March 10, 2020

Submitted via regulations.gov

Ms. Mary Neumayr, Chairman
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

Re: Docket Number **CEQ-2019-0003**
Proposed Revisions to Regulations Implementing the National Environmental Policy Act

Dear Chairman Neumayr:

Please accept these comments on the Council on Environmental Quality's (CEQ) proposed changes to the regulations implementing the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq., on behalf of the National Audubon Society, which includes our state and regional offices and independent Audubon Chapters from across the country, identified below. We submit these comments in addition to broader comments that we are also joining.

Introduction

With its 23 statewide programs and nearly 500 local chapters nationwide, the National Audubon Society's mission is to "protect birds and the places they need, today and tomorrow." As Audubon compellingly maintains "[b]irds are part of healthy ecosystems, bring joy to people, and benefit local economies throughout the United States."

According to a 2013 study by the U.S. Fish and Wildlife Service, there are 47 million birders in America, generating $107 billion in total industry output and $41 billion in expenditures on items such as equipment and travel, 666,000 jobs and $13 billion in tax revenue. "Birding in the United States: A Demographic and Economic Analysis," USFWS, 2013.[1]

These proposed rules (85 Fed. Reg. 1684, January 10, 2020), if adopted as final regulations and not overturned by the courts, could have catastrophic impacts on bird species and their habitats and the economies that depend on them. Thus, we offer specific comments on the proposed changes.

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[1] Available at: https://www.fws.gov/southeast/pdf/report/birding-in-the-united-states-a-demographic-and-economic-analysis.pdf

After brief general comments, the remainder of this document presents examples of how selected provisions of the proposed rule will lead to uninformed federal decision-making that could decimate bird populations and destroy crucial habitat.

General Concerns

Climate and Indirect and Cumulative Impacts Analysis – Perhaps the most disastrous provisions in the proposed rule are those that eliminate consideration of indirect and cumulative impacts. This will translate into a failure to consider climate change impacts and on-the-ground results likely to adversely affect bird species across the nation – iconic species such as the American goldfinch, American robin, brown pelican, common loon, whooping crane, Baltimore oriole, northern pintail, the sandhill crane, and many others.

These and hundreds of additional species are identified as at risk in Audubon's recent study, "Survival by Degrees: 389 Bird Species on the Brink" October 2019.[2] Based on a study of 604 bird species and 140 million bird records, the study concluded that ***two-thirds*** of North American birds are at risk of extinction due to climate change.

It is crucial that federal decision makers consider the climate impacts of their decisions. The regulations appear directed at eliminating inclusion of exactly these potentially dire impacts in the required analysis under NEPA.

Disregard for the Purposes, Goals and Requirements of NEPA – The proposed regulations are replete with provisions that fly in the face of NEPA and its key policy underpinnings. NEPA leads to better agency decisions because it: informs the decision maker; provides for orderly agency decision-making (for example, alternatives are considered at one time rather than seriatim); requires the agency to consider effects of the action on the environment, including the social and economic environment; and involves the public in agency decision-making. By, inter alia, eliminating the consideration of indirect and cumulative effects, limiting the range and altering the nature of alternatives to be considered, undermining the use of sound science, and expanding categorical exclusions, the proposed regulations are contrary to law and blatantly inconsistent with the informed decision making and public transparency that NEPA requires.

We also note that the meaning of the NEPA statute and the regulations has been thoroughly litigated since enactment and promulgation several decades ago. Given this, the interpretation of the current regulations and the meaning of the regulatory terminology is generally well-settled. The extensive modifications proposed by the CEQ could well lead to several decades of uncertainty and added delay in federal

[2] Available at: https://www.audubon.org/climate/survivalbydegrees

approvals – precisely opposite the result apparently intended by the proposed revisions.

