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10 March 2020

U.S. Council on Environmental Quality
730 Jackson Pl NW
Washington, DC 20506

RE: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act [CEQ-2019-0003]

Thank you for the opportunity to submit comments on the Notice of Proposed Rulemaking regarding the Council of Environmental Quality's (CEQ) update to the regulations implementing the National Environmental Policy Act (NEPA).

I am writing on behalf of the 1000+ professional biologists from California, Nevada, Hawaii, and Guam who comprise the Western Section of The Wildlife Society (http://tws-west.org). The Wildlife Society (TWS; https://wildlife.org) is an international non-profit scientific and educational association, representing over 15,000 wildlife biologists and managers, dedicated to excellence in wildlife stewardship through science and education. Our mission is to ensure that wildlife and habitats are conserved through management actions that take into careful consideration relevant scientific information. TWS and our membership work to ensure that science plays an active role in policy and regulatory decision-making processes, and this letter's comments provide our expert opinion about the proposed rules for NEPA. Within this proposed rule, there are several provisions that our organization finds concerning or requests clarification on in order to ensure the impacts on wildlife and science-based wildlife conservation are correctly understood.

Passed in 1969 in response to increasing public concern about the effects of human activity on the environment, NEPA established a procedural framework obligating all federal agencies to consider environmental impacts prior to taking any "major Federal actions significantly affecting the quality of the human environment." Rather than being prescriptive on substantive standards for environmental protection, NEPA focuses on ensuring federal agencies thoroughly consider the possible environmental effects of their actions and disclose these effects to the public.

Natural resource professionals play an integral role in all aspects of this process. These federal, state, university, and private employees engage through the development of NEPA documents, direct and indirect consultation, and drafting of public comment. The experience and subject-based knowledge they bring to the environmental review process is substantial and essential.

The proposed changes to the regulations implementing NEPA, published on January 10, would fundamentally change how both scientific professionals and the public interact with this bedrock environmental law. The proposed revisions would reduce the range of alternatives evaluated, exclude the consideration of critical types of impacts, place arbitrary time and page limits on NEPA documents, and reduce public opportunities to review and comment on proposed projects. It is essential that the NEPA's core tenets of ensuring proposed federal actions thoroughly consider and disclose possible environmental impacts remain intact.

These proposed regulations—which constrain public engagement and sharply limit circumstances in which agencies must fully analyze the effects of their proposed actions in a full Environmental Impact Statement (EIS)—are inconsistent with the purpose and intent of NEPA: that federal agencies "use all practicable means and measures… to create and maintain conditions under which man and nature can exist in productive harmony…." 42 U.S.C. § 4331(a).

Revisions to the Purpose and Function of NEPA

The original purpose of NEPA, in addition to establishing CEQ, includes, "promot[ing] efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; (and to) enrich the understanding of the ecological systems and natural resources important to the Nation" (Section 2 [42 USC §4321]). This is reflected in the very first sentence of the current language of Section 1500.1(a) that states that "NEPA is our basic national charter for protection of the environment. … The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of Section 101." The proposed revision removes all mention of environmental protection and replaces it with a statement that focuses on the procedural nature of NEPA in supporting agency decisions. It is our position that the context of the decisions with respect to the original purpose of NEPA must be preserved if future decisions are to reflect current scientific resource management that prioritizes protection of these environments.

As the existing NEPA regulations recognize in Section 1500.1(b), high quality information and analysis are essential to serving the goals of NEPA. Yet, the proposed NEPA regulations strike Section 1500.1 without replacing it with an equally meaningful requirement. To achieve NEPA's "twin aims," the information used in formulating NEPA analyses must be more than simply anything the agency finds reliable, it must be of high quality. The new regulations should require agencies to use the best available science in NEPA analyses and should require agencies to make the information and analyses they rely on available to the public.

