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August 10, 2018

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

Re: Docket No. CEQ-2018-0001.

Dear Sir,

We appreciate the opportunity to weigh in on the proposal to revise the National Environmental Policy Act (hereinafter NEPA) – a guiding policy which has served the American people and our environmental commons for decades. In any deliberations about the effectiveness of this guidance, we must review the intent of the original Act, and compare this intent with the outcomes – i.e. the current environment for which the Act was crafted to protect.

It states in the preamble that the intent of NEPA was…

> To declare national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[1]

It should be noted here that there is no reference to "economic values" in this statement of intent, although in practice, economic considerations do weigh into decisions made under NEPA.

I have been engaged in reviews and critiques of Environmental Impact Statements since 1992. Over the ensuing 25+ years I have seen a few changes in how Environmental Assessments (EA), and Environmental Impact Statements (EIS) have been implemented, and changes in how the various agencies implement the act - most particularly the Department of the Navy, the Department of the Interior (DOI), the National Oceanographic and Atmospheric Administration (NOAA), The National Marine Fisheries Service (NOAA Fisheries), and the Bureau of Ocean Energy Management (DOI-BOEM).

[1] United States. National Environmental Policy Act of 1969. Pub.L. 91–190, Approved January 1, 1970. 42 U.S.C. § 4321 *et seq.*

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While there has been some room for shenanigans in the drafting of Environmental Assessments and Environmental Impact Statements, the public engagement process of NEPA has by-and-large served us well in addressing the occasional misapplications of NEPA to sidestep and skirt environmental laws, or conceal or ignore actual environmental impacts and costs of a described action.

In terms of the environmental outcomes, it is abundantly clear that in many cases the environment is in much better shape than it was in 1970. Bodies of water – rivers, lakes, streams, and the ocean, are no longer being used as toilets for industrial waste, for example. But in other cases, as in exemptions for "military readiness," hastily applied Incidental Harassment Authorizations, and rubber-stamping of "boilerplate" authorizations that have little or nothing to do with a proposed action,[2] the process has fallen short.

Additionally, it is often found that preparers of Draft Environmental Impact Statements (DEIS) will "front load" the documents with unsubstantiated determinations of "Findings of no significant impact" (FONSI)[3] or assessments of "Negligible Impacts,"[4] tainting the review process with apparent "foregone conclusions."

So whether it is due to these common "oversights" and poorly-applied guidance, the lack of resources to review the hundreds to thousands of permit applications that float through the agencies throughout the years, or deliberate obfuscation; unforeseen or un-monitored environmental compromise has been steadily eroding the habitat quality of most of the public commons administered by the Agencies since the adoption of NEPA. This is most particularly the case with habitats managed by the Department of the Interior[5].

So in this context, should NEPA be revised, it would make sense to revise it with an eye toward greater precaution and more agency accountability. Although my suspicions are that NEPA, within the short seven-and-a-half-page Act (as currently amended) probably has all the guidance necessary to successfully apply the Act;[6] rather the Act's weakness may be more of a lack of Federal resources to review the EAs, DEISs, EISs and the subsequent public comments to most effectively apply NEPA.

[2] Probably more notoriously, in reviewing the permits to the BP Deepwater Horizon-Macondo field, a "impact mitigation plan" for walrus was found.

[3] E.g. Supplemental Exploration Plan OCS-G-32303 & OCS-G-24062 Mississippi Canyon Blocks 208/253 contained numerous characterizations of habitat, animal populations, and operating conditions that were patently not true, but because this plan was among the hundreds that get systematically submitted in the Gulf of Mexico, DOI just rubber-stamped it and let the operator proceed without oversight.

[4] In OCS EIS/EA BOEM 2012-005 "Atlantic OCS - Proposed Geological and Geophysical Activities Mid-Atlantic and South Atlantic Planning Areas Draft Programmatic Environmental Impact Statement," the term "negligible impact" appeared 957 times in a 550-page document.

[5] See: George Wuerthner and Mollie Matteson 2002 *Welfare Ranching: The Subsidized Destruction of the American West* pub. Foundation for Deep Ecology

[6] See CFR Title 40, Chapter V

When I first began critiquing DEISs under NEPA the public comments were synthesized, addressed, and published in a final EIS. And while there was often "batch processing" of comments by a team of readers, it was clear from the final EIS that the public comments were being read, and synthesized by humans. The comments were clearly linked to where in the FEIS the concern had been addressed or dismissed. But as the public becomes more concerned and engaged in the NEPA process, having the agencies respond to thousands – or even millions of comments is just not practical. If humans spent one minute each synthesizing the ~3 million public comments on the review of the Public Parks and Monuments[7], it would take about 50,000 person/work/hours to synthesize. So it is probable that DOI is now using machine-reading software to sort through the comments, categorize them, and supposedly respond.