NEPA Requires an Environmental Analysis in this Rulemaking Process -- CEQ in the preamble to the proposed regulations states that no environmental analysis under NEPA will be undertaken to inform the sweeping proposed changes to these NEPA regulations. This clearly controverts the requirements of NEPA and the current regulations and past practice. In fact, the preamble to the proposed regulations acknowledges that CEQ completed an environmental analysis pursuant to NEPA in the form of Environmental Assessments *both* when the NEPA regulations were initially promulgated in 1978 and when the regulations were amended in 1986. 85 Fed. Reg. 1711. See also 43 Fed. Reg. 55778 at 55989.

However, the preamble goes on to state that CEQ is not undertaking environmental analysis of the impacts of the proposed revisions to the NEPA regulations. According to CEQ, this is because the agency has "determined that the proposed rule would not have a significant effect on the environment because it would not authorize any activity or commit resources to any project that may affect the environment." 85 Fed. Reg. 1711.

This failure to undertake an environmental analysis conflicts with the fundamental requirements of NEPA. Clearly the promulgation of these regulations, which comprise a wholesale revision of how environmental analysis will be undertaken and considered by decision makers throughout the federal government, is a major "federal action significantly affecting the human environment," triggering NEPA requirements.

First, NEPA itself (see Section 102) and the regulations currently in effect (and indeed the proposed regulations themselves) state that major federal actions include "[a]doption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act…." 40 C.F.R. § 1508.18 (b)(1). The present rulemaking precisely fits this definition – and is indeed a "major federal action."

Furthermore, the proposed changes in the regulations will "significantly affect the human environment." See, for instance, the environmental concerns and harms detailed in each of the five examples below. To maintain that the proposed changes to the regulations would have no significant environmental effect is to ignore the fundamental changes being made by the proposed regulations and the importance of having a sound opportunity for public input and a fully informed decision maker. For example, certainly it is reasonably foreseeable that decision making under the proposed regulations, if adopted, will result in significant environmental impacts by failing to provide the decision maker with information on the indirect and cumulative impacts (such as climate impacts). Also, expanding the use of categorical exclusions could have profound on-the-ground impacts. Proposed regulation at §§ 1500.4(a), 1500.5(a). (*See* example #4 below). Explicitly allowing the substitution

of other documents for NEPA analysis (i.e., promoting the use of "functional equivalents") also is likely to undermine the information before the decision maker, leading to serious adverse impacts on the environment. Proposed regulation at § 1507.3(b)(6). These are just a few of the many provisions contained in the proposed regulations that are likely lead to significant environmental effects.

For these reasons, environmental analysis of the proposed revisions to the regulations is needed in order to comply with NEPA and must be undertaken to permit a fully informed decision on the proposed changes to the regulations.

Consultation under the Endangered Species Act is Required – Section 7 of he Endangered Species Act (ESA) provides that, federal agencies "shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species. . . " 16 U.S.C. § 1536(a)(1). Section 7 further requires that agencies must "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The obligation to "insure" against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987).

An agency must initiate consultation with the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service whenever it takes an action that "may affect" a listed species or its critical habitat. *See* 50 C.F.R. § 402.14(a). "The minimum threshold for an agency action to trigger consultation with FWS is low*." W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011). In this situation, the revision of the CEQ's NEPA regulations will reduce environmental analysis of proposed actions, thus increasing the risk of effects on listed species. For instance, by permitting agencies to ignore cumulative and indirect impacts, as well as narrowing the definition of effects to limit the scope of impacts considered, a broad range of potential environmental impacts will not be considered before decisions are made. As a result, CEQ must engage in formal consultation under the ESA before revising the NEPA regulations.

Specific Examples/Discussion of Likely Harm to Birds from Proposed Revisions

The following are examples of adverse impacts on birds and habitats that could result if the proposed rule is adopted and not overturned by the courts. We provide these examples to show both the potential impacts on birds and how deeply the proposed revisions contravene the letter and intent of NEPA.

Example #1: Authorizing Increased Sport Hunting of Migratory Game Birds in Wildlife Refuges to the Detriment of the Bird Species without Adequate Environmental Analysis

Summary: By eliminating cumulative impacts analysis and substituting less comprehensive analyses, the proposed rules could jeopardize the effective regulation of sport hunting of migratory game birds in wildlife refuges.