Definition of "effects or impacts"

Proposed changes to the definition of "effects or impacts" as well as the elimination of the requirement to assess "cumulative effects" would have long-lasting repercussions on the ability of natural resource professionals to plan and mitigate for the changes that a project may put into motion. The regulatory update would change the definition of "effects or impacts" to require a tight causal connection to the action – ensuring that only effects that are "reasonably foreseeable" would be considered in a NEPA review. The proposal would also eliminate the requirement to assess "cumulative effects" (§1508 (g)(2)).

Until now, NEPA reviews have typically considered a variety of effects of a proposed federal action, including direct, indirect, and cumulative effects. Indirect effects are generally those caused by a project but separated by time or space. Cumulative effects can be described as the combined effects of incremental direct and indirect effects of the project, the effects of other actions, and effects of reasonably foreseeable future actions.

Examples of indirect and cumulative effects that may no longer be considered include:

- A project that increases the fine sediment delivered to a stream:
    - Indirect effects: The direct effect of the project, the amount of fine sediment it creates in a month or two, might not change the habitat substantially enough to affect the streambed, but over the life of a project sediment accumulation might displace some aquatic organisms or reduce their reproductive success. These sorts of impacts are certainly related to the project's effects, but they would fall outside of the review as directed under the revised statute.
    - Cumulative effects: Cumulative effects analyses examine how the sediment added by one project fits into the sediment load of a stream given all other inputs. Again, the project in question may only add a small amount, but if there are other projects that also contribute sediments or other pollutants, their combined inputs may constitute a substantial change to the stream's habitat. Ignoring this additive effect assumes that each project occurs in a vacuum and disregards the reality that each change builds upon previous changes. It is often the pressure of these combined, or cumulative, changes on an ecosystem that cause species to be displaced, reduce reproductive success, or degrade water quality.

Tightening the causal relationship required sets an arbitrary and unnecessarily high bar for the consideration of indirect effects. Combined with eliminating the assessment of cumulative effects, this proposal could have serious impacts to adequate vetting and transparency in natural resource planning. Furthermore, the definition of effect (§1508(g)(2)), explicitly states that, "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should not be considered significant if they are remote in

time, geographically remote, or the product of a lengthy causal chain. Effects do not include effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action. Analysis of cumulative effects is not required." However, if a project creates conditions that interrupt seasonal migration patterns or create conditions that wildlife avoid, then the wildlife may have lower survival and/or reproductive success. If the project was not present (i.e. but for the project), no interruption to migration would occur. However, the product of this reduction in recruitment or gap in a year class may not be noticeable for years or may not affect the immediate wildlife population near the project. The argument that "but for" the change in their migratory path, these effects would not occur seems to be outside of the scope of the proposed changes to NEPA.

Attention must also be paid to the proposed rule's impacts on the consideration of climate change and its myriad effects in the review process. The judiciary has interpreted the analysis of cumulative effects to require consideration of greenhouse gas emissions, the impacts of rising sea levels, and other results of climate change on a given project. Regulatory changes discounting the importance of vetting climate-related impacts of federal actions does not provide the clarity needed to effectively manage our nation's resources long-term. We recommend retaining the existing definition of "effects or impacts" to ensure it does not restrict the effects considered and exclude possible effects that could have long-lasting and severe consequences for natural resources.

CEQ's existing NEPA regulations ensure that federal agencies fully evaluate the environmental impacts of their actions where those actions risk having the most impact—in particular, where unique geographic areas or threatened or endangered species are present, where the environmental effects of an action are controversial or poorly understood, or where there is potential for significant cumulative effects. *See* 40 C.F.R. § 1508.25. The proposed NEPA regulations eliminate these considerations and provide that further scrutiny is warranted only where there are "(i) Effects [*sic*] may be both beneficial and adverse; (ii) Effects on public health and safety; or (iii) Effects that would violate…law protecting the environment." Section 1501.3. In this way, the proposed regulations attempt to eliminate consideration of effects on the environment from environmental decision-making, which is contrary to the purpose of NEPA. CEQ must ensure that actions with potential effects to unique geographic areas or imperiled species, or cumulative effects, or whose effects are controversial or poorly understood, receive full scrutiny in an EIS, and CEQ should not eliminate the existing significance factors.

