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

[1] ACP is the national trade association representing the clean energy industry in the United States, bringing together

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

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

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.

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.

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,

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

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 provisimi

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.

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

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 o

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.

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

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

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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, 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."

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~~ shall 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

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."

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 and benefits from that action." 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 scientific or technical information, and the overall costs of obtaining the information and timeline to obtain it 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 or the timeline to do so is ~~are~~ unreasonable or the means to obtain it are not known..."

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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

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 hercha10.3 (Tw 5.848.7-(f)7 (1 Tw 54848 0 T1[(r)2 (.)10.3 ( )0 T1[r(e)8)1.0 (o)-(t)-4[(h6.326. (t)

comment period already exists.[28] Paragraph (d) serves not to remove a

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 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. f1s2eppeu3(e)0.l.t tt3r-]T(ev)5 8e t [1.2 ((t):as)2 ent307772 446.88 2057 8 2.61ref (en)4.6 6 (u 306|

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

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