September 29, 2023

The Honorable Brenda Mallory, Chair
Council on Environmental Quality
730 Jackson Place NW
Washington, D.C. 20503

Re: National Environmental Policy Act Implementing Regulations Revisions, Phase 2
Submitted via Federal eRulemaking Portal: www.regulations.gov, **Docket ID No. CEQ-2023-0003**

Dear Chairman Mallory:

The American Clean Power Association[1] appreciates the opportunity to provide comments on the Council on Environmental Quality's (CEQ) Proposed Rule issued July 31, 2023, entitled *National Environmental Policy Act Implementing Regulations Revisions, Phase 2.*[2] The National Environmental Policy Act (NEPA) is one of our nation's foundational environmental protection statutes. ACP and our members support NEPA but believe improvements like those discussed in these comments are essential, and consistent with the underlying intent of NEPA. Indeed, the members of ACP are seeking to deploy significant quantities of zero-emission energy resources to address our most pressing environmental challenge – anthropogenic climate change – while

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[1] ACP is the national trade association representing the clean energy industry in the United States, bringing together hundreds of member companies and a national workforce located across all 50 states with a common interest in encouraging the deployment and expansion of renewable energy resources in the United States. By uniting the power of wind, solar, storage, and transmission companies and their allied industries, we enable the transformation of the U.S. power grid to a low cost, reliable, and renewable power system. ACP members include manufacturers, component suppliers, project developers, project owners and operators, financiers, clean energy supporters, utilities, marketers, customers, and their advocates. Additional information is available at http://www.cleanpower.org. The views and opinions expressed in this filing do not necessarily reflect the official position of each of ACP's individual members.
[2] *National Environmental Policy Act Implementing Regulations Revisions Phase* 2, 88 Fed. Reg. 49924 (July 31, 2023) ("Proposed Rule"), available at: https://www.federalregister.gov/documents/2023/07/31/2023-15405/national-environmental-policy-act-implementing-regulations-revisions-phase-2. 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-publicinput/#:~:text=CEQ%27s%20Bipartisan%20Permitting%20Reform%20Implementation,security%2C%20and%20advance%20environmental%20justice.

responsibly minimizing any local impacts to America's waters, lands, wildlife, and the human environment writ large. Facilitating that level of clean energy deployment requires improvements to be made in the final rule, which we offer in these comments.

I. Introduction

President Biden has made addressing the climate crisis a national priority via his Executive Order (EO) "Tackling the Climate Crisis at Home and Abroad."[3] The EO calls for a "government-wide" approach to the climate crisis, including "to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a government-wide approach that reduces climate pollution in every sector of the economy."[4] In Sec. 213 of the EO, the President establishes a policy to "accelerate the deployment of clean energy and transmission projects in an environmentally stable manner." Further, Congress established a goal in law in late 2020 to permit 25 gigawatts (GW) of renewable energy (wind, solar, and geothermal) on public lands by 2025,[5] which the President has proposed to expand with targets for 2030 and 2035.[6] The Biden Administration has also set a goal of permitting 30 GW of offshore wind by 2030.[7] All these efforts will be frustrated without some reasonable improvements to NEPA reviews.

Of course, the reasonableness of environmental reviews pursuant to NEPA goes beyond projects proposed on federal lands or in federal waters. NEPA also impacts the ability, time, and cost to secure agency authorizations such as incidental take permits under the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), and the Bald and Golden Eagle Protection Act (BGEPA), and impacts projects seeking certain federal financial support. Reforms are necessary to ensure project developers, owners, and operators can secure timely agency authorizations to

[3] Executive Order 14008 Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021), 86 F.R. 7619 available at https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad.

[4] *Id.*

[5] Energy Act of 2020 § 3104, Public Law 116-260 available at: https://www.congress.gov/116/bills/hr133/BILLS-116hr133enr.pdf

[6] Fact Sheet: Biden-Harris Administration Outlines Priorities for Building America's Energy Infrastructure Faster, Safer, and Cleaner, May 10, 2023, available at: https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/10/fact-sheet-biden-harris-administration-outlines-priorities-for-building-americas-energy-infrastructure-faster-safer-and-cleaner/

[7] Fact Sheet: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs, March 29, 2021, available at: https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/

provide legal and economic certainty with reasonable costs and conditions, such as mitigation measures that are commensurate with the actual impacts.

ACP believes successfully achieving the level of wind, solar, storage, and transmission deployment necessary to avert the worst aspects of climate change is not possible without some targeted improvements to how agencies perform reviews under NEPA. Successfully deploying wind, solar, and transmission projects requires a predictable, timely, and cost-effective framework for environmental reviews. ACP's comments are therefore aimed at addressing areas where the Proposed Rule can support timely, well-planned development of clean energy resources. In some cases, undue delays and complexities in NEPA environmental reviews have deterred deployment or pursuit of agency authorizations such as take permits to improve conservation outcomes. It is also important to recognize that improvements to the regulations can only go so far if agencies are under-staffed, do not have the appropriate expertise on staff, and/or do not prioritize environmental reviews under NEPA. These resource challenges are unlikely to be resolved soon, if ever, which reinforces the need to focus this phase 2 rulemaking on improving efficiencies and timeliness and avoiding changes that expand the scope of reviews or authorities and that create vague obligations, which will result in additional uncertainty along with process and legal risks.

Today, the average timeline for a project to obtain necessary NEPA approvals from notice of intent to record of decision for an environmental impact statement (EIS) is 4.5 years.[8] For transmission projects, the average timeline is even longer – 6.5 years. These undue delays mean that it can take some projects more than a decade to get federal authorizations. Such long timelines for clean energy projects – largely due to procedural inefficiencies in implementation rather than problems with the law itself – serve as a roadblock to unlocking the full potential of U.S. clean energy currently being developed. Delays create uncertainty and raise costs for project developers, as projects typically cannot move forward until NEPA analyses and related authorizations are finished. Meanwhile, loans and other obligations must be paid, and materials must be purchased and stored. These delays can also have ripple effects throughout the economy – throwing off project timelines, domestic supply chains, and the jobs and economic activity tied to these projects.

For example, in the offshore context, one of the biggest bottlenecks for NEPA reviews has been the selection of a "reasonable range of alternatives" to the offshore wind project proposal.[9]

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[8] *See*: https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf

[9] 40 CFR 1508.1(z)

Under longstanding law, this range of alternatives for an applicant-driven project approval must account for the goals of the applicant and the economic and technical feasibility of a project.[10] However, as discussed *infra*, the lack of clarity in defining the reasonable range of alternatives often results in protracted deliberations and disagreements. This ambiguity can hinder project progress and stifle innovation of a nascent industry.

Another example of NEPA causing delay and complexity arises under the leasing of federal lands. As of the end of 2022, 3,728 megawatts (MW) of solar energy and 1,438 MW of wind energy were operating on BLM lands compared to 74,576 MW of operating solar capacity nationwide and 144,132 MW of operating wind capacity, meaning 95% and 99% of operating capacity for solar and wind, respectively, are on private lands.[11]

Public lands have the potential to host tens of thousands of additional megawatts of clean energy, and, as noted above, national policies call for significantly greater deployment on those lands.[12] Because clean energy development on public lands triggers a NEPA review, the pace of deployment of solar and wind on public lands is far slower than on private lands. The time, complexity, and expense of going through that process makes development on these lands less competitive than on private lands. In addition, seeking federal incidental take permits, which helps to conserve listed species, has often been discouraged and chilled due to unduly long timelines and excessive costs related to the NEPA review process that is triggered; across administrations, the timeline for NEPA approval can take nearly five years.[13] These delays can have ripple effects for the development of wind, solar, and transmission by throwing off project planning, supply chain and construction logistics, which can harm project economics and, at times, project viability.