But it is not clear how this process is set up. Who sets the filters that bin the comments? How are they prioritized? What happens to the technical comments submitted by professional research and conservation organizations like ourselves, with a deeper and more nuanced understanding of a proposed action? What happens to the mathematical models we submit to substantiate our case and contribute to the usefulness of the final document?

If NEPA needs revision, it would be in opening up public access to this filtering process so that we, the public, understand clearly the priorities of the reviewing agency and how they may bias the inclusion or exclusion of public comments and input.

It is clear that this process recently ran afoul in the Parks and Monuments Review[8], because of the 3 million comments, 97% of which expressed the need to keep the monuments intact, the Department of the Interior under Secretary Ryan Zinke accidentally released a partially redacted draft of their synthesis of the public comments, excising any references to the economic benefits advanced by the public substantiating why the DOI should not diminish or tamper with any Parks and Monuments boundaries.[9]

This probably gets to the point of why there is a call for a review and revision of NEPA: the current administration, under the leadership of the Koch Brothers and the Fossil Fuel interests find the NEPA process burdensome – likely because it gets in the way of their commandeering our public assets for their private gain.

So it is likely, given the performance of the DOI in the Parks and Monuments review, that the Council of Environmental Quality (CEQ) is as equally polluted with vested industrial interests who really have no interest in managing our public commons for anything but their short-term gains.

So there is little reason to trust this particular review process, because we suspect it has little to do with "streamlining" NEPA, and everything to do with the disingenuous

[7] Review of Certain National Monuments Established Since 1996: DOI-2017-0002
[8] Ibid.
[9] Rebecca Worbly, July 24, 2018 *Public Lands Advocates Respond to New Revelations from the DOI's 'Sham Review' of National Monuments* Pacific Standard

attempts of the current leadership to dismantle our public commons and interfere with the participatory democratic process that made this nation great. We will, none-the-less enter into this process in the good faith that either through honest synthesis of our comments, or through legal procedures, our comments will be considered and will contribute to improving the NEPA process.

My input is informed by over 25 years of critiquing DEISs as a citizen, science advisor for various conservation NGOs, and most recently (in the last decade) as a director of a scientific research and policy development NGO focused specifically on the acoustical impacts of human-generated noise on marine habitat. As such, our organizational comments on internal NEPA processes (questions 1 – 3) are in response to how the processes appear from "outside." Our response to the balance of the "scope" questions (4 – 20) are pertinent to how we interface with and review EAs and DEISs.

As a matter of process, it would have been helpful to locate or link the review questions to where they reside in the statute. For example; 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?" would be much easier to critique if the question was actually linked – or at least referenced to the format and page length guidelines of EAs and EIS's [10]. As it is, we needed to excavate those guidelines in order to make an informed statement about this question. And given that the stated objective behind this "proposed revision" exercise is to "streamline the process," the proposal is already at odds with the stated intent of the review.

This is just the sort of "shenanigan" we've encountered over the years; when critical components of a DEISs are concealed in pages and pages of repetitive boilerplate text; or when an DEIS with a 30-day comment period is released on December 20 – effectively eating up 15 days of review time in the year-end holiday season. Or in this particular case, where critical references to a proposal are not included in the review document

Regarding this specific call for public review, we feel that the Administration has called for documents to be "revised or rescinded" on principle alone, without having proved an actual need.[11] This review has all of the earmarks of a process that has been executed merely to disrupt something that has been operating successfully for years which industry perceives as an impediment to profiteering; and in revising the documents, they may find ways of eviscerating clauses and definitions to weaken the effectiveness of the Act.

So if CEQ proceeds with the rulemaking, we request that further analysis of each of the clauses be done to substantiate a real need.

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[10] CFR: Title 40 : Chapter V : Part 1502

[11] EO 13975 called for the NOAA Acoustical Exposure Guideline to be "revised or rescinded" without understanding that these guidelines had been in development for ten years, and everybody had their hands on them – industry, the Navy, conservation NGOs, and academics. There would be nobody available to do these revisions, and rescinding them would then defer to outdated guidelines not substantiated by the "best available science." In the end, after a lot of stakeholder engagement, the guidelines remained unchanged. Much effort would have been saved had the interests dictating this clause to EO19375 took a moment to think it through.

