foreseeable and proximate cause of any such effects. Where effects would occur regardless of whether or not the action under consideration occurs, such effects are not indirect effects of the federal action.*

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[10] *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 (6 th 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. Maryland 2005); .

[11] *See, e.g., 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).

D. Potential Revision No. 8: Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms?

EWAC believes that the NEPA Regulations would be further enhanced by defining the following key NEPA terms.

1. 8(a): Alternatives.

The efficiency and relevancy of environmental assessments and environmental impact statements would be greatly improved if CEQ were to limit the documents' analyses to only those alternatives that are within the control of the lead agency and cooperating agencies (if applicable) to implement, would accomplish the goals of the proposed action, and which could substantively alter the impacts of the federal action under consideration. To that end, EWAC recommends that CEQ include in 40 C.F.R. § pt. 1508 the following definition of the term "Alternatives," and revise regulations found at 40 C.F.R. § 1502.14 to the extent necessary to comply with the definition set forth below:

> *"Alternatives" means actions other than the proposed action or actions that meet the underlying and purpose and need to which the lead federal agency and any cooperating agencies are responding. Alternatives must be within the control and jurisdiction of the relevant agency or agencies and must substantively differ from the proposed action or actions in a manner in which impacts to resources analyzed in the environmental impact statement or environmental assessment would be materially different from the impacts that would occur under the proposed action. Where the lead agency complies with NEPA in response to an application for a discretionary permit, the "no action" alternative is permit denial, and the attendant impacts to the human environment that would occur as a result thereof. Notwithstanding the foregoing, it should be noted that permit denial does not always mean that the underlying activities will not be carried out in some other way or under some authority.*[12]

2. 8(b): Purpose and Need.

EWAC believes that appropriately constraining the terms "purpose" and "need" would further enhance the efficiency and relevancy of environmental assessments and environmental impact statements and allow the public to review and comment on NEPA documents in a more effective manner. EWAC finds the Department of the Interior's NEPA implementation regulations concerning "purpose" and "need" instructive, and recommends CEQ adopt similar regulations concerning the same. In order to assist CEQ, EWAC provides specific recommendations concerning the definitions of "purpose" and "need" below.

> *"Purpose" means the goal or objective the lead and any cooperating agencies are trying to achieve, and should be stated, to the extent practicable, in terms of the*

[12] EWAC notes that where the federal action under review is an agency's processing of a permit application (such an incidental take permit under section 10(a)(1)(B) of the Endangered Species Act), the "no action alternative" may not equate to "no project," particularly where the activities underlying such permit application are not otherwise be subject to federal review or authorization.

desired outcomes of the agency. "Need" means the underlying problem or opportunity to which the lead and any cooperating agencies are responding. Where a lead and any cooperating agency is responding to an application for a permit, license, or other approval, the agency preparing the environmental document shall consider the needs and objectives of the applicant.

3. 8(c): Reasonably Foreseeable.

EWAC provides the following definition of the phrase "reasonably foreseeable" for CEQ consideration:

"Reasonably foreseeable" means those actions or effects that a reasonable person would be able to predict or expect to occur with reasonable likelihood in the future. To be reasonably foreseeable, an effect, although uncertain, must nevertheless be probable. Effects considered possible, but not probable, may be excluded from analysis in the environmental document. Lack of legal authority or an identified source of funding or financing may justify a determination that an action or effect is not reasonably foreseeable. In order to predict confidently reasonably foreseeable impacts, the lead and any cooperating agency must make a judgment based on information and data obtained from reliable sources, such as peer-reviewed modeling or state and local officials.

E. Potential Revision No. 9: Should the provisions in CEQ's NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?

1. 9(c): Environmental Assessments.

In order to reduce unnecessary analyses and eliminate the duplicative process requiring separate documentation for an agency's finding of no significant impact ("FONSI"), EWAC proposes that new paragraphs (c) and (d) be added to the CEQ's definition of "Environmental assessment" found at 40 C.F.R. § 1508.9:

(c) Shall examine only those resources with the potential to be affected by the proposed action.

