Animal Welfare Institute
900 Pennsylvania Avenue, SE, Washington, DC 20003
awionline.org phone: (202) 337-2332 fax: (202) 446-2131

August 20, 2018

VIA THE FEDERAL ERULEMAKING PORTAL

Ms. Mary Neumayr, Chief of Staff
Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Re: Comments on the Council on Environmental Quality's Proposed Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 40 C.F.R. §§ 1500-1508, Docket ID No. CEQ-2018-0001

Dear Ms. Neumayr:

Please accept these comments on behalf of the Animal Welfare Institute ("AWI") regarding issues to be considered by the Council on Environmental Quality ("CEQ") in its proposed update to the regulations for implementing the procedural provisions of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*. *See* 83 Fed. Reg. 28591 (June 20, 2018). AWI specifically endorses and adopts the comments filed by the Center for Biological Diversity on behalf of itself and numerous other public interest organizations, including AWI, on CEQ's proposed update to the regulations for implementing the procedural provisions of NEPA ("the CBD comments"). It also offers the following supplemental comments.

AWI, established in 1951, is one of America's oldest animal welfare organizations. It is a non-profit charitable organization headquartered in Washington, DC. The organization is dedicated to reducing animal suffering caused by people by seeking better treatment of animals in the wild, in the laboratory, on the farm, at home, and in commerce. This is accomplished through public education, research, collaborations with like-minded organizations, media relations, outreach to agencies, engaging its members and supporters, advocating for stronger laws both domestically and internationally, and through litigation.

I. Introduction and Background

In general, AWI is opposed to any attempt by CEQ to alter the current manner in which NEPA is implemented. *See* 40 C.F.R. §§ 1500-1508. The twenty questions posed in the

ANPRM indicate that CEQ may seek to fundamentally change the NEPA process. However, the ANPRM provides no statement as to why CEQ believes its current NEPA regulations are inadequate. It is a well-settled principle of administrative law that a federal agency may not adopt a position that abruptly changes direction from prior agency regulations without providing a reasoned explanation for the change. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*. ("*State Farm*"), 463 U.S. 29, 42 (1983); *see also Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("adjudication is subject to the requirement of reasoned decisionmaking"), *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (an agency has a duty to "explain its departure from prior norms"). Courts reviewing abrupt agency changes of direction apply this principle when an agency formally rescinds or revises an existing regulation, *id*. at 42, 46, 57, and when it alters a prior interpretation of its own rules or governing statute. *See, e.g.*, *N.Y. Pub. Interest Research Group v. Johnson*, 427 F.3d 172, 182–83 (2d Cir. 2005); *Lal v. INS*, 255 F.3d 998, 1008–09 (9th Cir. 2001) (invalidating an agency interpretation of a regulation because the agency changed course from its settled policies).

In administrative rulemaking, the rationality requirement extends from the principle that changes to regulatory law should be founded on reasoned analysis based on agency experience and expertise. Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 820 (1994). According to a recent Supreme Court decision, when changing a policy, "the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (*citing FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009)). "In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* (citation omitted). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 515–16. "It follows that an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars*, 136 S. Ct. at 2126 (*citing Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

The current NEPA regulations have been in place, largely unchanged, for decades, and have been interpreted and supported by hundreds of decisions across all levels of the federal court system. CEQ, in addition to providing the required reasoned explanation for any changes to the regulations it may propose, should also evaluate how changes to the NEPA regulations may lead to confusion and costly litigation.

II. Response to Questions Posed in Notice

CEQ has specifically requested comments on a series of twenty questions set forth in the ANPRM. AWI has responded only to select questions to supplement the information and opinions contained in the CBD comments.

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?**

AWI opposes any mandate that requires agencies to ensure environmental reviews and authorization decisions involving multiple agencies are concurrent and synchronized for two reasons. First, CEQ's existing regulations already require agencies to prepare draft Environmental Impact Statements ("EIS") "concurrently with and integrated with environmental impact analyses and related surveys and studies" "to the fullest extent possible[.]" 40 C.F.R. § 1502.25; *see also* 40 C.F.R. § 1500.2(c), 40 C.F.R. § 1500.4(k), 40 C.F.R. § 1500.5(i). Further mandates to this effect would be unnecessarily duplicative. Second, agencies themselves are in the best position to determine when it is appropriate and beneficial to collaborate with other agencies, and regulations that reduce flexibility in this regard would be unduly burdensome. Agency collaboration is guided by Collaboration in NEPA: A Handbook for NEPA Practitioners (Oct. 2007) ("Handbook"), which was issued during the George W. Bush administration. The Handbook identifies opportunities for collaboration, discusses when collaboration is most appropriate, and describes situations in which collaboration does not work well. This Handbook has guided agencies for the past eleven years, and any proposed rule must state why this Handbook is insufficient to achieve CEQ's apparent goal of concurrent and synchronized agency decisionmaking. Furthermore, if CEQ does impose such a mandate upon agencies, the regulation should provide agencies with flexibility sufficient to determine when concurrent and synchronized reviews and decisions are appropriate and beneficial on a case-by-case basis. The regulation should also make clear whether the term "multiple agencies" refers only to federal agencies, or if it applies to state or perhaps tribal agencies as well, as the question posed is currently ambiguous in that regard.