Excessive timelines for permitting offshore wind facilities on the outer continental shelf can be tied, at least partially, to NEPA factors such as ambiguity on the range of alternatives and purpose and need, cumulative effects analyses beyond what is reasonably foreseeable, and cooperating agencies unreasonably expanding the scope of reviews, and delays in publishing notices of intent.

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[10] *See, e.g.*, Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991).
[11] American Clean Power Association, Clean Power Annual Market Report 2022.
[12] YALE CENTER FOR BUSINESS AND THE ENVIRONMENT ET AL., KEY ECONOMIC BENEFITS OF RENEWABLE ENERGY ON PUBLIC LANDS (May 2020), p. 15 https://www.wilderness.org/sites/default/files/media/file/CBEY_WILDERNESS_Renewable%20
[13] Philip Rossetti, Addressing NEPA-Related Infrastructure Delays, R STREET (Jul. 7, 2021), https://www.rstreet.org/2021/07/07/addressing-nepa-related-infrastructure-delays/.

These delays also have climate ripple effects. For example, each year, a 100 MW wind facility with average wind speeds will avoid the equivalent of approximately 250,000 metric tons of carbon dioxide or 575,000 barrels of oil consumed.[14] This means an additional year of permitting such a project, rather than having it approved, constructed, and operating, has a negative climate impact. By extension, improvements in permitting that responsibly speed up the permitting process for clean energy infrastructure, as recommended by ACP throughout these comments, have demonstrable benefits to our climate.

II. Executive Summary

Due to the issues outlined above, ACP supports many of the stated intents of the draft revisions proposed by CEQ, such as promoting better decision-making, an efficient and "expeditious" process, regulatory certainty, decisions grounded in science, and enhanced clarity. Several proposals in the draft rule would improve efficiency, including presumptive deadlines for EAs and EISs and the triggers starting the clock consistent with the Fiscal Responsibility Act[15] (FRA), joint records of decision between lead and cooperating agencies, allowing applicants to prepare environmental documents, publishing deadline schedules, consultation with applicants about deadlines, general page limits, and early dispute resolution between agencies. Other proposals would improve regulatory certainty and the quality of decision-making, such as a non-discretionary factor in determining major federal actions, greater flexibility for the creation of categorical exclusions, mitigated findings of no significant impact, and the inclusion of reasonably foreseeable climate change effects in environmental consequences.

Nevertheless, there are also several elements of the Proposed Rule that would undermine the purposes of increasing efficiency of review and improving clarity within the statute and should be removed or revised. ACP also highlights the need for some changes to ensure the final rule is consistent with changes made in the FRA. For these elements of concern, ACP makes recommendations, discussed in more detail below, to improve or remove those provisions. For example, ACP opposes removing the language describing NEPA as a procedural statute, as this is contrary to the spirit of the statute. Furthermore, the environmental effects (e.g., greenhouse gas

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[14] Calculation based on 100 MW facility with a 0.4 net capacity factor multiplied by 8,760 hours per year, plugged into https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator#results

[15] P.L. 118-5, Title III, Section 321

emissions and climate change) should be explicitly considered in selecting preferred alternatives and reasonable alternatives.

ACP also proposes language revisions that clarify the scope of agencies' authority for NEPA reviews. This includes revising the language to clarify that agencies' authority extends only to those actions under federal control; requiring agency to comment on how decisions are explicitly linked to their authority; and removing agencies' ability to propose alternatives that are beyond their authority.

ACP further recommends language revisions to enhance NEPA's efficiency, while maintaining the integrity of the environmental review process. These revisions include narrowing the scope of NEPA considerations (e.g., removing overly broad language relating to habitat considerations); providing agencies discretion to determine the appropriate forum and extent of public outreach to prevent delays and to reduce risk of litigation; and removing the existing requirement to publish the environmentally preferred alternative in the draft EA or EIS, as this may create public discontent should an agency decide not to select such alternative and could inappropriately narrow the focus of public comments; explicit language removing agencies' obligation to consider public comments submitted past the submission deadline; language limiting agencies' obligation to review to only a "reasonable" number of alternatives; and language narrowing and clarifying what information agencies are obligated to consider in making their determinations.

To increase certainty for project applicants, ACP recommends revising the language to clarify which projects will be subject to the revisions in the rule and requiring greater transparency regarding the models, data, and research used by agencies in making determinations under NEPA.

ACP also proposes revisions to the definitions for environmentally preferable alternative, major federal action, reasonable alternatives, and reasonably foreseeable.

Finally, throughout the comments that follow, ACP proposes additional or revised language. When doing so, newly added language is underlined, and language ACP proposed to be deleted is stricken through.

III. Comments

1. Part 1500. Purpose and Policy

In §1500.1, CEQ proposes to restore much of the language from the 1978 regulations and further incorporate the policies Congress established in the NEPA statute. CEQ is proposing these changes to restore text regarding NEPA's purpose and goals, placing the regulations into their broader context. ACP have several recommendations in this part of the proposed rule.

a. Purpose §1500.1 and Policy §1500.2

ACP opposes the removal of language describing NEPA as a procedural statute. As CEQ writes in the preamble, the proposal is to "revise its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA)…".[16] CEQ further acknowledges that NEPA "does not dictate a particular outcome by the decision maker…".[17] Retaining the language describing NEPA as a procedural statute is essential to prevent misconceptions and confusion, both in the public and the legal system, and to avoid disputes and unnecessary litigation. Maintaining the clarity that NEPA is procedural helps prevent undue pressure to prioritize environmental outcomes over other considerations. Additionally, it provides a legal foundation for NEPA's application, reducing the likelihood of legal challenges based on misunderstandings about its intent. NEPA does not require selection of the environmentally preferable outcome, which is often misunderstood by stakeholders.

b. §1500.1(c)

ACP recommends revising §1500.1(c) to add the following language that is underlined in order to restore the balance of interests called for under the law: "The NEPA process is intended to help public officials make decisions that are based on an understanding of environmental consequences and take actions that protect, restore, and enhance the environment while still fulfilling the social, economic, and other requirements of present and future generations of Americans as required in the Act, specifically 42 USC 4331(a)."

c. §1500.2(e)

ACP recommends revising §1500.2(e) to add the following language that is underlined: "Use the NEPA process to identify and assess ~~the~~ reasonable alternatives to proposed actions that are technically and economically feasible and that will avoid or minimize adverse effects of these actions upon the quality of the human environment…"

[16] Fed. Reg. 49924 at 1.
[17] *Id*. at 22.

d. §1500.2(f)

ACP recommends revising §1500.2(f) to add the following language that is underlined because "restore and maintain" is consistent with the underlying congressional declaration of national environmental policy in 42 USC 4331(a)-(b), whereas "enhance" goes beyond what is called for in the underlying statute: "Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to ~~restore and enhance~~ restore and maintain the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment."

e. NEPA Compliance §1500.3 (i.e., exhaustion, judicial remedies)

ACP recommends that, rather than completely removing the reference in §1500.3(c) to resolve allegations of non-compliance "as expeditiously as possible," it could be revised to focus the direction on agencies since CEQ cannot dictate to courts on the timeliness of their processes.