In its Federal Register notice, CEQ solicited comment on whether to include a "proximate cause" concept in its definition of effects to be analyzed. "Proximate cause" lends little to the definition of effects—it is poorly-defined in tort law and will only cause confusion about the scope of the agency's effects analysis. The proposed NEPA regulations also improperly attempt to narrow the effects an agency must consider, by defining that "[e]ffects do not include effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action." Section 1508.1(g)(2). If anything, the

new NEPA regulations should clarify that agencies must consider *all* effects on the environment associated with their actions, including effects that would occur without the agency action. If an agency action contributes to an effect, it is a cause of that effect, and CEQ should make clear in the new NEPA regulations that agencies cannot escape disclosing to the public effects caused by their actions. This invitation for agencies to disclaim culpability is just another way in which the proposed NEPA regulations seem little more than an effort to promote unfettered, unreviewable agency discretion. It also is contrary to the purpose and intent of NEPA.

Limits on the Ability to Comment

The proposed revisions to NEPA include a new section 1500(b) *Exhaustion* that would move the time for public comment to just after the Notice of Intent (NOI) and limit the comment period to 30 days after issuance of a final EIS. The requirements on the commenter are also raised. The language has been changed to state that ”comments shall be as specific as possible…., and shall provide as much detail as necessary to meaningfully participate and fully inform the agency of the commenter's position.” Furthermore, the burden of evidence has been shifted from the agency's response to the commenter's comment. Where in the current NEPA, the agency was required to provide evidence for dismissing a comment (§1503.8(a)(5)), now the commenter is directed to reference the corresponding section or page number of the draft EIS, propose specific changes to those parts of the EIS, where possible, and include or describe the data sources and methodologies supporting the proposed changes (§1503.3(a)). As scientists, we are study, gather data, and conduct an analysis to reach a decision and use this to support our positions, but this requirement would place an undue burden on a member of the public who may not have the skills or access to targeted data sources to provide the information required.

The proposed changes to NEPA make ‘‘publish’’ a defined term that provides agencies with the flexibility to make environmental review and information available to the public by electronic means not available at the time of promulgation of the CEQ regulations in 1978. Historically, the practice of circulation included mailing of hard copies or providing electronic copies on disks or CDs. While it may be necessary to provide a hard copy or copy on physical media in limited circumstances, agencies now provide most documents in an electronic format by posting them online and using email or other electronic forms of communication to notify interested or affected parties. This change would help reduce paperwork and delays and modernize the NEPA process to be more accessible to the public. To provide equity in access, please ensure that copies are made available at libraries or other institutions for people to access, whether a hard copy or electronic, with free access to computers for viewing.

Limits on Defining and Developing Alternatives

The proposed changes have revised §1502.14 substantially. Currently §1502.14 states that the alternatives section is the “heart of the environmental impact

statement." The current language also directs the agency to "(a) Rigorously explore and objectively evaluate all reasonable alternatives." This text has been removed in the proposed revision. In the purpose section of current NEPA §1502, reasonable alternatives are described as those which would avoid or minimize adverse impacts or enhance the quality of the human environment.

The revisions include a new definition for "reasonable alternatives" at §1508(z) z). "Reasonable alternatives" mean a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant. Note that there is no mention of examining alternatives based on their ability to reduce or avoid impacts. The insertion of the applicant's goals into the evaluation is also inconsistent with the purpose of NEPA. The updated analysis of alternatives also includes an economic evaluation including any economic benefits of an action as part of the environmental review. We believe that including economic analyses in environmental review processes is not consistent with the intent of the regulation. The intent of NEPA is to ensure that the agency is reviewing environmental impacts appropriately, independent of economic considerations.