Additionally, while AWI is a proponent of efficient and timely decisionmaking, we are opposed to any mandate that may sacrifice thoroughness and the use of sound science under the guise of efficiency and timeliness. NEPA is intended to "ensure that [federal agencies] … will have detailed information concerning significant environmental impacts" and "guarantee[] that the relevant information will be made available to the larger [public] audience." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). An Environmental Impact Statement ("EIS") must "'provide full and fair discussion of significant environmental impacts and … inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.'" *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004) (citing 40 C.F.R. § 1502.1).

The NEPA regulations specifically require agencies to rely on "high-quality" scientific information in preparing an EIS. *Id.* §§ 1500.1(b), 1502.24 (directing agencies to "insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements"). This includes "identify[ing] any methodologies used and [making] explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement." *Id.* Moreover, where necessary scientific information does not

already exist, if the data is "essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant," the agency is required to collect the information to include in the EIS. *Id.* § 1502.22(a). These well-established standards must continue to be met, regardless of any new mandate regarding the efficiency and timeliness of agency decisionmaking.

A review that is rushed in the name of efficiency and timeliness would likely have insufficiencies that would increase the likelihood that a final agency action would be challenged in court. If the court finds the final agency action to be inadequate, then it would likely be remanded to the agency for further review. This would increase the time and resources that the agency would need to expend on its review, which would reduce efficiency and timeliness of agency decisionmaking, in contravention of CEQ's apparent goals.

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?

AWI supports the use of best available science in decisionmaking. We therefore oppose any mandate that requires agencies to rely on environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions without also requiring the inclusion and consideration of current studies, analysis and decisions. Agencies are already required to use available environmental studies and analyses, *see* 40 C.F.R. §§ 1502.21, 1506.3, and there is no indication that agencies improperly ignore or give inadequate consideration to relevant, scientifically rigorous studies, analysis, and decisions. The existing regulatory framework is adequate, and any more restrictive mandate could result in agencies being forced to incorporate studies, analysis, and decisions even if they are inaccurate, biased, or outdated. Agencies are in the best position to determine when it is appropriate and beneficial to use studies, analysis, and decisions conducted in earlier reviews or decisions.

Furthermore, any new regulations would need to explicitly address the following issues to ensure that only environmental studies, analysis, and decisions of sufficient scientific rigor were relied on by agencies in their NEPA decisionmaking process:

a. The Notice's use of the term "earlier" is improperly ambiguous. Depending on the date of publication of prior reviews and decisions, such "earlier" documents may rely upon data and conclusions that are outdated, incomplete, and/or no longer relevant. Evolving understandings of scientific, economic, and social processes must be taken into account in the NEPA decisionmaking process.

b. Earlier reviews and decisions may be based on incomplete information. No new regulations should abridge existing regulation 40 C.F.R. § 1502.22 or existing caselaw, which states that where there is incomplete information that is relevant to the reasonably foreseeable impacts of a project and essential for a reasoned choice among alternatives, the agencies must obtain that information unless the costs of doing so would be exorbitant or the means of obtaining the information

are unknown. 40 C.F.R. § 1502.22. Even in those instances where complete data is unavailable, an EIS also must contain an analysis of the worst-case scenario resulting from the proposed project. *Friends of Endangered Species v. Jantzen*, 760 F.3d 976, 988 (9th Cir. 1985) *citing Save our Ecosystems v. Clark*, 747 F.2d 1240, 1243 (9th Cir. 1984); 40 C.F.R. § 1502.22.

c. Any new regulation should articulate the criteria that an agency must use to assess the rigor of the methodology and results of "earlier" reviews and decisions. The criteria should require review of whether the methodology and results are reliable, identification of what scientific methods were applied and what data was collected, and evaluation of errors and biases that may be present, and how such errors and biases may have influenced the results.

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?

The provisions relating to public involvement should be revised to be more inclusive by requiring agencies to allow the public to submit comments in all of the following manners: (1) online; (2) electronic mail; (3) regular mail; or (4) hand delivery. CEQ's existing regulations recognize that public involvement should be encouraged and facilitated because "public scrutiny [is] essential to implementing NEPA." 40 C.F.R. § 1500.1(b). The regulations therefore require agencies to "encourage and facilitate public involvement" in decisionmaking by making "diligent efforts to involve the public in preparing and implementing their NEPA procedures" and "solicit appropriate information from the public." *Id.* §§ 1500.2(d), 1506.6(a), (d).

