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Edward A. Boling
Associate Director for the National Environmental Policy Act
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

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

The American Wind Energy Association (“AWEA”)¹ submits these comments in response to the Council on Environmental Quality’s (“CEQ”) June 20, 2018 Advance Notice of Proposed Rulemaking—Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (“NEPA”) (the “Notice”).² AWEA appreciates that CEQ is considering an update to its NEPA implementing regulations and for the extension of time to allow for meaningful review and opportunity to provide comments on the proposed changes.³

¹ AWEA is a national trade association representing a broad range of entities with a common interest in encouraging the expansion and facilitation of wind energy resources in the United States. AWEA members include wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, researchers, renewable energy supporters, utilities, marketers, customers, and their advocates.

² 83 Fed. Reg. 28,591 (Jun. 20, 2018).

³ 83 Fed. Reg. 32,071 (July 11, 2018).



I. Background

NEPA requires federal agencies to incorporate environmental considerations in their planning and decision-making through a systematic interdisciplinary approach. NEPA's statutory requirements are implemented through CEQ regulations, which are binding on all federal agencies. It is these regulations that are currently under review by CEQ and upon which these comments focus.

Among other things, the NEPA process is triggered for projects that occur on land that is owned or managed by the federal government and for projects subject to U.S. Fish and Wildlife Service control. As of March 2018 there were 35 Bureau of Land Management ("BLM") approved wind energy projects on public lands,⁴ totaling one percent of the cumulative installed U.S. wind power capacity.⁵ For each project, the BLM conducted a NEPA analysis, and any future wind energy development on federal land will require the same.

While wind energy development on public lands currently represents a somewhat small percentage of total wind energy development in the United States, the potential for offshore wind development is vast. Estimates show that ten gigawatts of offshore wind will be installed by 2027, with an expected total of 86 gigawatts installed by 2050.⁶ Many of these

⁴ BLM, *Wind Energy Fact Sheet*, https://www.blm.gov/sites/blm.gov/files/energy_renewablewindfactsheet.pdf (March 2018).

⁵ AWEA, 2017 Annual Market Report at 83.

⁶ United States Department of Energy and United States Department of the Interior, *National Offshore Wind Strategy*, viii (Sept. 2016), available at <https://www.energy.gov/sites/prod/files/2016/09/f33/National-Offshore-Wind-Strategy-report-09082016.pdf>.



offshore wind farms will be sited in waters managed by the Bureau of Ocean Energy Management (“BOEM”) and will undergo NEPA analysis prior to leasing and development. As wind development on federal land and in federal waters continues to grow, a coordinated, efficient, and legally sufficient NEPA process is critical to ensuring timely development in the coming years.

NEPA can also be triggered by applications for issuance of federal permits for wind energy projects on private lands, such as eagle take permits under the Bald and Golden Eagle Protection Act or incidental take permits under the Endangered Species Act. Since the overwhelming percentage of wind energy facilities are deployed on privately-owned lands,⁷ NEPA related to issuance of federal permits for species and similar issues for wind projects on private lands projects is of particular importance to AWEA members.

II. Comments

AWEA supports CEQ revising its NEPA regulations to ensure that all environmental reviews and authorization decisions are conducted in a coordinated, consistent, timely, and legally sufficient manner. Due to the breadth of the subject matter, AWEA has focused its comments below on those questions posed by CEQ that may significantly affect the wind industry.

⁷ AWEA, 2017 Annual Market Report at 83.



A. NEPA Process

- Notice Question #2 - *Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?*

AWEA supports CEQ revising its NEPA regulations to ensure that previously conducted environmental studies, analyses, and decision documents are incorporated at an early stage of the review process. During the scoping process, the Lead Agency should be required to reach out to all relevant Federal, state, or local governmental agencies to invite submissions of previously conducted environmental studies, analyses, and decision documents. The Lead Agencies should then be required to review such documents and data to determine whether they can be incorporated in the current analysis. By requiring the Lead Agency to both consider and incorporate, where appropriate, information from preexisting reviews early in the NEPA process, it will prevent duplicative processes.