ACP also recommends retention of some elements of the exhaustion requirements currently in §1500.3, notably (b)(3). This provision requires: (1) comments and objections be submitted during the comment period, (2) the record of decision be based on this available record, and (3) issues not previously raised in public comment cannot be raised in litigation. This language improves certainty for applicants and enables other stakeholders to understand the full record on which decisions will be based. At a minimum, the limitation on raising new or previously unraised issues should apply absent a materially changed circumstance.

ACP also recommends retention of a key portion of the existing §1500.3(d), which provides an explanation of CEQ's intent that can be guidance for courts. Specifically, ACP recommends retaining the following key language, "Harm from the failure to comply with NEPA can be remedied by compliance with NEPA's procedural requirements as interpreted in the regulations in this subchapter. It is the Council's intention that the regulations in this subchapter create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm. It is also the Council's intention that minor, non-substantive errors that have no effect on agency decision making shall be considered harmless and shall not invalidate an agency action."

f. Concise and Informative Environmental Documents §1500.4

ACP recommends revising §1500.4(c) to add the following language that is underlined to further improve the efficiency of writing and reviewing documents: "Writing environmental documents in plain language and avoiding unnecessary repetition among sections and chapters,

including in describing and assessing alternatives." This change will help the regulated community and the public review and sort through the complex materials in environmental review documents and improve the ability to stay within the page limits proposed in §1502.7.

ACP further recommends adding a new subsection to §1500.4 to address the need to focus on reasonably foreseeable impacts: "Limiting discussion of effects to those that are reasonably foreseeable." ACP recognizes that the focus in proposed §1500.4(b) on "important" issues may partially address this, but it is not appropriate to analyze effects that speculative, even if an agency or commenter may consider those "important." Therefore, ACP recommends adding a reference to this section to reasonably foreseeable impacts. Later in these comments ACP also makes a recommendation to revise the definition of reasonably foreseeable.

2. Part 1501 NEPA Planning and Agency Planning

a. Purpose §1501.1

ACP supports several of the changes proposed to this section, including an early narrowing of the scope to "important environmental issues," "providing for the swift and fair resolution of interagency complaints," and "promoting accountability by establishing appropriate deadlines and requiring schedules." ACP will comment in more detail on the substance of these issues later in these comments in the relevant regulatory sections, but it is important to signal their importance by including them in the purpose section.

b. Determine an Appropriate Level of NEPA Review §1501.3

ACP supports this non-discretionary factor in determining whether the threshold for major federal action is met, "The proposed activity or decision is a non-discretionary action with respect to which such agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action." This clarity helps reduce legal risk and an overly broad interpretation of when NEPA applies.

However, ACP recommends revising §1501.3(b) to add the following language that is underlined to keep the scope within what is under an agency's control: *"Scope of action and analysis*. If the agency determines that NEPA applies, the agency shall consider the scope of the proposed action that is under federal agency control and its potential effects to inform the agency's determination of the appropriate level of NEPA review. The agency shall evaluate, in a single review, proposals or parts of proposals that are related closely enough to be, in effect, a single

course of action." The scope of environmental reviews should be limited only to the portion of the project and activities under federal control. For example, for a non-federal project that nevertheless requires a federal permit for some element, the environmental review should be limited only to that portion/activity the agency is authorizing.[18]

ACP further recommends revising § 1501.3(c) to ensure that generally low impact or net beneficial projects are not swept up into mandatory or presumptive EIS status by virtue of arbitrary thresholds. To provide an example, the current U.S. Department of Agriculture Rural Utility Service regulations at 7 CFR 1970.151 require that an EIS be prepared for projects exceeding "640 contiguous acres." This provision had its origins in an acreage threshold in the Bureau of Land Management's (BLM) NEPA Handbook for mining operations, at which an EIS is "normally required." While some renewable projects of that size may create a likelihood of significant environmental impacts and require an EIS, many others will not, and it does not advance Administration priorities or NEPA purposes to automatically compel an EIS for such projects based on an arbitrary acreage threshold rather than assessing the significance of impacts. Consequently, ACP recommends the following revision to the proposed § 1501.3(c) as follows: "(3) Is likely to have significant effects and is therefore appropriate for an environmental impact statement (part 1502 of this subchapter). In setting acreage, output, or similar thresholds for mandatory or presumptive Environmental Impact Statements, agencies should avoid inflexible or arbitrary limits that may force low-impact projects unnecessarily into an EIS."

ACP recommends revising §1501.3(d)(2)(iii) to remove the following language that is stricken through: "The degree to which the proposed action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, park lands, Tribal sacred sites, ~~prime farmlands,~~ wetlands, wild and scenic rivers, or ecologically critical areas." As the

[18] The U.S. District Court for the District of Columbia in *American Bird Conservancy et.al. v. Granholm et.al.* recently ruled (September 26, 2023) against the plaintiffs on several grounds, including some relevant to the scope of the environmental review. For example, the plaintiffs argued the Army Corps erred in failing to consider a project alternative that would include a predefined, post-construction system to monitor bird and bat collisions with the Icebreaker offshore wind project proposed in the Great Lakes. However, as the Court found, the Army Corps, to satisfy its obligation to determine whether any "practicable alternative to the proposed discharge" exists that "would have less adverse impact on the aquatic ecosystem," needs only to consider options that are "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." The Court went on to point out that Corps guidelines indicate practicable alternatives might include "[a]ctivities which do not involve a discharge of dredged or fill material into waters of the United States or ocean waters" or "[d]ischarges . . . at other locations." The Court concludes, "The Guidelines make clear that the Corps need only consider alternatives to the discharge itself—not to any environmentally damaging aspect of the project" and that "…the Guidelines still confined that analysis to effects stemming – directly or indirect – from the discharge itself." Available at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019cv3694-37

Natural Resource Conservation Service notes, the Farmland Protection Policy Act "does not authorize the Federal Government to regulate the use of private or nonfederal land."[19] The NCRS goes on to note "Activities not subject to FPPA" include Federal permitting and licensing, projects planned and completed without Federal Assistance etc. The inclusion of prime farmlands as an example in this subparagraph could be misinterpreted as requiring agencies, such as the U.S. Fish and Wildlife Service, to consider impacts, such as land use, beyond those that are under their control.

ACP recommends revising §1501.3(d)(2)(viii) to remove the following language expanding habitat considerations beyond what is protected under federal law as follows: "The degree to which the action may adversely affect an endangered or threatened species or its ~~habitat, including~~ habitat that has been determined to be critical under the Endangered Species Act of 1973." CEQ's proposed expansion beyond critical habitat to anywhere a listed species may occur is unnecessarily broad, arguably beyond statutory authority, and particularly problematic for widespread species for which habitat is not a limiting factor. Federal agencies must publish for notice and comment designations of critical habitat. There is not currently an accepted definition of just "habitat." Therefore, including this expansion to all habitat in these regulations will create confusion and the potential for delays and challenges.

c. Categorical Exclusions §1501.4

ACP has commented previously in support of more efficient processes for designating categorical exclusions (CEs) and for more widespread adoption of CEs related to clean energy. Therefore, ACP supports the following provisions in the proposed rule:

- §1501.4(a), which clarifies that CEs may be established by agencies "individually or jointly with other agencies."
- §1501.4(c), which provides flexible authority for agencies to establish CEs outside of their normal NEPA procedures, "through a land use plan, a decision document supported by a programmatic environmental impact statement or programmatic environmental assessment, or other equivalent planning or programmatic decision…" and to establish CEs in §1501.4(d)(2) for a limited duration to promote experimentation with new CEs. Though, the limited duration point should be revised to make clear that for project(s) cleared by

[19] Available at: https://www.nrcs.usda.gov/conservation-basics/natural-resource-concerns/land/cropland/farmland-protection-policy-act.

such a CE are covered for the life of the project and would not be reconsidered were the CE later reconsidered.

