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Council on Environmental Quality
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RE: AWEA Comments on the Council of Environmental Quality's Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act

The American Wind Energy Association ("AWEA")[1] submits these comments in response to the Council on Environmental Quality's ("CEQ") January 10, 2020, Notice of Proposed Rulemaking—Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act ("NEPA") (the "Proposed Rule").[2] AWEA appreciates that CEQ is updating its NEPA implementing regulations and respectfully submits the following comments on the proposed changes.

NEPA is one of our nation's foundational environmental protection statutes. The wind energy industry considers it appropriate and important to consider the potential environmental impacts of major federal actions and supports the underlying intent of NEPA. However, undue delays and complexities in NEPA environmental reviews have, in some instances, deterred the deployment of wind energy.

[1] AWEA is a national trade association representing a broad range of entities with a common interest in encouraging the expansion and facilitation of wind energy resources in the United States. AWEA members include wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, researchers, renewable energy supporters, utilities, marketers, customers, and their advocates.
[2] 85 Fed. Reg. 1,684 (Jan. 10, 2020) ("Proposed Rule").

Several of the updates to NEPA in the Proposed Rule, if implemented, hold the promise of changing this dynamic. Among others, the proposed procedural reforms regarding presumptive time and page limits for NEPA documents, clarification of the roles of lead and cooperating agencies, and enhanced use of categorical exclusions will provide needed direction to agencies to improve the efficiency of the NEPA review process.[3]

We believe these reforms can be accomplished without harming the rigorous environmental review and public participation that is at the heart of NEPA. With that in mind, we caution that these reforms, if implemented, should not be used by federal agencies to undercut the requisite "hard look" at the environmental impacts of projects, as that could result in legally vulnerable decisions and continued uncertainty for projects.[4]

AWEA believes robust climate considerations in NEPA analyses are important. We recognize that replacing the indirect and cumulative impact effects analyses with one based on reasonably foreseeable impacts, as provided in the Proposed Rule, will likely limit the consideration of greenhouse gas emissions and, in turn, climate impacts from federal authorizations. However, even if the reasonably foreseeable standard is adopted in the final rule, as discussed further below, federal agencies should still be required to include a robust discussion of the significance of climate impacts from federal actions.

Finally, in our comments, we offer changes to some of these proposed reforms to ensure adequate flexibility to address project-specific issues in environmental reviews, as well as helping ensure the reviews develop a legally defensible record.

[3] NEPA § 2, 42 U.S.C. § 4321.
[4] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

I. Background

Wind power has some of the lowest environmental impacts of any source of electricity generation.[5] Wind power does not emit carbon dioxide, does not generate hazardous waste, saves billions of gallons of water a year, and cuts pollution that creates smog and triggers asthma attacks. In fact, wind energy is one of the most cost-effective ways to reduce greenhouse gas emissions and, in turn, mitigate climate change, which is the greatest existential threat to the environment. Unduly lengthy environmental reviews can forestall the nation from realizing these benefits.

Wind energy projects most often face NEPA challenges when developing on federal lands or waters; seeking a federal wildlife "take permit" pursuant to the Endangered Species Act ("ESA") or the Bald and Golden Eagle Protection Act ("BGEPA"); or involving some other type of federal action. Currently, only one percent of installed wind energy capacity in the U.S. is on federal public lands. This is largely due to the fact that developing on federal lands triggers NEPA review, and the time, complexity, and expense of going through that process makes development on these lands less competitive than on private lands.[6] In addition, seeking federal voluntary take permits, which help conserve covered species, has often been discouraged and chilled due to unduly long timelines and excessive costs related to the NEPA review process that is triggered.