(d) Shall include, in the final environmental assessment, a statement and explanation for each resource carried forward as to whether or not the proposed action or other action alternatives would have a significant impact on the human environment as compared to the no action alternative. This paragraph shall not be construed as requiring analysis of resources without the potential to be affected by the federal action subject to review under the environmental assessment. A finding of no significant impact ("FONSI") signals that the NEPA review may conclude with the environmental assessment.

2. 9(d): Findings of No Significant Impact.

EWAC believes that the efficiency of environmental assessments would be much improved if FONSIs could be built in to environmental assessments themselves and did not

require separate documentation. As such, EWAC proposes the following revision to 40 C.F.R. § 1508.13—Finding of no significant impact:

> "Finding of no significant impact" means ~~a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not~~ *a statement, and analysis relating thereto, as to why a given resource examined in an environmental assessment is not likely to experience* ~~have~~ a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. ~~It shall include the environmental assessment or a summary of it and shall note any other documents related to it. If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.~~ *A finding of no significant impact may be made where mitigation (40 C.F.R. § 1508.20) provided by an applicant for a federal permit, license, or other authorization, or by the federal agency itself reduces the impacts of the proposed action to a point where such impacts are not significant.*

F. Potential Revision No. 10: Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how?

EWAC recommends that CEQ consider revising its regulation 40 C.F.R. § 1502.5—Timing to specifically allow an applicant for a federal permit to provide a preliminary draft or preliminary draft along with the application for the federal permit:

> (b) For applications to the agency, appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable state or local agencies. *An applicant for a federal permit, license, or other authorization, or the applicant's consultant, may prepare and submit a preliminary draft environmental assessment or preliminary draft environmental impact statement. Where an applicant for a federal permit, license, or other authorization submits a preliminary draft environmental assessment or statement along with the application for federal action, the federal agency must consider the information contained therein, and promptly inform the applicant whether additional information and analyses are necessary. Where preparation of an environmental assessment or environmental impact statement is in response to an application for a federal permit, license, or other authorization, and the lead agency or its contractor has prepared the environmental assessment or environmental impact statement, the applicant shall be provided an opportunity to review and provide comment on the draft environmental assessment or statement prior to publication of the same for public review and comment.*

G. Potential Revision No. 11: Should the provisions in CEQ's NEPA regulations relating to agency responsibility and the preparation of NEPA documents by contractors and project applicants be revised, and if so, how?

While 40 C.F.R. § 1506.5 states that an agency may "permit" an applicant to prepare an environmental impact statement, EWAC believes that preparation of environmental impact

statements could also be much improved if CEQ regulations specifically allowed applicants for federal authorization, or the applicant's contractor, to prepare the same. EWAC provided proposed revisions to NEPA Regulations found at 40 C.F.R. § 1502.5 in section II(F) above, and additionally recommends the CEQ revise the NEPA Regulations found at 40 C.F.R. § 1502.17—List of Preparers as follows:

> …Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. *Where an applicant for a federal permit, license, or other authorization, or the applicant's consultant, prepares a draft or preliminary draft environmental impact statement, the name of the applicant and its consultant, if relevant, shall be included on the list of preparers.* Normally the list will not exceed two pages.

Additionally, EWAC recommends that CEQ revise NEPA Regulations found at 40 C.F.R. § 1506.5(c)—Agency responsibility—relating to preparation of environmental impact statements. Currently, that regulation requires that environmental impact statements be prepared "directly by or by a contractor selected by the lead agency." Particularly where the federal action under consideration is the issuance of a federal permit or other authorization to a non-federal entity, this requirement often creates unnecessary and significant delay and increases in costs. A contractor unfamiliar with the underlying project may need substantial time to familiarize itself with the purpose, need, alternatives to, and environmental consequences associated with the underlying activity. Often, the NEPA contractor selected by the federal agency is not allowed to coordinate with the non-federal applicant or review their documents before a permit application has been submitted to the lead agency. This approach is problematic for several reasons, including that the approach results in a significant delay in completing draft NEPA documents, an increase in the cost of preparation, and a greater likelihood that the preliminary draft document will contain inaccuracies due to the NEPA contractor's lack of familiarity with the underlying project. These costs and delays often are borne by the project proponent. To address these concerns, EWAC suggests the following revision to 40 C.F.R. § 1506.5(c):