The Questions:

NEPA Process:

1. Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?

This is a sensible proposal. Not knowing how interagency coordination has been done to date, perhaps it would be advisable to have a coordinator assigned to a document from each of the concerned agencies. These coordinators would serve as "document shepherds," and prior to submitting a the first DEIS, they would block out the entire document with the purpose of identifying where agency remits or priorities intersect or conflict. These intersection points could be linked to a workspace where the particulars of the intersection could be detailed by the specialists within the agencies with an understanding of the intersections.

This may sound complicated in terms of assigning live staff for the task. But I presume the question is being advanced because the disparate priorities of the agencies – such as the department of the Navy, and NOAA, or NMFS and the DOI, have run afoul of their conflicting agency remits, necessitating costly revisions to the DEIS.

But this is a surprising question in light of the recent revision of the National Ocean Policy Act[12] removing key provisions to Federally coordinate agencies with ocean jurisdiction.

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?

If earlier studies, analysis, and decisions are not superseded by the most current science, more detailed analysis, or non-conflicted, working decisions, then by all means these data should be used as to avoid replicating efforts to establish the data points. But this provision should not be used as an excuse to rely on incomplete data where and when better, or more current data are available.

In cases where NEPA environmental provisions are met or exceeded by state or local guidelines, the more rigorous guidelines should prevail, so as to not run afoul of state or local laws, and not require the applicant to respond to (or defend) Federal, State, and Local guidelines.

3. Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?

[12] Executive Order 13547

This process dovetails into our recommended solution for process question #1. If Agency "document shepherds" are assigned before the EIS or EA is released for public review, the agencies could establish a landing path to navigate the document around agency intersections.

NEPA Scope:

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?

As the specifics of this question are not referenced to the defining document, I presume it is referring to CFR Title 40 Ch. V Pert 1502 "Environmental Impact Statements." If this is the case, the guidelines on form and page length don't need to be revised, rather they need to be followed. It has been increasingly the practice of the agencies to put out ever-larger documents to the point of their becoming cumbersome and an "unreasonable burden" on the public, stakeholders, and NGOs to review. It is not uncommon to have a 2000 page EIS to review. And given the 30-day review window – often aggravated by a "holiday release" (for the US Navy) or the apparent habit of DOI to release two DEISs concurrently, cutting down the size of these documents would be a worth-while endeavor.

The Federal Aviation Agency webpage on EIS Best Practices[13] states that "Susan Smillie and Lucinda Swartz identified three reasons Federal agencies fail to meet or even approach the page limits established by CEQ in a paper presented to the convention of the National Association of Environmental Professionals in May 1997. The reasons are (1.) A requirement by counsel to "beef up" EIS's in the hope that volume will deter potential litigants or in the event the deterrence fails that the agency can argue "it's in there somewhere;" (2.) Failure to properly scope the document; and (3.) In the case of EA's, preparation of "mini-EIS's" rather than an appropriate assessment."

We have found this to be the case as the practice of shoveling in gobs of repetitive boilerplate into a DEIS to apparently conceal minor, but critical data within the gobs of text, which has required us to pour over pages and pages of redundant verbiage to find the novel text. This was inferred ('it's in there somewhere…") but not mentioned in the Smille and Swartz comment. The practice of "Tiering[14]" would significantly reduce this particular burden.

I do believe that 150 pages per simple DEIS, and 300 Pages for complex DEIS page-count criteria may need to be tailored to the scope of particular projects, and appendices for complicated data like animal population density tables, references for time-area exclusions, particulars on equipment specifications and deployment, and supporting citations should not be included in the page count limitations, as these are data and not description of proposed actions. But it has been my experience that clear, succinct writing benefits everyone.

[13] https://www.faa.gov/airports/environmental/eis_best_practices/?sect=documents
[14] 40 CFR Ch. V Pert 1502.20

The time to review and revise the document should be dependent on how many comments need to be considered, responded to, and incorporated into the final document. It should also be dependent on how many technical critiques, how many unique, but less complex critiques, and how many "public sentiment" statements are submitted. I believe that these differing sorts of critiques need to be segregated and responded to in kind, and weighted in consideration of how much individual effort has gone the submission.