The agencies should exercise all efforts to streamline the NEPA process in accordance with Executive Order 13807. At the same time, agencies' actions under NEPA should be transparent in that all science and studies used to inform decision-making be made available through appropriate government data portals (i.e. BOEM's Marine Cadastre and the FWS's Environmental Conservation Online System ("ECOS")). These changes will ensure that the agency preparing the ultimate NEPA document has a full and complete picture of the underlying purpose, need, setting, and context of the action, as well as access to relevant and



specific information gathered or obtained by Federal, state, and local agencies and tribes with particular expertise in the matter.

- Notice Question # 3 - *Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decision, and if so, how?*

AWEA supports revising the CEQ regulations to ensure optimal interagency coordination through the NEPA review process by making sure all of the necessary agencies are brought into the review early in the process. Section 102(C) of NEPA requires that, prior to conducting an environmental impact statement, the Lead Agency must “consult with and obtain the comments of any Federal agency with jurisdiction by law or special expertise regarding the environmental impacts involved.”⁸ However, at the expense of a fully informed and efficient review, agencies often do not seek special expertise if they perceive that expertise may challenge their in-house experts or policy goals. The CEQ regulations should be modified to emphasize that the Lead Agency is required to request the participation of each agency with jurisdiction by law or special expertise in the NEPA process. This will ensure that all of the necessary agencies are brought to the table.

The CEQ regulations also need to be modified to ensure that cooperating agencies are brought in prior to initiation of the scoping process. As written, CEQ regulation § 1501.6 requires, among other things, that the lead agency request participation of cooperating agencies “at the earliest possible time.” The CEQ regulations should be modified to clarify

⁸ 42 U.S.C. § 4332(C).



that this “earliest possible time” is prior to the initiation of the scoping process. This will ensure that the cooperating agencies can be involved in the scoping process and help shape the review from the very beginning, thereby reducing the chance for unforeseen delays and duplication of work in the review process.

In addition, there needs to be increased transparency and adherence to strict timelines. Cooperating agencies should expressly told the timeline allowed for the completion of each step of the review process. If a cooperating agency misses a deadline, the process shall continue without the input of that agency.

B. Scope of NEPA Review

- Notice Question # 4 - *Should the provisions in CEQ’s NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?*

AWEA supports streamlining the NEPA process by, among other things, incorporating time and page limits for NEPA documents. Such limitations will force agencies to review their current process to eliminate duplicative actions and unnecessary delays, and will likely result in more concise and comprehensible NEPA documents. However, the page and time limits need to be reasonable and take into consideration the technical complexity of projects subject to NEPA review, as well as the legal sufficiency that is required for such analysis to withstand legal challenge.

AWEA recommends that CEQ require Federal agencies to adopt or amend their existing agency-specific NEPA procedures to provide for shorter, more readable documents. While such procedures should include both page and time limitations, there should be a clear



process within each agency for receiving variances where, for example, the complexity of a Federal action warrants a departure from the limitations that would otherwise apply. This will help ensure that strictly enforced time or page limits will not make certain NEPA documents more susceptible to Administrative Procedure Act challenges because an agency needs additional space or time to fully explore the range of alternatives, environmental consequences, or mitigation associated with a complex project or one that is likely to face strong public opposition.

In addition, in order to effectively streamline NEPA without causing delays for pending projects, CEQ should require that agencies grandfather all pending NEPA analyses that have been substantially completed. AWEA recommends that “substantially completed” include NEPA analyses that have been published as drafts. Otherwise, agencies may cause further delays trying to revise draft NEPA analyses to fit within the newly established page limitations.

- Notice Question # 7 - *Should the provisions in CEQ’s NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?*

a. *Categorical Exclusions Documentation*

Agencies are not fully utilizing Categorical Exclusions as a tool to satisfy NEPA obligations. To assist with the streamlining process, the CEQ regulations relating to Categorical Exclusions should be revised to ensure that agencies can properly and efficiently apply exclusions to all qualifying actions. Currently, the regulations define categorical exclusions as “a category of actions which do not individually or cumulatively have a



significant effect on the human environment... and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.”⁹ Agencies, not CEQ, create a categorical exclusion for certain classes of activities. While CEQ encourages the use of categorical exclusions to reduce unnecessary paperwork and delays,¹⁰ the regulations need to be modified to provide enough clarity as to what constitutes a “significant effect” to assist agencies in determining what falls under the exclusion.