> (c) Environmental impact statements. Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly ~~by~~ or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. *Where the lead agency is responding to an application for a permit, license, grant, or other authorization submitted by a non-federal project proponent, the applicant or applicant's contractor may also prepare a preliminary draft of the environmental impact statement. Where a preliminary draft environmental impact statement is prepared by the applicant or applicant's contractor, the agency, in addition to fulfilling other requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental impact assessment. For federal proposals not involving a non-federal applicant,* i~~I~~t is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors *selected by the federal agency* shall execute a disclosure statement prepared by the lead agency, or where

appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by a contractor, applicant, or applicant's contractor, the responsible federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

H. Potential Revision No. 13: Should the provisions in CEQ's NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?

As indicated above, in many circumstances, federal agencies' responsibility for NEPA compliance stems from the agencies' obligation to respond to applications for federal permitting, licenses, or other authorizations. Where that is the case, the role of the federal agency sometimes is limited to determining whether or not any such application complies with the standards set forth in the relevant statutory or regulatory framework, and the agency has little discretion to make material changes to the underlying activity. EWAC recommends, therefore, that the CEQ's NEPA Regulations be revised to consider circumstances in which the role of a federal agency is limited to determining whether an application for a federal permit, license, or other authorization complies with the relevant statutory or regulatory requirements. To that end, EWAC proposed in sections I(A) and II(D)(1) above, changes to 40 C.F.R. § 1502.2-- Implementation and 40 C.F.R. § pt. 1508—Terminology and Index respectively. Language proposed by EWAC in section II(D)(2) also provides federal agencies further direction on whether to include additional alternatives in a NEPA document that have been eliminated from detailed analysis.

III. General

A. Potential Revision No. 14: Are any provisions of the CEQ's NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced.

As the nation's first comprehensive environmental statute, NEPA has long been interpreted as requiring a broad inquiry into the potential environmental consequences of proposed federal activities. EWAC acknowledges the benefit of a federal agency examining the environmental consequences of a proposed action and alternatives thereto and, therefore, making a decision that takes into account potential environmental consequences. However, since the passage of NEPA, numerous federal laws protecting a wide array of resources (e.g., the Clean Water Act, Endangered Species Act, Clean Air Act, Resource Conservation and Recovery Act, Federal Insecticide, Fungicide, and Rodenticide Act) have been passed and implemented. Quite often, as noted above, federal agencies comply with NEPA in connection with the agencies' processing of an application for a permit under another environmental statute. In such circumstances, the underlying statutory framework—such as the individual permits under section 404 of the Clean Water Act or incidental take permits under section 10 of the Endangered Species Act—requires detailed analysis of certain types of resources to be affected by permit issuance and requires public involvement. To the degree that other federal statutory frameworks

require detailed analyses of environmental resources and a public review and comment process, and those resources are, in fact, analyzed under those frameworks and receive public input, EWAC recommends that CEQ consider paring back the degree to which the same resources must be analyzed in later NEPA documents in order to eliminate redundancy and the costs and time associated with conducting potentially duplicative analyses.