Offshore wind development in federal waters has also been slowed by delays from NEPA review. NEPA reviews also impact transmission development that crosses federal land, or triggers NEPA for other reasons. Transmission development is crucial to lowering energy

[5] *See* Life Cycle Assessment Harmonization project, National Renewable Energy Lab (NREL), https://www.nrel.gov/analysis/life-cycle-assessment.html

[6] U.S. Wind Industry Annual Market Report Year Ending 2018, American Wind Energy Association.

prices, supporting competitive markets, improving reliability, and bringing wind and other clean energy resources to consumers. These delays can have ripple effects for the development of onshore wind, offshore wind and transmission by throwing off project planning, supply chain and construction logistics, which can harm project economics and, at times, project viability.

II. Comments

AWEA views updating NEPA regulations as an opportunity to ensure that wind energy projects that are environmentally, socially and economically beneficial are not unduly delayed through the environmental review process. Several elements of CEQ's Proposed Rule make strides in this area and would help facilitate environmental reviews and authorization decisions that are conducted in a more coordinated, consistent, and timely manner, ultimately helping to reduce delays that have hampered development of both onshore and offshore wind, as well as associated transmission, without interfering with an appropriately robust level of environmental review, and public participation therein, for a given federal action. Due to the breath of the subject matter, AWEA has focused its comments below only on the changes contemplated by the Proposed Rule that may significantly affect the wind industry.

A. AWEA Supports Many of the Proposed Procedural Reforms that Will Serve to Expedite the NEPA Review Process Without Sacrificing Rigorous Environmental Review

AWEA supports the proposed reforms regarding presumptive time and page limits for NEPA documents; greater coordination among federal agencies, state governments, and tribal governments; enhanced use of categorical exclusions; properly defining the scope of the purpose and need statement; addressing the "small handles" problem; and focusing the consideration of alternatives on feasible ones. These reforms, taken together, can expedite the NEPA review process without sacrificing the rigorous environmental review Congress intended. The following comments provide further feedback on these areas of reforms.

1. Presumptive Limitations

a. Time Limits

AWEA members have experienced, at times, prolonged and substantial delays in federal permitting as a result of the NEPA process, and think the time frames for NEPA reviews can be shortened without limiting meaningful environmental review, including sufficient time for public comment. We therefore support the proposal to set a presumptive time limit of two years to complete Environmental Impact Statements ("EIS") and one year to complete Environmental Assessments ("EA"). Currently, the average timeline for federal agencies to complete an EIS for a wind project is far greater than two years, and EAs also often take that long. The presumptive time limits should help change this dynamic.

The Proposed Rule however does not provide a clear definition of what constitutes the starting point for conducting an EA, providing only that the one-year timeframe will begin on an agency's "decision to prepare an EA."[7] The running of the clock for an EIS is clearer and begins at the publication of the Notice of Intent ("NOI") to prepare an EIS in the *Federal Register* and ends with the date the Record of Decision ("ROD") is signed.[8] However, both of these time limits could, in practice, experience significant delays if federal agencies avoid triggering the "start" by delaying their decisions to prepare an EA or publish an NOI for an EIS. Further, the decision to deem an application "complete" could also be withheld, delaying the start of the clock; for instance, a federal agency could seek additional information that should be more appropriately required during the environmental review process as the project is further developed. In short, the clock could easily be delayed by an agency—rendering the presumptive time limits meaningless in practice.

[7] Proposed Rule at 1717.
[8] *Id.* at 1717.

AWEA therefore recommends CEQ consider revising the starting point for both EA and EIS timelines. Specifically, if an applicant has applied to a federal agency for an authorization that triggers NEPA, the clock for an EA or EIS should begin when a "complete application" has been submitted to the relevant federal agency or agencies—the agency has received all information required in order for the environmental review process to commence. In other words, the agency should not be allowed to delay the clock until it deems the application to meet issuance criteria or to request supplemental information at the outset that is not crucial for the review process to begin.