Federal courts have recognized the importance of public input in the NEPA process, holding that "NEPA's public comment procedures are at the heart of the NEPA review process" and reflect "the paramount Congressional desire to internalize opposing viewpoints into the decision making process to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision." *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) (internal quotations omitted); *Sierra Club v. Froehlke*, 816 F.2d 205 (5th Cir. 1987). *See also Utahns for Better Transp. V. U.S. Dep't of Transp*., 305 F.3d 1152, 1166 (10th Cir. 2002) (discussing the "NEPA goals of informed decisionmaking and public comment"), *Pogliani v. U.S. Army Corps of Eng'rs*, 306 F.3d 1235, 1237-38 (2d Cir. 2002) (recognizing that Congress enacted NEPA "to ensure that federal agencies examine and disclose the potential environmental impacts of projects before allowing them to proceed," which process "must involve the public").

Of particular concern are notices that only allow the public to submit comments by a method that requires an Internet connection. According to a survey conducted by the U.S. Census Bureau, over 20 percent of households do not have Internet subscriptions or devices that connect to the Internet. Camille Ryan & Jamie M. Lewis, U.S. Census Bureau, Computer and Internet Use in the United States: 2015 2 (2017).[1] By limiting the comment process in this

[1] Available at: https://www.census.gov/content/dam/Census/library/publications/2017/acs/acs-37.pdf.

manner, the number of people who can submit comments is reduced, in contravention of the clearly stated objectives of NEPA and the CEQ's implementing regulations.

Furthermore, Internet access varies widely across various socioeconomic factors, such as race, age, geographical location, educational attainment, and income. *See id.*

- Regarding race, 80 percent of white households have an Internet subscription, compared with 71 percent of Hispanic households, and 65 percent of black households. *Id.* at 4-5.

- Regarding age, only 62 percent of households headed by a person aged 65 and older have an Internet subscription. *Id.* at 3.

- Regarding geographical location, 79 percent of households in metropolitan areas have an Internet subscription, while only 68 percent of nonmetropolitan households have an Internet subscription. *Id.* at 4-5. Household usage also varies greatly by region. For example, Western households have the highest rate of Internet subscriptions, at 81 percent, while only 74 percent of households located in the South have Internet subscriptions. *Id.* at 4, 6.

- Regarding educational attainment, of those with a bachelor's degree or higher, 91 percent have an Internet subscription, whereas 66 percent of those with a high school education have an Internet subscription, and only 48 percent of those without a high school education have an Internet subscription. *Id*. at 5-6.

- Regarding income levels, 52 percent of households earning less than $25,000 have an Internet subscription, compared with 72 percent of those earning $25,000 to $49,999, 86 percent of those earning $50,000 to $99,999, and 93 percent of those earning more than $100,000. *Id.* at 4-6.

These statistics demonstrate that limiting the method of comment submission to those which require Internet access will have a discriminatory impact based on race, age, geographical location, educational attainment, and income. For public comment to be meaningful, it is vital that the entire public, not just those with Internet access, be allowed to submit comments.

Recent notices published in the Federal Register indicate that acceptance of multiple comment formats is already routine across agencies. Therefore, requiring agencies to accept comments via a delivery method that does not require an Internet connection will not impose an undue burden upon action agencies. *See, e.g*., *Proposed Replacement of the Regulations for the Nonessential Experimental Population of Red Wolves In Northeastern North Carolina*, 83 Fed. Reg. 30,382 (June 28, 2018) (proposed rule issued by USFWS allowing comments to be submitted by U.S. mail, hand delivery, or the Federal eRulemaking Portal); *Migratory Bird Hunting; Proposed 2019-20 Migratory Game Bird Hunting Regulations (Preliminary) with Requests for Indian Tribal Proposals*, 83 Fed. Reg. 27,836 (June 14, 2018) (proposed rule issued by USFWS allowing comments to be submitted by U.S. mail, hand delivery, or the Federal eRulemaking Portal); *Waste Prevention, Production Subject to Royalties, and Resource*

Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7,924 (Feb. 22, 2018) (proposed rule issued by BLM allowing comments to be submitted by U.S. mail, hand delivery, or the Federal eRulemaking Portal); *Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule*, 82 Fed. Red. 34,464 (July 25, 2017) (proposed rules issued by BLM allowing comments to be submitted by U.S. mail, hand delivery, or the Federal eRulemaking Portal); *National Environmental Policy Act Compliance*, 83 Fed. Reg. 302 (Jan. 3, 2018) (ANPRM issued by Forest Service regarding the agency's NEPA regulations, allowing comments to be submitted by U.S. mail, email, or the Federal eRulemaking Portal); *Fisheries of the Exclusive Economic Zone Off Alaska; Yellowfin Sole Management In the Groundfish Fisheries of the Bering Sea and Aleutian Islands*, 83 Fed. Reg. 23,250 (May 18, 2018) (proposed amendment issued by NOAA allowing comments to be submitted by U.S. mail or the Federal eRulemaking Portal); *Hawaii: Proposed Authorization of State Hazardous Waste Management Program Revisions*, 83 Fed. Reg. 29,520 (June 25, 2018) (proposed rule issued by EPA allowing comments to be submitted by U.S. mail, hand delivery, email, facsimile, or the Federal eRulemaking Portal).