- §1501.4(d)(3), which provides the ability to use mitigation measures to qualify for a CE.
- §1501.4(e), which promotes the ability for an agency to use a CE listed by another agency.

Lastly, ACP recommends adding a subparagraph §1501.4(f) that sets an expectation of a decision on whether to establish a CE for a particular action should be made within 30 days.

d. Findings of No Significant Impact (FONSI) §1501.6

ACP supports the clear statement in §1501.6(a) that an agency can publish a "mitigated finding of no significant impact because the proposed action will not have significant effects due to mitigation." Eligible mitigation should be allowed to be proposed by applicants, where relevant, or standard mitigation measures proposed by an agency. However, ACP opposes the requirement to establish monitoring and compliance plans pursuant to a mitigated FONSI as this goes beyond the NEPA statute and not all agencies have the authority to require such monitoring and compliance plans.

e. Lead Agency §1501.7

ACP supports the expectation set in §1501.7(c) that "lead and cooperating agencies shall evaluate the proposal in a single environmental impact statement and shall issue, except where inappropriate or inefficient, a joint record of decision."

ACP recommends replacing the language in §1501.7(h)(2) to make it consistent with changes in law made by the FRA, which only requires the lead agency to "give consideration" to analysis and proposals from cooperating agencies:[20] "Give consideration to any analysis or proposal from a cooperating agency that is consistent with the purpose and need of the proposal." The addition of "of the proposal" is consistent with the language in the FRA that the range of alternatives "meet the purpose and need of the proposal."[21] In ACP members' experiences, cooperating agencies can sometimes request unreasonable alternatives and/or conditions, including ones that fall well outside of agency authorities and expertise, or have little relation to the proposal leading to the NEPA review.

ACP also recommends revising §1501.7(h)(4) to add the following language that is underlined: "Determine the purpose and need, and alternatives in consultation with any

[20] 42 USC Chapter 55 Section 4336a(2)(C)
[21] P.L. 118-5, Title III, Section 321(a)(3)(B)(iii)

cooperating agency, with ultimate authority to finalize the purpose and need and alternatives resting with the lead agency." In ACP members' experiences, cooperating agencies can sometimes request unreasonable alternatives and/or conditions, and delay decisions with untimely input and extended dialogues. For example, a lead agency should not propose alternatives to transmission line routes in an EIS that do not reflect limitations of project proponent property rights (e.g., new alternatives proposed crossing private land not under control of the project proponent).

f. Cooperating Agency §1501.8

In §1501.8(b)(7), ACP recommends restoring the following underlined language in the current regulations to this subparagraph: "Meet the lead agency's schedule for providing comments and limit its comments to those matters for which it has jurisdiction by law or special expertise with respect to any environmental issue…". Allowing agencies to put opinions in the record which they have no legal authority to enforce, nor special expertise to assess, is an invitation for delay and unnecessary analysis, dispute resolution, and potential for litigation risk. Further, given limited agency resources and the critical need for timely agency action, there is no justification for encouraging an agency to act outside its authority or expertise.

g. Public and Governmental Engagement §1501.9

ACP is concerned the extensive notification requirements in §1501.9(d) will create an opportunity for challenges to agency decisions based on perceptions of insufficient outreach or the right form of outreach. This is exacerbated by the differentiation between actions with "effects of national concern" versus those with effects of "primarily local concern." These are undefined terms and are ripe for varying interpretations and challenges and will create massive uncertainty for applicants.

While ACP supports outreach so that potentially affected parties have adequate opportunity to comment and otherwise participate in NEPA reviews, agencies need to have discretion to determine the appropriate level and forums for outreach. ACP believes this is already covered under the direction in paragraph §1501.9(c) regarding outreach. As a result, ACP recommends striking the unnecessary and potentially harmful details in paragraph §1501.9(d). If paragraph (d) remains, ACP recommends adding a new (3) and re-designating the subsequent paragraphs as follows: "(d) *Notification.* Agencies shall… "(3) Have discretion and flexibility in making final determinations on the appropriate level and forums for outreach and notification."

h. Deadlines and Schedule for the NEPA Process §1501.10

ACP has long argued for establishing more reasonable and enforceable timelines on NEPA reviews and appreciates that Congress has now adopted important measures along these lines in the FRA.[22] ACP supports the following revisions proposed in the draft rule as they are consistent with the provision of the FRA: the requirement in §1501.10(a) to consult with applicants or project sponsors on deadlines and schedules; the presumptions in §1501.10(b)(1) for EAs being completed within one year and in §1501.10(b)(2) for EISs being completed within two years, with the ability to extend in consultation with the applicant or project sponsor; and the starting of the clock in §1501.10(b)(3) being the earliest of (i) the date on which the agency determines that NEPA requires an environmental impact statement or environmental assessment for the proposed action, (ii) the date on which the agency notifies an applicant that the application to establish a right-of-way for the proposed action is complete, or (iii) the date on which the agency issues a notice of intent (NOI) for the proposed action.

While these provisions should result in an improvement to the timeliness of decisions, ACP is aware of situations in which agencies delay publication of NOIs, delay decisions on whether an application is complete, and/or repeatedly request additional information to decide an application is complete. Such delays before the start of the clock undermine the intent of (b)(3). Currently, agencies have no regulatory limits to their discretion with respect to this limbo period between application and the foregoing agency actions. In the case of clean energy infrastructure, such open-ended delay results in climate opportunity costs by delaying the deployment of clean energy infrastructure. CEQ should consider establishing, or at a minimum directing agencies to establish in their own regulations, objective criteria for determining when an application is complete to avoid such scenarios. ACP has proposed such language later in these comments in the section covering §1502.5(b). This is not a hardship, because agencies have the authority to deny deficient applications.

ACP supports the designation of authorities in §1501.10(c) for the lead agency to "develop a schedule for completion of environmental impact statements and environmental assessments as well as any authorizations required to carry out the action. The lead agency shall set milestones for all environmental reviews, permits, and authorizations required for implementation of the action, in consultation with any project sponsor or applicant and in consultation with and seek the

[22] P.L. 118-5, Title III, Section 321.

concurrence of all joint lead, cooperating, and participating agencies, as soon as practicable" and the direction to elevate unresolved disputes that may otherwise contribute to missed deadlines "to ensure timely resolution within the deadlines for individual action."