One option for addressing the ambiguity around the timeline "start" date could be to establish a presumptive response period whereby federal agencies must notify applicants whether they deem their application to be "complete." For example, the rule could provide that the date of notification of "completeness" would be 60 days from the date upon which the application for an authorization was submitted by a project proponent, unless an agency determines that the application is deficient. If the agency determines that the application is not complete, it must provide an explanation within that time period of what additional materials are needed to cure the deficiency. Finally, if an agency needs more than 60 days to make the determination of completeness due to "unusual circumstances,"[9] the agency will notify the applicant of the alternative time frame for making that determination.

AWEA does support, per the proposal, reasonable extensions of the review timeline if a senior agency official, on an as-needed basis, determines the timelines need to be extended, especially where analysis can aid in developing a more robust and legally defensible record.

[9] "Usual circumstances" exist if a federal agency needs more time to process the request because it involves a "voluminous" amount of records that must be reviewed or the agency needs to consult with another federal agency that has a substantial interest in the responsive information.

CEQ should however revise the Proposed Rule to also allow applicants to request a longer time period for completion of NEPA documents if, in the applicant's judgment, more time is advisable. Finally, to the extent time frames for NEPA reviews are expedited, we think they should continue to include reasonable time for a robust environmental review and public participation in that process.

b. Page Limits

AWEA also supports CEQ setting presumptive page limits that apply to final EISs and EAs.[10] There may be circumstances where exceeding the prescribed page limits is necessary and advisable for a full analysis of the potential effects of the proposed project and consideration of reasonable alternatives. To that end, if a NEPA document requires greater detail than the allotted page limit, AWEA supports delegating authority to senior agency officials to grant exceptions to these page limits if a rigorous environmental review would be constrained by absolute page limits, and there is sufficient justification for the need for additional pages. In the same vein, CEQ should include in the final rule the ability for an applicant to seek a waiver, on a case-by-case basis, to allow for more pages than the presumptive limits, which could help support a stronger record.

2. Greater Coordination Among Federal Agencies, State Governments, and Tribal Governments

AWEA supports interagency coordination to develop a single environmental review[11] consistent with the One Federal Decision policy in order to encourage "timely resolution" of all environmental reviews and authorizations required for a project.[12] This policy would place a

[10] Proposed Rule at 1719.
[11] *Id.* at 1716.
[12] Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, E.O. 13807 (Aug. 15, 2017).

lead agency in control of the environmental review to develop a joint schedule and set milestones for all environmental reviews and authorizations required for a project, as well as providing conflict resolution procedures to elevate issues to the appropriate officials of the agency for "timely resolution." We also support authorizing and requiring federal agencies to cooperate with state, tribal, and local governments to reduce duplication, including through the use of prior and joint environmental review documents and decisions.[13] These pragmatic approaches should create as few NEPA documents and decision points as possible and, in turn, expedite the process, as well as allowing federal agencies to use fewer resources, while still completing robust environmental reviews.

3. Enhanced Use of Categorical Exclusions

AWEA supports facilitating the use of more categorical exclusions ("CEs") as a means to expedite NEPA review.[14] This includes providing that a CE may be applied if mitigating circumstances or conditions are sufficient to avoid significant effects.[15] This should encourage more federal agencies to make more frequent use of CEs for federal permits.

AWEA also supports adding, consistent with the Proposed Rule, a clarification that NEPA does not require the adoption of mitigation measures. We do request further clarification in the final rule that it is not intended to preclude the concept of applicant-volunteered mitigation measures and the specific inclusion of a Mitigated Finding of No Significant Impact ("FONSI"). Maximum flexibility for an applicant should be preserved to proffer up voluntary mitigation as either mitigation or a design feature that offsets "reasonably foreseeable impacts" to the human environment caused by a proposed action and that has a nexus to the effects of the proposed

[13] Proposed Rule at 1716.
[14] *Id*.at 1696.
[15] *Id.* at 1696.

action. Finally, the final rule should also allow agencies to utilize CEs adopted by other agencies for certain classes of activities that present no significant environmental impacts.