There are multiple actions that occur during wind energy development that have limited effect on the human environment and thus should always be categorically excluded from NEPA. These include, among others: (1) deployment of floating instrument buoys, such as FLiDAR, for offshore wind development; and (2) placement of meteorological towers for land-based wind development. While AWEA will continue to engage with the necessary agencies for specific categorical exclusions, the CEQ regulations should be modified to provide for an efficient and streamlined approach for the development and use of categorical exclusions by all Federal agencies. CEQ should require that agencies maximize the use of Categorical Exclusions and make all Categorical Exclusions available in a publicly searchable database. This approach will reduce costs, promote infrastructure development, and satisfy NEPA requirements. Furthermore, the Categorical Exclusions relied on by one agency with jurisdiction shall be available to all agencies for similar actions.

⁹ 40 C.F.R § 1508.4.

¹⁰ 75 Fed. Reg. 75632 (Dec. 6, 2010)(“[a]ppropriate reliance on categorical exclusions provides a reasonable, proportionate, and effective analysis for many proposed actions, helping agencies reduce paperwork and delay.”).



- Notice Question # 11 - *Should the provisions in CEQ's NEPA regulations relating to agency responsibility and the preparation of NEPA documents by contractors and project applicants be revised, and if so, how?*

Many NEPA project proponents end up paying twice for the necessary NEPA analysis for their project or action. While the Lead Agency often hires a private company and/or contractor to prepare the NEPA document for the agency at the expense of the proponent, the project proponent typically also hires outside help to assist with navigating the NEPA process. To correct this problem, AWEA recommends that CEQ provide or push for action agencies to get the necessary funding to effectively complete the NEPA analysis required for all projects and actions. In the alternative, the CEQ regulations should be revised to specifically allow the project proponent, or its contractor, to prepare the draft NEPA documents.

- Notice Question # 12 - *Should the provisions in CEQ's NEPA regulations relating to programmatic NEPA documents and tiering be revised, and if so, how?*

CEQ should revise its regulations to specifically state that the Bureau of Land Management (BLM) is to permit tiering off of existing BLM Wind Energy Programmatic Environmental Impact Statements ("PEIS"). This would allow projects within the PEIS purview to utilize the PEIS and conduct site-specific NEPA analysis only as needed. CEQ should clarify what constitutes a new and significant issue that would trigger the need for additional analysis after the issuance of a PEIS. In addition, these modifications would allow wind energy projects to avail themselves of the incentives of locating in Designated Leasing Areas under BLM regulations.



- Notice Question # 13 - *Should the provisions in CEQ's NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?*

In many circumstances a Federal agency's involvement in an action that requires NEPA compliance stems from an application for Federal permitting, licensing, or other authorization of a project. For these matters the agency's role is limited to determining whether such application is consistent with the relevant statutory or regulatory framework. The agency has very little discretion to make material changes to the underlying activity. Accordingly, the CEQ regulations should be revised to account for these circumstances. It should not require the agency to spend time and resources providing an exhaustive list of alternative actions when such a course is an exercise in futility.

C. General

- Notice Question # 20 - *Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how?*

Federal agencies are not obligated under NEPA to mitigate the potential adverse environmental impacts of a proposed action or to require an applicant to do so before the issuance of a permit or license. However, Federal agencies often propose mitigation as a means to reduce impacts associated with a proposed action in order to allow for a finding of no significant impact ("FONSI") for the project. These determinations are called "mitigated FONSI." While the CEQ regulations define "mitigation,"¹¹ the regulations are currently

¹¹ See 40 C.F.R. 1508.20.



silent as to the use of such mitigated FONSI. AWEA suggests that CEQ revise its regulations to direct the use and implementation of mitigated FONSI.

III. Conclusion

AWEA appreciates the opportunity to comment on CEQ's update to its regulations implementing NEPA, and looks forward to engaging with CEQ throughout this process.

Sincerely,

Gene Grace
Senior Counsel
American Wind Energy Association
Suite 900
1501 M Street, NW
Washington, DC 20005
(202) 383-2521
ggrace@awea.org

Lauren Bachtel
Associate Counsel
American Wind Energy Association
1501 M St, NW
Washington, DC 20005
(202)383-2520
lbachtel@awea.org