ACP also supports the change in requirement of §1501.10(e) that EIS schedules set by the lead agency include proposed dates for publication of the NOI, issuance of the draft EIS, the public comment period, issuance of the final EIS, and issuance of the ROD. And, ACP supports the requirement in §1501.10(f) that EA schedules set by the lead agency shall include proposed dates for a decision to prepare an EA, issuance of a draft EA where applicable along with the public comment period, issuance of a final EA and FONSI or a decision to pursue an EIS.

All these changes are important to improve the transparency and timeliness, and the certainty of those timelines, for environmental reviews pursuant to NEPA.

ACP also recommends revising the factors that a lead agency can consider in determining schedules and timelines in §1501.10(d)(1) as follows: "Potential for environmental harm <u>or benefit.</u>"

i. Programmatic Environmental Documents and Tiering §1501.11

ACP has previously commented in support of providing more information on when it is appropriate to prepare programmatic analyses and how to effectively tier to those documents to streamline environmental reviews, so we appreciate CEQ taking steps in this direction in the proposed rule. ACP generally supports the direction provided in §1501.11(a) and its subsections on when it may be appropriate to conduct programmatic analysis. ACP also supports the direction in §1501.11(b) on when tiering is appropriate and how tiering can narrow the subsequent review. Programmatic reviews can help project-specific environmental reviews, facilitate compliance with the timelines/deadlines/page limits CEQ is proposing in this draft rule consistent with the FRA, and can be a valuable tool for resource-limited agencies to manage environmental review workloads.

3. Part 1502 Environmental Impact Statement

a. Purpose of an EIS §1502.1

ACP recommends revising §1502.1(b) as follows to ensure consistency with the underlying statute: "Environmental impact statements shall provide full and fair discussion of significant effects and shall inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse effects or ~~enhance~~ <u>restore and maintain</u> the quality of the human environment." Similar to a point made earlier in these comments, the underlying statute does not

put the burden on federal decision makers nor project sponsors to "enhance" the quality of the human environment. Rather at 42 USC 4331 Congress spoke to "restoring and maintaining environmental quality."

b. Scoping §1502.4

ACP supports the defined authorities granted to lead agencies in §1502.4(d). ACP also recommends adding the following underlined language at the end of subparagraph §1502.4(c) to avoid opening opportunities for litigation over whether enough outreach was done inviting participation: "Publication of a notice in the Federal Register satisfies the requirement for outreach to 'other likely affected or interested persons.' It is at the discretion of the agency what additional outreach to such persons may be warranted."

c. Timing §1502.5

ACP recommends the following revisions to subparagraph §1502.5(b) to ensure there are not unnecessary delays in proceeding: "For applications to the agency requiring an environmental impact statement, the agency shall commence review of the application and decide on its completeness within 30 days and shall issue a notice of intent within 6 months ~~within the statement as soon as practicable~~ after ~~receiving the complete~~ determining the application is complete. Federal agencies should work together and with potential applicants and applicable State, Tribal, and local agencies and governments prior to receipt of the application. Federal agencies shall establish objective measures in their regulations for determining when an application is complete."

d. Page Limits §1502.7

ACP supports the page limits included in the draft rule, which are consistent with the provisions of the FRA. However, ACP recommends adding the following language to this section that would allow for an expansion of the limit at the request of an applicant or project sponsor and to provide that documents already being prepared at the time of finalization of the rule not be required to be re-done if they exceed the designated limits: "The page limits may be exceeded with the concurrence of or at the request of an applicant. Documents already in development as of the effective date are not required to adhere to these limits."

e. Draft, Final and Supplemental Statements §1502.9

ACP recommends the following addition at the end of subparagraph §1502.9(b) to make clear agencies have the authority to identify a preferred alternative in a draft EIS as some agencies do, but others do not: "…including the proposed action and may identify a preferred alternative."

f. Summary §1502.12

ACP recommends removing the requirement to publish in the EIS, including the draft EIS, "the environmentally preferable alternative or alternatives" as provided for in this section: "The summary shall include the major conclusions and summarize any disputed issues raised by agencies and the public, any issues to be resolved, and key differences among alternatives~~, and identify the environmentally preferable alternative or alternatives~~."

While ACP recognizes NEPA regulations have long required this information to be included in the ROD, ACP is concerned that including it in the EIS, particularly the draft EIS, will unnecessarily skew perceptions about a proposed project being reviewed pursuant to NEPA. While CEQ acknowledges that an agency is not required to adopt the environmentally preferred alternative, in the public's mind, the agency will be perceived as doing something wrong if that alternative is not the agency's preferred alternative. It could also lead to a less robust record if commenters focus on the environmentally preferred alternative to the exclusion of other alternatives that may be preferred by the agency because they better meet the overall purpose and need of the proposal and/or they offer a better balance of environmental, social, and economic considerations as required by NEPA. At a minimum, the requirement to identify the environmentally preferable alternative should only apply to the final EIS, not the draft.

g. Purpose and Need §1502.13

ACP recommends revising this section as follows, which is consistent with the FRA's mandate that alternatives meet the "purpose and need of the proposal,"[23] rather than the agency action. "The environmental impact statement shall include a statement that briefly summarizes the underlying purpose and need of the proposal and ~~for~~ the proposed agency action."

h. Alternatives Including the Proposed Action §1502.14

In §1502.14(a), ACP recommends adding the following, which is consistent with the FRA's direction that alternatives meet the "purpose and need of the proposal:" "Rigorously explore and objectively evaluate reasonable alternatives to the proposed action that will also meet the purpose

[23] P.L. 118-5, Title III, Section 321(a)(3)(B)(iii)

<u>and need of the proposal</u>, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination."

ACP also recommends in §1502.14(a), striking the following language: "~~Agencies also may include reasonable alternatives not within the jurisdiction of the lead agency.~~" This language added by CEQ inherently contradicts the purpose and need of the proposal. In addition, this language would open to door to a host of alternatives that would be fundamentally the same as the no action alternative and would not offer any value for informed decision-making, resulting in needless added time to prepare, and complexity in, environmental documents, which undermines the intent of the proposed reforms.

ACP recommends language be added to this section that would require consulting with a project sponsor to solicit input on the technical and economic feasibility of alternatives prior to selecting which to analyze in the EIS. This is consistent with legal obligations imposed on agencies pursuant to Title III, Section 321(a) of the FRA, which requires that the "reasonable range of alternatives" be "technically and economically feasible and meet the purpose and need of the proposal." The best way to determine whether alternatives being considered meet these thresholds is via consultation with the project sponsor. Alternatives must meet the purpose and need of the proposal, and be feasible, or else are not worth absorbing the agency's, applicant's, or public's time to consider – as they would result in no project at all if selected as the preferred alternative. For example, considering an alternative that presumes a developer can move the location of all or a portion of the project to land the applicant does not have under control is not reasonable. A project can always be rejected if the agency cannot identify a preferred alternative that works for the project sponsor, so there is no need to waste time and resources doing analysis on alternatives that are themselves non-starters. ACP recommends the following language be added to (a): "Rigorously explore and objectively evaluate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination. <u>When there is an applicant, the agency shall consult with the applicant on the reasonableness of alternatives, including the economic and technical feasibility of the alternatives and whether they meet the purpose and need of the proposal</u>…"

ACP recommends re-instating language from the current NEPA regulations that agencies, "Limit their consideration to a reasonable number of alternatives." While we recognize that CEQ has included language that says, "The agency need not consider every conceivable alternative to a

proposed action...," it is helpful and consistent with judicial precedent to further qualify this with the "reasonable number."