4. Properly Defining the Scope of the Purpose and Need Statement

AWEA supports requiring that an agency must base the purpose and need for environmental review on that agency's authority over a project.[16] Often, an agency will consider an impact outside the purview of the agency's authority. By way of example, agencies regularly expand their review in NEPA documents related to a wind energy permit under BGEPA to a consideration of the impacts of the broader, underlying non-federal activity—operation of the project. This is the case even though there is no requirement under BGEPA that a project apply for an eagle permit to operate a project; as eagle permits are voluntary, a wind project need only apply if it is concerned that it might take bald and/or golden eagles and wants authorization to do so. This is especially true because many wind projects can be constructed and operated in a way that avoids take of either species. Therefore, the purpose and need statement for a voluntary eagle permit, for instance, should establish the goals of the agency action as being focused on an examination of impacts to eagles (not a consideration of the broader operational impacts of the project, as the issuance of an eagle permit is not critical for the project to proceed), and the alternatives analysis should then provide the range of means for achieving that goal. In sum, where federal involvement in an authorization is limited to the issuance of a permit that is not required for completion of a project (*e.g.*, can be operated without federal authorization), then the NEPA purpose and need statement should be limited in its scope to the underlying activity.

[16] Proposed Rule at 1720.

5. Addressing the "Small Handles" Problem

AWEA supports amending the definition of "major Federal action" to limit environmental review of actions that fall into the "small handle" of a non-federal project[17] (*i.e.*, limit NEPA reviews to potential impacts that are under federal agency control).[18] One example of a federal application in which the small handles problem arises is with respect to transmission development. For linear infrastructure, such as transmission development, a project often passes primarily over nonfederal lands, but also requires a federal crossing—for example, over federal public lands. Federal agencies will often take the view that federal jurisdiction over a small part of the project federalizes the entire line, forcing the whole project to be reviewed, rather than just the crossing of public lands. If only a small part of line is on public lands, the federal agency's NEPA review should be limited to that piece of the project and not its entirety. While we support limiting NEPA reviews to the segment of an action that is under federal agency control, we do not take a position with respect to the proposal to declare private projects with minimal federal funding or minimal federal involvement to be exempt from NEPA review altogether.

6. Reducing the Consideration of Alternatives

AWEA supports clarifying that "reasonable alternatives" must be "technically and economically feasible" and "meet the purpose and need for the proposed action."[19] Because the range of alternatives considered often drives the scope of an environmental document, curtailing unbounded alternatives to those that are feasible will ensure that an EIS is not delayed as a result of studying those that are speculative or tangential to the proposed project.

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[17] *Id.* at 1709.

[18] AWEA would like further clarification on what exact "other *per se* categories of activities" will be removed from the definition of "major Federal action."

[19] Proposed Rule at 1730.

While we support not requiring an agency to analyze purely conjectural alternatives, we do think that feasible alternatives should be considered. In addition, we do not support adoption of a presumptive number of alternatives for consideration by a federal agency.[20] The appropriate number of alternatives to a proposed action should be determined on a case-by-case basis, considering the unique aspects of a project or the environmental effects thereof, as well as the feasible alternatives thereto.

Finally, consistent with our recommendation above on the purpose and need statement, AWEA requests the final rule declare that for certain types of federal actions, such as those related to voluntary wildlife take permits for wind projects (such as those under BGEPA and the ESA), the "no action alternative" should be consideration of the issuance of the federal permit rather than an authorization of the project itself (*i.e.*, construction and operation).

B. AWEA Seeks Clarification on the Effective Date of the Rule and the Reasonably Foreseeable Standard

1. Effective Date

AWEA seeks clarification regarding the effective date of the reforms in the Proposed Rule. Specifically, the NEPA reforms should not presumptively apply to all applicants that applied for a permit or other federal governmental action prior to the finalization of the rule.[21] Rather, if the agency seeks to apply the NEPA reforms to a project proceeding through NEPA review at the time of finalization of the rule, it should only be done with the concurrence of the applicant. If a project is near the end date of the environmental review, it could be in the interest of the developer to continue with the NEPA process in place at the time the review began. If not, the Proposed Rule may cause delays in projects, which conflicts with the goals of the reforms.