[Example based on Fund for Animals v. Hall, 448 Fed. Supp. 2d 127 (D.D.C. 2006)].

The National Wildlife Refuge System Administration Act of 1966 closes national wildlife refuges to all uses until opened. The Secretary of the Interior may open refuge areas to any use, including hunting and fishing, upon a determination that such uses are compatible with the purposes of the refuge. The U.S. Fish and Wildlife Service (FWS) reviews refuge hunting and fishing programs annually to determine whether to include additional refuges or whether individual refuge regulations governing existing programs need modification due to changing environmental conditions and other factors affecting fish and wildlife populations. The FWS opens refuges to hunting or expands or modifies migratory game bird hunting opportunities by final refuge-specific regulation.

In addition, the Migratory Bird Treaty Act authorizes the Secretary to determine when hunting of migratory game birds can take place. In order to implement this authority, the FWS prescribes final Migratory Bird Hunting Frameworks from which states may select season dates and limits for the annual migratory bird hunting season. According to the FWS, these frameworks are necessary to allow recreational harvest at levels compatible with population and habitat conditions. The FWS also conducts consultations regarding migratory bird hunting under section 7 of the ESA.

The evaluation under NEPA of proposed regulations allowing or conditioning migratory bird hunting at specific National Wildlife Refuges allows the FWS to consider both the bird populations and habitat conditions and also the overall environmental impact of this hunting.

In this case, the FWS proposed to create or expand recreational hunting activities in an additional 60 refuges based on Environmental Assessments (EAs) done by each individual refuge. The court found that cumulative impacts of hunting were not adequately considered. In addition, the court rejected the FWS arguments that the Migratory Bird Hunting Frameworks and ESA section 7 consultations were the "functional equivalent" of NEPA analysis. Subsequently, the FWS had each affected refuge amend its EA to include cumulative impact analyses, and in addition, issued a Supplemental EA on the Wildlife Refuge System Hunting Programs for the relevant years, addressing the impacts to the Refuge System as a whole. (Fund for Animals v. Hall, 777 F. Supp. 2d 92 (D.D.C. 2011). Based on this additional analysis, the court found that the defendants had complied with NEPA.

The NEPA Analysis:

Under Current Regulations:

1. Cumulative Impacts – Under current law, if an agency is involved in several actions that, cumulatively, have a significant impact on the environment, then these actions should be considered in the same environmental document. The existing regulations define "cumulative impact" as:

> "'Cumulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

Under existing regulations, to open additional Refuges to migratory game bird hunting, the NEPA analysis must include cumulative impacts on migratory birds, the impacts on the affected refuge, and the impacts on the overall National Wildlife Refuge System. Furthermore, without considering impacts on the bird species from all relevant conditions (including climate change) in addition to the hunting impacts, the agency cannot make an informed decision about the effect of increased hunting.

2. Functional Equivalency -- Under existing law and regulation, an agency may be exempt from conducting a NEPA environmental review if a statute provides, "procedurally and substantively," for the "functional equivalent" of compliance with NEPA. However, to be functionally equivalent under existing law, the analysis must analyze substantively the same factors as an analysis under NEPA (e.g., cumulative impacts). Public participation opportunities in the development of the "functional equivalent" must be the same as under NEPA. Thus, Migratory Bird Hunting Frameworks and ESA Section 7 consultations that did not consider cumulative impacts in the manner required under NEPA and provided different public participation opportunities, were held not to be the functional equivalent of NEPA compliance.

3. Climate change – Under existing regulations, the potential effect of climate change on bird species and their habitats where increased hunting may be authorized would have to be evaluated and considered. For example, if projected climate change impacts would make the vegetation of the area less attractive to a bird species, adding additional hunting to that impact could cause grave problems for bird reproduction or populations.