ACP recommends §1502.14(c) should be revised to clarify the no action alternative as follows to avoid confusion about the agency's authority with respect to a project: "Include the no action alternative, <u>which for voluntary permits should be considered denial of the federal permit rather than the project not proceeding, since the permit itself may not be required to construct or operate the project. The no action alternative will not necessarily mean no project in all cases and no action may mean that an action or project proceeds without federal involvement rather than no action at all.</u>"

For the reasons mentioned above, ACP also recommends removing paragraph §1502.14(f) on identifying of the environmentally preferred alternative in the EIS.

i. Affected Environment §1502.15

ACP recommends the following edit to subparagraph §1502.15(b) to remove the discretion to use best available science and to remove the ambiguous term "high-quality information": "Agencies ~~should~~ <u>shall</u> use ~~high-quality information, including the~~ best available science and data~~,~~ to describe reasonably foreseeable environmental trends, including anticipated climate-related changes to the environment…"

j. Environmental Consequences §1502.16

CEQ invited comment on whether it should include additional direction or guidance regarding the no action alternative in the final rule (88 FR 49949). ACP believes such guidance would be valuable. Importantly, for voluntary permits, actions with a small federal nexus, and some limited federal funding scenarios, the federal action will often not control whether infrastructure is built or not. Therefore, ACP recommends revising the description of the no action alternative in such circumstances to make clear it is focused on the environmental consequences of not issuing the requested federal approval(s) rather than a proposed facility not being built or a proposed physical action not occurring. ACP recommends the following revision in §1502.16(a)(1): "The no action alternative should serve as the baseline against which the proposed action and other alternatives are compared. <u>For voluntary federal permits, certain federal funding programs, or other proposed actions with a limited federal nexus, the no action alternative should be premised on the reasonably foreseeable environmental outcomes if the requested approvals are not granted, including if the proposed action will occur in the same or similar form in reliance on private action</u>

<u>and local or state approvals. The no action alternative will not necessarily mean no project in all cases and no action may mean that an action or project occurs without federal involvement rather than no action at all.</u>"

ACP supports the inclusion of §1502.16(a)(7), which requires consideration of, "Any reasonably foreseeable climate change-related effects, including the effects of climate change on the proposed action and alternatives," but recommends the following addition at the end of the sentence, "…and alternatives <u>and benefits from that action</u>." The environmental benefits of any action, climate change or otherwise, should be considered as well.

k. Incomplete or Unavailable Information §1502.21

ACP recommends revising §1502.21(b) as follows to improve consistency with federal law as amended by the FRA: "If an agency cannot make an informed choice among alternatives regarding reasonably foreseeable significant adverse effects due to incomplete <u>scientific or technical</u> information, and the overall costs of obtaining the information <u>and timeline to obtain it</u> are not unreasonable, the agency shall include the information in the environmental impact statement." ACP is concerned the current language in §1502.21(b) sets an expectation that perfect information be available to make a reasoned decision rather than relying on available information that is adequate to make an informed decision. In addition, ACP's recommendations make the language more consistent with the FRA which states, "In making a determination under this subsection, an agency…**is not required to undertake new scientific or technical research** unless the new scientific or technical research is essential to a reasoned choice among alternatives, **and the overall costs and time frame** of obtaining it are not unreasonable." (emphasis added)

Consistent with the edit to §1502.21(b), ACP recommends the following edit to §1502.21(c): "If the information relevant to reasonably foreseeable significant adverse effects cannot be obtained because the overall cost~~s~~ of obtaining it <u>or the timeline to do so is</u> ~~are~~ unreasonable or the means to obtain it are not known…"

l. Methodology and Scientific Accuracy §1502.23

ACP recommends adding the following to paragraph §1502.23(a) to remove the ambiguous term "high-quality information" and to provide additional direction on the use of data and models: "Agencies shall use ~~high quality information, such as~~ best available science and reliable data, models, and resources, including existing sources and materials, to analyze effects resulting from a proposed action and alternatives. Agencies may use any reliable data sources, such as remotely

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gathered information or statistical models. Where project-specific data from field studies is available, for example, with respect to incidental take permit applications, in general, agencies should rely on such project-specific data rather than theoretical models."

ACP recommends adding a new paragraph §1502.23(b) to address the need for transparency in models and re-designating the subsequent paragraphs. The proposed addition is as follows: "When utilizing models, agencies should have the models peer-reviewed, make assumptions and data inputs transparent to applicants and the public, to the maximum extent practicable make the models publicly available to project sponsors and other stakeholders to run themselves, and update models to incorporate new information on a regular basis." It has been our members' experience that agencies rely on models, notably in the incidental take permit context, in which the actual impacts are significantly lower than the models predict. While potentially informative in terms of setting take levels at the outset, models have proven problematic when used for compliance purposes; in contrast having actual data from field studies may often demonstrate more favorable results for the environment, while also being more favorable for the permit holder. Further, overestimating impacts can make it more difficult for subsequent applicants to obtain incidental take permits, because overall impacts to local area populations are exaggerated by the models and take estimates are excessively high.

m. Environmental Review and Consultation Requirements §1502.24

ACP recommends adding a new §1502.24(a) as follows and re-designating the subsequent paragraphs to further enhance the likelihood of timely decisions: "To the fullest extent possible, a consulting agency shall adhere to the schedule and deadlines set forth for consultation by the lead agency, unless the consulting agency can demonstrate that doing so conflicts with their statutory obligations."

4. Part 1503 Commenting on Environmental Impact Statements

a. Specificity of Comments and Information §1503.3

The public's ability to comment on an agency action is a cornerstone of the governmental process. Thus, ACP appreciates and shares CEQ's desire to address provisions that have the potential to unduly burden public commenters.[24] Nevertheless, ACP urges CEQ to retain, rather than strike, paragraphs (b) and (d) of §1503.3, "Specificity of Comments and Information." As

[24] Proposed Rule at 49951.

outlined below, these paragraphs provide useful, rather than burdensome, structure to the commenting process, better enabling the public and agencies to engage in a reasoned and timely discussion of proposed actions under NEPA. Turning first to paragraph (b), the existing regulations state:

> Comments on the submitted alternatives, information, and analyses and summary thereof (§ 1502.17 of this chapter) should be as specific as possible. Comments and objections of any kind shall be raised within the comment period on the draft environmental impact statement provided by the agency, consistent with § 1506.11 of this chapter. If the agency requests comments on the final environmental impact statement before the final decision, consistent with § 1503.1(b), comments and objections of any kind shall be raised within the comment period provided by the agency. Comments and objections of any kind not provided within the comment period(s) shall be considered unexhausted and forfeited, consistent with § 1500.3(b) of this chapter.

With limited time and resources, focusing public comments is an efficient use of resources – both the public's and the agency's. This guidance helps commenters draft more thoughtful comments, many of whom may not be experienced in submitting comments.

As partial justification for removal of the paragraph, the Proposed Rule states, "[t]he paragraph also is unrelated to the subject addressed in § 1503.3, which addresses the specificity of comments, rather than when commenters should file their comments."[25] ACP agrees that, under the existing title of the section, the time requirement for public submission of comments is unrelated. Nevertheless, this section is the most logical placement for the timing requirement for the public. First, comment requirements for the public are not explicitly stated elsewhere in the statute. Second, § 1506.11, which outlines the minimum comment periods, is entitled "timing of *agency* action";[26] putting the public requirements in this section would arguably be more confusing. Thus, CEQ should keep this paragraph in its current location. ACP notes that the title of § 1503.3 could also be renamed as "Specificity and Timing of Comments and Information."