Page limits and deadlines

The proposal would establish page limits and timelines for environmental reviews, allowing one year and 75 pages for environmental assessments (EAs) and two years and 150 pages for EISs (or 300 pages for EISs dealing with complex issues, with written direction by a deciding official).

In 2018, CEQ studied how long it took federal agencies to complete EISs between 2010 and 2017. It found that the average time to complete an EIS was 4.5 years and the median was 3.6 years. One quarter of the EISs took less than 2.2 years and one quarter took more than 6.0 years. CEQ also examined the lengths of EISs from 2010 to 2017. It found that the average length of a final EIS was 669 pages. According to the notice, "CEQ has concluded that revisions to the CEQ regulations to advance more timely reviews and reduce unnecessary paperwork are warranted. CEQ has determined that improvements to agency processes, such as improved coordination in the development of EISs, can achieve more useful and timely documents to support agency decision making."

While we understand the desire to complete environmental reviews in a timely manner and in a reasonable length, we are concerned that simply imposing arbitrary limits does nothing to address how coordination can be improved. In fact, it is our position that these new requirements would lead to reviews that do not adequately consider possible effects of the proposed federal actions as required by law. A better directive would be for agencies to do as CEQ suggests, and coordinate on the expected levels of impacts on each resource area and tailor the EAs and EISs to focus the information they provide on the resources at risk. While we agree that some EAs and EISs are longer than necessary, limiting the number of pages does not ensure more focused documents, nor does it guarantee better analyses.

NEPA requires that the level of review be commensurate with the potential for impacts. A better directive would be for agencies to do as CEQ suggests, and coordinate on the expected levels of impacts on each resource area and tailor the EAs and EISs to focus the information they provide on the resources at risk. While we agree that some EAs and EISs are longer than necessary, limiting the number of pages does not ensure more focused documents, nor does it guarantee better analyses. Finally, it will also leave the decision maker less informed.

Third party reviews

The proposed changes include language that would allow third parties involved in a project requiring environmental review to conduct their own review under the supervision of a federal agency.

In current third-party reviews, the federal agency selects and hires the reviewers, directs the review, and has oversight and final approval on the documents produced. The proposed changes would allow a project proponent to take over these responsibilities. NEPA provides a process for review of a project from the perspective of the regulating agency, not the organization requesting the project. It is reasonable to assume that a project proponent would judge their approach as adequate, and that they might not want to pursue alternatives that require additional mitigation or monitoring to ensure that impacts are minimized. Federal agencies have internal guidance and processes which ensure that NEPA documents are appropriately prepared; there is no guarantee that third parties working for a project applicant would have such safeguards in place. This proposed change may result in environmental review documents being prepared by employees without the necessary training and experience to consider all impacts as required by law.

The proposed NEPA regulations also include throughout an intention to increase the roles of State and local governments and agencies in shaping NEPA documents and decisions. For example, the proposed NEPA regulations expand the definition of federal agency to include State and local agencies and governments. CEQ should not increase the roles of state and local governments in federal agency decision-making. The new NEPA regulations should be sure to preserve the role of the federal government as primary decisionmaker over federal public lands—indeed, anything less would violate the Property Clause of the U.S. Constitution.

In conclusion, we stress the foundational role that NEPA plays in ensuring that federal decisions are thorough and consider all possible effects on natural resources. Any changes to the regulations that currently implement NEPA should keep this central role in place and ensure that environmental reviews continue to appropriately analyze proposed federal actions that can affect natural resources.

The Western Section of The Wildlife Society thanks you for the opportunity to submit comment on this proposed rule. Please contact Kelly Holland, CWB®, the President and the Conservation Affairs Committee Chair for the Western Section

of The Wildlife Society (conservation@tws-west.org), with any follow up questions regarding these comments.

Sincerely,

Kelly Holland, CWB
President and Conservation Affairs Committee Chair
Western Section, The Wildlife Society