B. Potential Revision No. 17: Are there additional ways CEQ's NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?

The provisions set forth at 40 C.F.R. § 1506.3—Adoption allow a federal agency to adopt a draft or final EIS prepared by another federal agency so long as the original EIS and proposed action are substantially the same and so long as the original EIS (or relevant portion thereof) complies with the standards set forth in the NEPA Regulations. Prior to adoption, the lead agency must recirculate as a final EIS, which can take months. EWAC believes that the adoption process could be more flexible and efficient if, under these circumstances, the adopting agency were allowed simply to issue its own record of decision ("ROD"), which is also subject to public review and comment. Accordingly, EWAC suggests that CEQ revise 40 C.F.R. § 1506.3(b) as follows:

> (b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement ~~is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section)~~ *may issue its own Record of Decision based on that statement; provided the adopting agency accepts comments for a period of not less than 30 days and determines that the statement remains current prior to issuing the Record of Decision*.

Further, EWAC recommends that the CEQ consider adopting new regulations that explicitly exempt from NEPA processes agency actions that are non-discretionary. Federal courts, including the Supreme Court, have weighed in on the issue, and in various circumstances have found that where federal agencies lack discretion with respect to certain actions, the procedural provisions of NEPA do not apply.[13] Such regulation could be similar to regulations promulgated by the Services at 50 C.F.R. § 402.03, which state that interagency consultation under section 7 of the ESA applies only to "actions in which there is discretionary federal involvement or control."[14]

Finally, EWAC recommends that CEQ consider adopting regulations that contemplate to some degree the process set forth in section 5(b)—One Federal Decision—of Executive Order 13807, Presidential Executive Order on Establishing Discipline and Accountability in the

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[13] *See, e.g., Flint Ridge Development Company v. Scenic Rivers Association*, 426 U.S. 776 (1976) (finding that where there is a "clear and unavoidable conflict in statutory authority…NEPA must give way"); *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004); *Citizens Against Rails-to-Trails v. Surface Transportation Board*, 267 F.3d 1144 (D.C. Cir. 2001).

[14] 50 C.F.R. § 402.02.

Environmental Review and Permitting Process for Infrastructure.[15] Specifically, EWAC recommends that CEQ's Revised Regulations include a provision providing that where project undergoing NEPA review involves multiple federal agencies, the lead, cooperating, and any participating agencies be permitted to record all agency decisions in one Record of Decision ("ROD") where completion of a single, multi-agency ROD would result in a more expedient conclusion of the NEPA process. Because there are circumstances in which a single, multi-agency ROD may not promote completion of the NEPA process, the lead agency should not encourage a multi-agency ROD where doing so would, in fact, slow the process. Additionally, where the federal decision or decisions under NEPA review relate to a non-federal project seeking permitting, licensing, or other authorization from the lead, cooperating, and/or participating agencies, the lead agency should be required to seek applicant consent prior to compilation of a single ROD.

C. Potential Revision No. 20: Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how?

While there is no obligation under NEPA for a federal agency to mitigate adverse environmental effects associated with a proposed action, or to require an applicant for federal permitting or licensing to provide mitigation, federal agencies and applicants often propose mitigation as a means to reduce impacts associated with a proposed action in order to arrive at a finding of no significant impact or "mitigated FONSI." While the CEQ defines the term "mitigation" in 40 C.F.R. § 1508.20, the regulations provide little direction concerning the appropriate use of mitigation in NEPA documents. Indeed, although widely utilized, CEQ regulations are silent with respect to the propriety of mitigated FONSIs. To assist applicants and federal agencies in determining appropriate use of mitigation, EWAC suggests that CEQ revise its regulations found at 40 C.F.R. § 1508.13 as proposed in section II(E)(2) above.

IV. Summary

EWAC appreciates the opportunity to comment on the CEQ's potential revisions to NEPA implementing regulations and looks forward to continuing to work with the CEQ in its efforts to improve the NEPA process, and to review and comment on future proposed regulatory changes. EWAC supports the efforts of CEQ to ensure that the environmental effects of federal actions are thoroughly considered and suggests changes merely to improve the process associated with—rather than alter the underlying purpose of—such analyses.

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[15] 82 Fed. Reg. 40467, 40466 (Aug. 24, 2017).