The second justification set forth by the Proposed Rule is that "agencies have long had the discretion to consider special or unique circumstances that may warrant consideration of comments outside those time periods."[27] ACP appreciates that unique circumstances may arise that necessitate accepting comments beyond the review period. However, authority for extending the

[25] Id. at 49952.
[26] 40 CFR § 1506.11 (emphasis added).
[27] Id.

comment period already exists.[28] Paragraph (d) serves not to remove agency authority to extend the deadlines; rather, it serves to make clear that comments received after the deadline—whether those outlined in section 1506.11 or otherwise—shall not be considered, absent good cause.

ACP further recommends revising, rather than striking, paragraph (d), in the following way (underlined below):

> A cooperating agency with jurisdiction by law shall specify mitigation measures it considers necessary to allow the agency to grant or approve applicable authorizations or concurrences <u>along with an assessment of the specific statutory provisions that support requiring those measures</u>.

We understand that, in general, by virtue of having been designated a "cooperating agency" such an agency has jurisdiction by law to make recommendations.[29] However, providing additional details to the lead agency on which specific statutory provision(s) a proposed mitigation measure is intended to satisfy will help the lead agency (and project sponsors and applicants for that matter) better assess the reasonableness of the recommendation, as required under NEPA.

5. Part 1504 Pre-decisional Referrals to CEQ of Proposed Federal Actions Determined to be Environmentally Unsatisfactory

ACP agrees with the substance of this section as it will provide for a timelier and more efficient process for dispute resolution between the lead and cooperating agencies. However, ACP recommends revising the title of this Part. If a proposed decision is in dispute, the involved agencies, by definition, may not agree on whether an action is "environmentally unsatisfactory." Indeed, § 1504.1 (Purpose) states that "[t]his part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions *that might cause* unsatisfactory environmental effects."[30] ACP therefore recommends Part 1504 title be revised to: "<u>Pre-decisional Referrals to CEQ for Interagency Dispute Resolution</u>."

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[28] 40 CFR section 1506.11(e)("The lead agency may extend the minimum periods in paragraph (b) of this section and provide notification consistent with § 1506.10.").

[29] Id. ("This requirement is unnecessary since, at this stage, those agencies with jurisdiction by law have already established their legal authority to participate as cooperating agencies."); 40 CFR 1508.1(e)("Cooperating agency means any Federal agency (and a State, Tribal, or local agency with agreement of the lead agency) other than a lead agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action that may significantly affect the quality of the human environment.").

[30] (emphasis added)

ACP supports the addition of §1504.2 (early dispute resolution), which sets the expectation for resolving interagency disputes "early in the NEPA process," with further direction to "elevate issues to appropriate agency officials or the Council in a timely manner…."[31] The addition of this language will serve to further ensure previously determined schedules and deadlines are met. Additionally, for the sake of efficiency, ACP supports the relocation of the current §1504.2 (criteria for referral) to §1504.3(a). We also support the processes laid out for dispute resolution described in the existing §1504.3, which are generally consistent with current regulations, including providing timelines for certain agency actions and providing an applicant the opportunity to provide comments to CEQ. Finally, ACP supports the renaming of §1504.3 as "Criteria and Procedure for Referrals and Response."

6. Part 1506 Other Requirements of NEPA

a. Limitations on actions during NEPA process §1506.1(b)

ACP appreciates CEQ's desire to "ensure that agencies and applicants do not take actions that will adversely affect the environment or limit the choice of reasonable alternatives until an agency concludes the NEPA process."[32] However, ACP recommends striking the CEQ proposed language to be added at the end of §1506.1(b) as follows:

> An agency considering a proposed action for Federal funding may authorize such activities, including, but not limited to, acquisition of interests in land (e.g., fee simple, rights-of-way, and conservation easements), purchase of long lead-time equipment, and purchase options made by applicants~~, if the agency determines that such activities would not limit the choice of reasonable alternatives and notifies the applicant that the agency retains discretion to select any reasonable alternative or the no action alternative regardless of any potential prior activity taken by the applicant prior to the conclusion of the NEPA process~~.

Regarding offshore wind, the Bureau of Ocean Energy Management (BOEM) already conducts a NEPA analysis on a project design envelope (e.g., a range of potential offshore wind farm designs with varying numbers of turbines, etc.). Additionally, because of the extended timelines involved in offshore wind contracting and supply chain procurement, to effectively plan a project, offshore wind developers must have the flexibility to make these commitments without needing to secure agency approval each time.

b. Agency Responsibility for Environmental Documents §1506.5

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[31] Proposed Rule at 49953.
[32] Id. at 49954.

ACP supports the language in paragraph (a) explicitly allowing environmental documents to be prepared by contractors or applicants,[33] and believes that this language should be retained[34] As it is required by the "sponsor preparation" provision of the FRA now incorporated into 42 USC §4336a(f). We have long supported such authority to improve the timeliness of federal environmental reviews by resource-limited agencies.[35] Furthermore, ACP recommends adding a new paragraph (c), consistent with the timelines in §1507.3, which requires agencies to develop regulations to implement the third-party document preparation provisions of these NEPA reforms to maximize the opportunity to utilize the provisions. The proposed language for the new paragraph is as follows:

> "(c) No more than 12 months after the effective date of this rule, or nine months after the establishment of an agency, whichever comes later, the agency shall develop or revise, as necessary, proposed procedures to implement this section."

c. Innovative Approaches to NEPA Reviews §1506.12

Given the vagueness of this section, it is difficult to assess its value or the implications for future projects. The vagueness also creates concern regarding how the provision could be implemented. Therefore, ACP recommends CEQ include direction that any innovative approaches: (1) do not go beyond what is permissible under NEPA; (2) do not limit or otherwise undermine the role of applicants in the process and; (3) accelerate schedules and deadlines.

d. Effective date §1506.13

In the Proposed Rule, CEQ notes that "[f]ederal agencies would not need to redo or supplement a completed NEPA review (e.g., where a CE determination, FONSI, or ROD has been issued) as a result of the issuance of this rulemaking." ACP is concerned that this could be interpreted as requiring significant revisions to environmental documents and processes that are well underway, even those with draft documents that are already published but not yet final. The proposed language change from CEQ in §1506.13 reinforces this concern:

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[33] 40 CFR **§**1506.5(a)(The agency is responsible for the accuracy, scope (§ 1501.9(e) of this chapter), and content of environmental documents prepared by the agency or *by an applicant or contractor* under the supervision of the agency.")(emphasis added).

[34] The Proposed Rule at 49956 "proposes to remove references to applicants from this section other than to cross-reference the requirement that agencies establish procedures in their agency NEPA procedures for project sponsors to prepare environmental documents."

[35] *See*, ACP's comments on Phase I at 6 ("Specifically authorizing applicant-led documents, subject to independent review and concurrence by the action agency, would help alleviate the burden on agencies, increase efficiency, and facilitate the consideration of all relevant data (which the applicant often has the best access to."). Available at: https://www.regulations.gov/comment/CEQ-2021-0002-39375.