Under the Proposed Regulations:

1. Cumulative Impacts – Cumulative impacts will not be considered. Under the proposed regulations, "Analysis of cumulative effects is not required." Proposed regulation at § 1508.1(g). This could allow additional units of the National Wildlife Refuge System to be opened or hunting opportunities created or increased without considering the cumulative impacts on migratory birds or the other resources of the Wildlife Refuge or the Refuge System.

2. Functional Equivalency – A finding that another process or analysis is the functional equivalent of NEPA is much more likely. The proposed regulations require a "NEPA threshold applicability analysis" which specifically provides that in assessing whether NEPA applies, agencies should consider "Whether the proposed action is an action for which the agency has determined that other analysis or processes under other statutes serve the function of agency compliance with NEPA." Proposed regulation at § 1501(a)(5). This grants the agency broad discretion to determine that another analysis is the functional equivalent of NEPA.

In the case of migratory bird hunting, the proposed regulations could pave the way for agencies to use the Migratory Bird Hunting Frameworks, the section 7 ESA consultations, or some other analysis as the "functional equivalents" of NEPA with their lack of considering cumulative impacts on the migratory bird species habitats, the specific Refuge involved, and overall National Wildlife Refuge System. Public participation opportunities could also be reduced, undermining a key purpose of NEPA. Further, if the analysis for regulations was carried out under an Executive Order (for example E.O. 12866), those orders generally specifically state that they do not create a cause of action, and therefore would preclude judicial review of the analysis.

3. Climate change – Under the proposed regulations, evaluation of climate change is not mentioned or required. Without the information about how climate change may affect a bird species or the habitat for the particular bird species, a decision maker cannot effectively apply standards for evaluating effect of hunting on species.

Example #2: Allowing Issuance of Section 404 Clean Water Act Dredge and Fill Permits, Attendant Damage to Wetlands, and Habitat Fragmentation without Adequate Environmental Analysis.

Summary: Section 404 Permits are likely to be easier to obtain resulting in sharply increased wetland habitat degradation and fragmentation due to the proposed regulations limiting alternatives, not requiring cumulative impacts analysis, and undermining collaboration in finding solutions. Bird species could well be seriously adversely affected.

[Examples based on Stewart v. Potts, 996 F. Supp. 668 (S.D. Tex. 1998) and "NEPA Success Stories," Environmental Law Institute, 2010, p. 10].

Section 404 of the Clean Water Act requires that the U.S. Army Corps of Engineers (COE) issue a permit prior to dredge and fill activities. In one case, the COE issued a dredge and fill permit for the construction of a golf course on 200 acres part of which was wetlands that served as habitat for neotropical songbirds. In this instance, NEPA required the COE to consider the cumulative and indirect impacts of the filling of the wetlands. Subsequently, on remand, in order to comply with the court's ruling, the COE considered additional information regarding cumulative impacts on habitat and native and migratory birds and issued a Supplement to the Environmental Assessment. Stewart v. Potts, 126 F. Supp. 2d 428 (S.D. Tex. 2000).

In another example involving section 404 permits, the NEPA process served to motivate citizens of Eugene, Oregon, to come together to successfully consider cumulative impacts and alternatives to construction of a four-lane road to be cut through a remnant wetland habitat for the great blue heron.

The NEPA Analysis:

Under the Current Regulations:

1. Cumulative Impacts – The cumulative impacts on the wetlands and neotropical songbirds and their habitat must be considered. The CEQ regulations define "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions." 40 C.F.R. § 1508.7. The current regulations require consideration of the cumulative actions, such as the filling of wetlands – past, present and in the reasonably foreseeable future.

2. Range of Alternatives – The government agency must consider a reasonable range of alternatives to the proposal. NEPA demands that the agencies rigorously explore and objectively evaluate all reasonable alternatives. Under existing law, the alternatives analysis is the "heart of the environmental impact statement." 40 C.F.R. § 1502.14.

3. Climate change -- Under present regulations, if an area being considered for a wetlands permit will be changed or affected by climate change in the foreseeable future, that effect must be evaluated. Climate change may cause warming or drought that makes an area more problematic for a bird species, for example, and permitting wetlands development in that area may have an enhanced adverse effect on the birds.