These notices are a small sampling of the many notices published in recent years that allow the public to comment by multiple methods. The necessity of ensuring the public can provide input into an agency's decisionmaking process by multiple methods is demonstrated by the fact that for this ANPRM, CEQ inexplicably required comments to be submitted only via the Federal eRulemaking Portal. By doing so CEQ excluded comments from the twenty percent of the population without access to the Internet, and disproportionally marginalized people of color, those older than 65 years of age, those with low educational attainment, those facing poverty, and those located in the South and in rural areas across the United States.

Regarding whether the current regulations addressing public involvement should be revised to be more efficient, it is unclear what CEQ means by this term in the context of public involvement. AWI strongly opposes any attempt to reduce the amount of time the public is given to submit comments under the guise of improving efficiency. Public comment is at the "heart" of the NEPA process, and CEQ's current regulations recognized this. 40 C.F.R. § 1500.1(b). To provide useful information and meaningful comments, the public must be given adequate time to research the relevant issues. By limiting the length of time to comment, the quality of information that is provided to the agency will inevitably be compromised. This would undermine the public input process and violate the principles of the current regulations and court decisions. Furthermore, if the agency provides insufficient time for public input, this increases the likelihood that the agency would fail to evaluate something it should have evaluated. This in turn increases the likelihood of a successful legal challenge.

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?

AWI opposes changes to the regulations regarding an appropriate range of alternatives. The appropriate range of alternatives has been the subject of significant litigation, and a large body of caselaw has been developed on this subject. Changing the existing regulations would be unwarranted.

A critically important component of the NEPA process is an agency's duty to consider "alternatives to the proposed action" and to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. §§ 4332(2)(C)(iii), 4332(2)(E). "A 'viable but unexamined alternative renders [the] environmental impact statement inadequate.'" *Muckleshoot Indian Tribe v. U.S. Forest Serv*., 177 F.3d 800, 814 (9th Cir. 1999) (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)). "The purpose of NEPA's alternatives requirement is to ensure agencies do not undertake projects "without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means." *Envtl. Defense Fund, Inc. v. U.S. Army Corps of Engrs.*, 492 F.2d 1123, 1135 (5th Cir. 1974). The courts have consistently held that an agency's failure to consider a reasonable alternative is fatal to an agency's NEPA analysis. *See, e.g.*, *Idaho Conserv. League v. Mumma*, 956 F.2d 1508, 1519-20 (9th Cir. 1992) ("The existence of a viable, but unexamined alternative renders an environmental impact statement inadequate."). If the agencies reject an alternative from consideration, they must explain why a particular option is not feasible and was therefore eliminated from further consideration. 40 C.F.R. § 1502.14(a).

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?

AWI strongly agrees with the suggestion raised the CBD comments that CEQ should reinstate its guidance for agencies on the consideration of climate change in NEPA reviews. Courts have repeatedly held that climate change is exactly the type of environmental impact that agencies should consider in NEPA decisionmaking. *See, e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172, 1217 (9th Cir. 2008); *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222 (10th Cir. 2017); *Border Power Plant Working Grp. v. U.S. Dep't of Energy*, 260 F.Supp.2d 997, 1028-29 (S.D. Cal. 2003); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174 (D. Colo. 2014); *Sierra Club v. FERC*, 867 F.3d 1357 (D.D.C. 2017); *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017); *San Juan Citizens Alliance v. U.S. Bureau of Land Mgmt*., 2018 U.S. Dist. LEXIS 99644 (D.N.M. 2018). By rescinding the climate change guidance, CEQ has removed an important tool for agencies to effectively evaluate an environmental impact that courts have required agencies to consider, thus increasing the likelihood that agencies' environmental analyses will be challenged and deemed unlawful.

III. Conclusion.

Thank you for your consideration of these comments. If you have any questions or there is any additional information we can provide at this stage, please do not hesitate to contact me.

Sincerely,

Johanna Hamburger

Johanna Hamburger

Wildlife Attorney
Animal Welfare Institute
900 Pennsylvania Ave, SE
Washington, DC 20003
Phone: 202-446-2136
Email: johanna@awionline.org