> The regulations in this subchapter apply to any NEPA process begun after ~~September 14, 2020~~[EFFECTIVE DATE OF THE FINAL RULE]. An agency may apply the regulations in this subchapter to ongoing activities and environmental documents begun before ~~September 14, 2020~~[EFFECTIVE DATE OF THE FINAL RULE].[36]

ACP supports the first part of the proposed effective date provision, as it provides helpful guidance and certainty by allowing environmental reviews that began before the effective date to continue under the rules in place at the time they were initiated. However, ACP believes the second sentence of the effective date should be removed as it provides unchecked authority for an agency to apply the new rules to reviews that began *before* the effective date and therefore contradicts the first sentence. Further, in the interest of certainty for applicants and fairness, the language should be revised to limit application of the new rules to reviews initiated prior to the effective date to situations in which the applicant concurs. ACP therefore recommends the following revisions:

> "The regulations in this subchapter apply to any NEPA process begun after [EFFECTIVE DATE OF THE FINAL RULE]. ~~An agency may apply the regulations in this subchapter to ongoing activities and environmental documents begun before [EFFECTIVE DATE OF THE FINAL RULE].~~ NEPA processes begun before that date shall be governed by the NEPA regulations in effect at the time the process began, except to the extent that (1) application of those regulations would not be consistent with current law or (2) the applicant concurs with the application of the regulations in this subchapter, whether in whole or in part, to such processes."

7. Part 1507 Proposed Revisions to Agency Compliance

ACP recommends the following addition to §1507.3(c)(9): "Include a process for reviewing the agency's categorical exclusions at least every 10 years, which does not impact projects approved under a categorical exclusion that existed at the time." This addition makes it clearer to agencies and other stakeholders that changes to categorical exclusions are forward-looking, and do not affect previously approved projects.

ACP supports the requirement in §1507.3(d). ACP further supports the requirement in §1507.3(d)(1) for an agency to "identify those activities or decisions that are not subject to NEPA," along with the enumerated list in (2) through (6).

8. Part 1508 Definitions

[36] Proposed Rule at 49958.

a. (l) environmentally preferable alternative

ACP recommends revising the definition as follows to make clear that not selecting this alternative is still consistent with NEPA obligations:

> *"Environmentally preferable alternative* means the alternative or alternatives that will best promote the national environmental policy as expressed in section 101 of NEPA, but that may not have been selected as the preferred alternative as the alternative or alternatives may not be the most technically and economically feasible and may not best meet the purpose and need of the proposal as required by 42 USC 4432(C)."

b. (u) Major federal action

ACP recommends a revision to (u)(1)(vi) to remove ambiguity and the potential for individuals to interpret an expansion of authority for agencies in the major federal action definition as follows: "(vi) Providing 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 environmental effects~~,~~ or otherwise has authority to 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 the financial assistance~~." As drafted, there is significant ambiguity created by terms like "sufficient control and responsibility," which may lead to conflict and litigation. Further, the clause ACP proposes to strike could be interpreted as an expansion of authority for agencies depending on how "sufficient control and responsibility" was implemented by individual agencies or interpreted by courts. The edits proposed by ACP make clear that with respect to providing financial assistance, the major federal action definition revision is not an attempt to expand agencies consideration of environmental issues where they do not otherwise have the authority to consider.

CEQ should further amend the definition of "major federal action" to clarify that NEPA review only applies to the portion of a project that is under agency control, as defined in the proposed guidance. This limitation would both provide certainty for project applicants and allow for a more efficient allocation of agency resources.[37]

Finally, for further clarification, the list of non-major federal actions should include a new paragraph (u)(2)(v), with the following sections re-designated. The added language should be:

[37] For a more detailed explanation, see ACP's comments on Phase I at 6.

"Subordination of a loan. Subordination is a step removed from the loan, and subordination does not affect the control over the project or action that the FSA has. It affects only the priority of the loan. Therefore, it should not be considered a major federal action."

c. (ff) Reasonable alternatives

The definition of reasonable alternatives should be revised with the underlined language as follows to improve the timeliness and efficiency of environmental reviews and, in the case of the language changed to "of the proposal," to be consistent with the language of the FRA incorporated now reflected in 42 USC 4332(C)(iii):

> *"Reasonable alternatives* means a reasonable range of alternatives that (1) are technically and economically feasible (2) meet the purpose and need ~~for the proposed action~~ of the proposal (3) are within the control of the agency to implement and (4) could substantively differ with respect to the environmental impact of the federal action under consideration."

While ACP supports the existing definition,[38] which explicitly states that reasonable alternatives must be both economically and technically feasible and meet the purpose and need of the proposal, the addition of requirements (3) and (4) will serve to further ensure that agencies use the "rule of reason"[39] when selecting the preferred alternative for a specific project. Turning to requirement (4), ACP notes that in certain situations, it may be appropriate for CEQ to require consideration of air pollution or other climate impacts when comparing the preferred alternative and those deemed to be reasonable alternatives.[40] Greenhouse gas (GHG) emissions and climate change are issues that "significantly effect[] the quality of the human environment" as envisioned by NEPA.[41] Thus, requiring that agencies take these effects into consideration when determining "reasonable alternatives" will serve to ensure that varying environmental impacts of different

[38] 40 CFR § 1508.1(z)("Reasonable alternatives means a reasonable range of alternatives that are technically and economically feasible, and meet the purpose and need for the proposed action.").
[39]*See* Nat. Res. Defense Council, Inc. v. Morton, 458 F.2d 827, 834-35 (1971) (holding that while the reasonable analysis of alternatives does not mean that the scope should be limited to those alternatives that the responsible agency or official has authority to adopt, but rather should include all alternatives that would be useful for the guidance of the ultimate decision-maker, the analysis need not extend to alternatives "remote from reality" that would not be "compatible with the time-frame of the needs to which the underlying proposal is addressed."); State of Alaska v. Andrus, 580 F.2d 465, 476 (D.C. Cir. 1978) (recognizing that "the agency retains, under NEPA, reasonable discretion to decide when it has sufficient information to choose intelligently between alternative courses of action that affect the environment")
[40] ACP Comments Phase I at 12.
[41] 40 CFR § 1500.1(a).

alternatives will be fully considered. This approach is also consistent with the Biden Administration's "whole-of-government" approach to climate change.[42]

d. (gg) Reasonably foreseeable

For the reasons outlined below, the definition of "reasonably foreseeable" should be revised as follows:

> "*Reasonably foreseeable* means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision. An effect is 'reasonably foreseeable' when an agency can conclude with a high degree of confidence that the effect is more likely than not to occur."

A robust foreseeability requirement is essential as agencies are required to evaluate the connection between their decisions and such decisions' reasonably foreseeable effects. However, to the extent practicable, it is also essential to provide clear guidelines to agencies regarding the limit of this obligation. For example, agencies should not be required to quantify, analyze, and disclose those effects which are highly speculative—especially when such additional analysis will significantly increase the cost and time of NEPA review without adding value to decision-makers or to the public.

IV. Conclusion

ACP appreciates the opportunity to engage in this important dialogue. We believe the proposed revisions and additions proposed in these comments will serve to further improve NEPA review through ensuring that the process is streamlined, effective, and reasonable. ACP looks forward to continuing to work with CEQ as it moves forward with the final rules.

Sincerely,

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[42] See FN 4.