Under the Proposed Regulation:

1. Cumulative Impacts – The cumulative impacts of successive Section 404 permits allowing the fill of wetlands will not be considered. The proposed rules explicitly state that the consideration of these impacts is not required.

2. Range of Alternatives - The consideration of alternatives will be significantly curtailed to the detriment of the environment. Under the revised definitions, alternatives must "meet the goals of the applicant" and be "technically and economically feasible." Proposed regulation at § 1508.1(z) (definition of "Reasonable alternatives"). For some actions, consideration of alternatives outside the agency's authority may provide a preferable approach, but the proposed regulations would prohibit such analysis (under present court decisions such analysis is not required but is also not precluded). Under these limitations, the range of alternatives may be limited to the proposed action and the no action alternative. These limits on reasonable alternatives to be analyzed limit useful information for the decision-maker and should be rejected. Further, the proposed regulations delete the provision that the alternatives analysis is the "heart of the environmental impact statement." 40 C.F.R. 1502.14, as well as dropping the language that requires agencies to "[r]igorously explore and objectively" evaluate all alternatives". 40 C.F.R. 1502.14(a). Those omissions devalue the importance of the alternatives analysis and cause the proposed regulations to undermine an important approach of NEPA.

3. Climate change – Under the proposed regulations, the magnifying effect on species problems that climate change may have in conjunction with development in an area would not be considered, and attendant potentially devastating adverse effects on bird species would occur.

4. Bias Toward the Permit Applicant – First and foremost, the proposed rules provide that an applicant may prepare the EIS for that applicant's project. Proposed regulation at § 1506.5(c). In addition, another significant provision favoring the permit applicant under the new regulations include the requirement that the alternatives considered must meet the "goals of the applicant." Alternatives also must be "technically and economically feasible." Proposed regulation at § 1508.1(z).

5. NEPA Collaboration -- The role of NEPA in incentivizing parties with divergent points of view to come together to find collaborative solutions will be undermined by the new regulations which weaken the implementation of the law.

Example #3: Undermining Science and the Consideration of Increased Bird Strikes and Bird Displacement in the Regulation of Airspace and Aircraft Facilities

Summary: The proposed regulations could result in serious adverse impacts on bird species and their habitat due to undermining the use of sound science

and indirect and cumulative impacts analysis when regulating airspace and aircraft facilities.

[Example based on: National Audubon Society v. Dept. of the Navy, 422 F.3d 174 (4th Cir. 2005)].

When a branch of the military or the Federal Aviation Administration approves new landing facilities or use of airspace, NEPA requires an analysis of environmental impacts, often entailing an EIS with its attendant "hard look" at impacts on the environment, including on bird species. This hard look requires the use of sound science, including site- specific analysis of the bird species that may be impacted. This can include site visits, radar studies, other scientific surveys, and modeling (such as bird avoidance modeling and bird strike studies), as well as a literature search. In addition, an EIS that considers indirect and cumulative impacts will analyze the incremental effect of adding additional facilities and additional flights (with noise and other disruption to the species) to an area.

The NEPA Analysis:

Under the Current Regulations:

1. Climate Change – Existing regulations require the consideration of indirect and cumulative impacts. "Indirect effects" caused by the Federal action "are later in time or farther removed in distance but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Under existing law, the climate change impacts from a federal action must be considered in the environmental analysis. In this instance, climate change impacts of the new landing facilities and the increase in flights (including climate impacts on the bird life) should be considered. In addition, if climate change is projected to affect the land or habitat on which the new facility is to be developed, evaluating that change may lead to information that an area may become prone to flooding, for example, and is thus not suitable for an aircraft facility.

2. Science -- Consideration of sound science is required in the EIS. This "hard look" analysis requires reasonable methodology and a robust consideration of the science. Under existing regulations, agencies often undertake on-the-ground scientific analysis such as site visits, surveys and other relevant site-specific science. Further, under existing regulation (40 C.F.R. § 1502.22), the agency is to identify incomplete or unavailable information, and under specified circumstances must develop that information for the environmental review.