We spend a lot of time critiquing the DEISs we take up. It is both annoying and disrespectful of our time – and a missed opportunity of the part pf the Agencies to lump our well-considered critiques into an "opinion bin" without a measured response. On the other hand, it is a waste of time to do much more than tally "mass responses" that clearly come through one organization's efforts. e.g.: in parsing the public comments to this very request for comment, a couple of organization had their members paste prepared text into the comments: (e.g. "My comment relates to the CEQ's Question 5 "Should CEQ's NEPA regulations be revised to provide greater clarity to..." and "As an advocate and supporter of our national parks, I am writing in opposition to the proposed updates to…").

This comment is ideological in nature and doesn't inform the discussion, but it seems to comprise as much as 50% of the "public comments." Aside from tallying these into one bin, not much more should be done with them. On the other hand, unique comments in support or objecting to a proposed action could be binned in "yea" or "nay" columns, but should be qualified as an individual source, with a greater weight than a mass response from some advocacy organization.

So these differing levels of response take various amounts of time to process. Putting a time limit on the review and revision of a document would potentially scuttle earnest consideration of individual comments and meaningful revisions informed by technical critiques.

5. Should CEQ's NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decision makers and the public, and if so, how?

This sounds like a reasonable inquiry, but the gist of it assumes that heretofore there has been less clarity, and that any DEIS did not focus on "significant issues that [were] relevant and useful to decision makers and the public." This has not been my experience. What concerns me about this inquiry is who would be defining "significant issues," "relevant," and "usefulness?"

Up to now these terms have been defined in terms of "environmental quality." And while socio-economic considerations have also been included, given the current Administration's focus on "economic productivity," I would not welcome a DEIS where economists and businessmen replace the scientists and engineers who are currently writing the DEISs.

6, Should the provisions in CEQ's NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?

While there does not seem to be any specific exclusionary language in the Code of Federal Regulations[15] it has become almost predictable for agencies to issue DEISs for public comment under strained time constraints – such as opening up a 30-day comment period on DEISs that are a thousand pages or more; issue two or more large DEISs concurrently; and issue them over traditional holidays – the second week of December, for example.

There should be a correlation between review time and document complexity. There should be some coordination between agencies which safeguards against the issuance of concurrent, large DEISs. This should particularly be the case when it is known that the DEISs will garner a lot of public attention. Coordination could be set up under provisions of the first question in this review about coordinating agencies.

Additionally, agencies should avoid issuing any DEISs in the month of December when citizens of many religions and creeds traditionally take extended holidays.

7. Should definitions of any key NEPA terms in CEQ's NEPA regulations, such as those listed below, be revised, and if so, how?

The terms “Major Federal Action,” “Effects,” “Cumulative Impact,” “Significantly,” and “Scope” have all been defined under CFR Title 40, Chapter V – 1508 and these definitions have proved serviceable, so I don’t see any reason to revise them.

8. Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms?

As “Alternatives,” “Purpose and Need,” “Reasonably Foreseeable,” and “Trivial Violation” are not currently defined under CFR 40 ChapterV:1508, it would be useful to define them.

Additional terms needing definition:

- Negligible impacts
- Concurrent exposure impacts
- Direct impacts
- Indirect impacts.
- Duplicative efforts

9. Should the provisions in CEQ's NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?

[15] 40 CFR Ch. V-1503.1-4

The terms “Notice of Intent,” “Categorical Exclusions Documentation,” “Environmental Assessments,” “Findings of No Significant Impact,” and “Environmental Impact Statements” as defined under CFR 40 Chapter V:1508 and supporting documents have served reasonably well, so I see no reason to revise them.

The “Records of Decision” process is appropriately transparent, but should include supporting documentation referring to the public comments and how the comments were addressed in the decision. Finding no guiding text on “Supplements,” I do not know how to respond to this.

10. Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how?

Per the previous comments; any Environmental Assessment, Draft Environmental Impact Statement, Incidental Harassment Authorization, Record of Decision or other documents made available for public review and comment needs to be made available at such a time that the review and comment period does not fall across holidays or coincident with other comment periods where equal public interest would interfere with a thorough assessment of the document.

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?

This inquiry is another case where the particular text in question should be explicitly referenced in the inquiry. I suspect that CFR has a lot of text relating to agency responsibilities in the preparation of NEPA documents. I also suspect that the people who were drafting these provision would not have had the honed interest of the current Administration to thwart the effectiveness of NEPA. So these provisions probably don’t need revising, and they certainly should not be revised under the current anti-environmental climate of the current Administration.