[20] *Id.* at 1702.
[21] *Id.* at 1727.

2. Reasonably Foreseeable

To the extent that CEQ finalizes its proposed amendment to the definition of effects regarding the reasonably foreseeable standard,[22] AWEA seeks clarification that federal agencies must only consider those impacts that are not purely speculative. This will help federal agencies expedite NEPA reviews as they will not need to speculate about all conceivable impacts but can instead focus their limited resources on evaluating the reasonably foreseeable effects of a proposed action.

C. AWEA Does Not Support Limiting Appropriate NEPA Review of Climate Change Impacts from Federal Actions

While AWEA appreciates CEQ's efforts to both simplify and clarify how federal agencies should undertake effects analyses in NEPA documents, we do not support these reforms being implemented in a manner that would undermine the consideration of climate change impacts from projects in NEPA documents. Specifically, we recognize that replacing the indirect and cumulative impact effects analyses with one based on reasonably foreseeable impacts, could serve to narrow the consideration of the climate impacts from proposed projects. In order to limit this outcome, to the extent CEQ finalizes its proposed reasonably foreseeable standard, we urge that any such consideration should fully assess climate impacts from a federal action as they "significantly affect the quality of the human environment"[23] and contribute to

[22] *Id.* at 1728.
[23] NEPA § 102(C), 42 U.S.C. § 4332(C).

"damage to the environment and biosphere."[24] Further, as CEQ recognizes, "climate change is a fundamental environmental issue, and its effects fall squarely within NEPA's purview."[25]

As greenhouse gas emissions from a proposed project contribute to climate change, if an agency has legal authority to mitigate, the environmental analysis should accordingly include a discussion of the significance of these impacts related to the authorization and the effects that would occur as a result of the agency's decision.[26] Similarly, federal agencies should also recognize reasonably foreseeable climate change mitigation benefits from federal actions, whether resulting from a federal action or as an identified alternative. For instance, if a project can be reasonably foreseen to reduce greenhouse gas emissions, the environmental analysis should consider the ability of the project to mitigate those impacts. In addition, if a proposed federal action is a carbon-intensive activity, federal agencies should evaluate projects as alternatives if they can accomplish the same purpose and need and have less impacts to environment (*i.e.*, climate change), and are technically and economically feasible. Finally, AWEA does not support finalization of CEQ's Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions,[27] or codification of any aspects of that guidance in this rule.

[24] NEPA § 2, 42 U.S.C. § 4321; *see also*, IPCC, IMPACTS OF 1.5°C GLOBAL WARMING ON NATURAL AND HUMAN SYSTEMS IN: GLOBAL WARMING OF 1.5°C (2018) ("The global climate has changed relative to the pre-industrial period, and there are multiple lines of evidence that these changes have had impacts on organisms and ecosystems, as well as on human systems and well-being (*high confidence*).)."

[25] Council on Environmental Quality, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews 2 (Aug. 1, 2016). As the thirteen U.S. federal agencies who collaborated on the Fourth National Climate Assessment reported in 2018, climate change is already affecting the natural environment, agriculture, energy production and use, land and water resources, transportation, and human health and welfare across the United States and its territories. *See* Fourth National Climate Assessment, available at https://nca2018.globalchange.gov/.

[26] *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (citations omitted).

[27] 84 Fed. Reg. 30,097 (June 26, 2019).

III. Conclusion

For the reasons discussed above, AWEA supports updating the NEPA process to make it more efficient and workable, without sacrificing the environmental integrity of the process. Please do not hesitate to contact us with any questions.

Sincerely,

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