We have seen DEISs prepared by contractors that include “boilerplate” text that in some cases did not refer to the proposed action, and in some cases seemed to be placed in the document as “filler.” The preparer or contractor should be held responsible for drafting a clear and concise document, un-cluttered by superfluous boilerplate. This also intersects the following question on “Tiering.”

12. Should the provisions in CEQ's NEPA regulations relating to programmatic NEPA documents and tiering be revised, and if so, how?

When done appropriately, tiering can save a document from a lot of superfluous text, and should figure into the structure of any DEIS. It seems to have been somewhat ignored of late and it should really figure into the draft requirements.

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?

It clearly states in 40 CFR 1502.14 - Alternatives including the proposed action: "This section is the heart of the environmental impact statement."[16] If the originators of these regulations felt that this provision was so important, why would someone want to revise it?

But for clarity sake, the "No Action Alternative" should always be included. The deliberations on what constitutes "reasonable alternatives" and "practicable alternatives" is often left up to the discretion of the applicant. The deliberations on "practicable" and "reasonable" should be open for public review – or at least to informed stakeholders, so that what constitutes these assessments do not solely hinge on maximizing corporate profitability. And on occasion unlikely "alternatives" are inserted seemingly just for the purpose of having a "range of alternatives," even while the inserted alternatives may not make much sense in the context of what action the applicant seeks.

The application of "Least Environmentally Damaging Practicable Alternative (LEDPA)" should always be included as well, because implicit in the issuance of a DEIS or EA is the assumption that the environment will be compromised in some manner.

General

14. Are any provisions of the CEQ's NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced.

As our engagement with NEPA is through issued DEISs, EAs, and IHAs we are only dealing with provisions which are in play, and thus not obsolete. And while it may make sense to go through the document to clean up any dross, more publicly open analysis of this question would be required before CEQ eliminates what someone perceives a "obsolete provisions."

This analysis might be served by other reviewer's responses to this question – which should be available for public review prior to making any revisions.

15. Which provisions of the CEQ's NEPA regulations can be updated to reflect new technologies that can be used to make the process more efficient?

Probably most meaningful would be the use of "machine reading" of the comments. But as mentioned above, this process - particularly the definitions of the machine filters, needs to be crafted in full daylight. This might require an intermediary stage wherein after the close of a comment period a panel of experts and stakeholders from all sides of

[16] 40 CFR Chapter V 1503.14

the proposal come together and establish meaningful filters and thresholds for what constitutes a "position comment" (an opinion), and what constitutes an informative and qualified input that should be addressed and included in the revisions of the DEIS to arrive at a Final EIS.

16. Are there additional ways CEQ's NEPA regulations should be revised to promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how?

I believe that the EISs, EAs, IHAs, and other documents such as 404(b)1[17] need to remain autonomous. Building these documents and reviewing them are very different processes. Folding them all under the rubric of one DEIS (for example) would more likely scatter review and comments efforts rather than consolidate them.

17. Are there additional ways CEQ's NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?

As our engagement with NEPA is through reviewing issued DEISs, EAs, and IHAs we are not aware of how these revisions might look. And as I am suspicious of this Administration's definitions of "efficiency" I would like to see the recommendations from other reviewers before commenting on this clause.

18. Are there ways in which the role of tribal governments in the NEPA process should be clarified in CEQ's NEPA regulations, and if so, how?

Many native tribes are also sovereign nations. Deliberations between sovereign nations may not be subject to US transparency laws. The distinction between tribal councils and native corporation boards need to be distinguished in the consultation process, and transparency to stakeholders outside of the Sovereign Nations need to be exercised to the fullest extent.

19. Are there additional ways CEQ's NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?

"Unnecessary burdens and delays" is a phrase fraught with subjective implications. It has been our experience that what might be construed as "burdens" or "delays" are actually evidence that the process is working. As such we don't feel that the process should be revised to short-circuit the efforts merely to "unburden" or expedite decisions.

20. Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how?

[17] 40 CFR Ch. I Pt. 230

This would need to be reviewed on a per-case basis. We have no suggestions other than to maintain enough flexibility in the process to not force an action due to time limits or page counts, and to openly defer to the environmental conservation purpose of NEPA with the application of the Precautionary Principle.[18]

Sincerely,

Michael Stocker
Director
Ocean Conservation Research

[18] Raffensperger, C., and Tickner, J. (eds.) (1999) Protecting Public Health and the Environment: Implementing the Precautionary Principle. Island Press, Washington, DC.