3. Cumulative Impacts -- The current regulations require the consideration of cumulative impacts – in this instance, an analysis of other flights, facilities and air space requirements that may together with the proposed action, impact bird species. Also climate change impacts must be considered.

Under the Proposed Regulations:

1. Climate Change – The proposed regulations explicitly eliminate the consideration of indirect and cumulative impacts, stating:

> "A 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal change. Effects do not include effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action. Analysis of cumulative effects is not required." Proposed regulation at § 1508.1(g)(2).

This appears to be directed to eliminating the need to consider the impacts of climate change. Climate change will have huge impacts on bird species and their habitats as exhaustively documented in the Audubon report , "Survival by Degrees: 389 Bird Species on the Brink" October 2019 (see discussion, supra, on p. 2). Failure to consider those impacts will lead to poor decisions and serious adverse effects on birds.

2. Science – The proposed regulation would undermine the consideration of relevant science. The proposed revisions to section 1502.24 of the regulation inserts the following new statements: "Agencies shall make use of reliable existing data and resources and are not required to undertake new scientific and technical research to inform their analyses. Agencies may make use of any reliable data sources, such as remotely gathered information or statistical models." [Emphasis added]. Rather than availing itself of on-the-ground data and information, the agency can exclusively use remotely gathered information or modeling. It may also be aware that certain data is essential for an effective decision—as for example what happens to birds in the area during breeding season—without having to develop that data before deciding. As a result, decisions will not be as environmentally sound.

3. Cumulative Impacts – Because the proposed regulations explicitly do not require the consideration of cumulative impacts there is unlikely to be any analysis of the incremental impacts on birds of new air facilities when combined with existing facilities and flights or those anticipated in the future, or when combined with other assaults on the birds such as climate change.

Example # 4: Siting and Operation of Communications Towers without Providing Adequate Consideration by the FCC and the FAA of Alternatives to Reduce Bird Kill.

Summary: The proposed regulations may undermine consideration of options for siting and operation of communications towers and lead to millions of bird deaths.

[Example based on: American Bird Conservancy v. Federal Communications Commission, 516 F.3d 1027 (DC. Cir. 2008)].

The Federal Communications Commission (FCC) regulates the placement and lighting of communications towers. It shares responsibility with the Federal Aviation Administration (FAA) that by statute focuses on airplane safety. Studies have indicated that collisions with communications towers may be responsible for millions of bird deaths a year.

Initially the FCC declined to undertake an environmental review of the effects of its regulations for operation and siting of communications towers on birds. In a strong decision, the Court of Appeals for the District of Columbia Circuit held that the FCC's approach was "arbitrary and capricious." Thereafter, the FCC appears to have undertaken a more serious environmental review, modified its requirements for NEPA evaluations and its lighting requirements for towers to assure better bird protection. The FCC has acknowledged the benefits of its present approach and the significant reduction in bird mortality from better tower lighting systems. It received a Presidential award for the improvements.

In addition to the lighting requirements, the FCC has identified a set of conditions that require EAs or environmental analyses and do not fit into its categorical exclusions. This approach assures better protection, including for birds.

Despite this success, the FCC has again attempted to exempt siting—this time of 5G towers—from NEPA compliance, and been rebuffed by the D.C. Circuit. See United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC, 933 F. 3d 728 (D.C. Cir. 2019).

The NEPA analysis:

Under Current Regulations:

1. Cumulative impacts – Under current regulations, the FCC must evaluate the effect on birds and bird species of both individual cell towers and cell towers collectively. Since the effects on birds and bird species (i.e., deaths) at a single tower is greatly magnified when towers are looked at collectively, this requirement is essential to effective decision-making about siting and lighting.

2. Alternatives -- Through evaluation of a range of reasonable alternatives, including those proposed by members of the public, the FCC identified different approaches to lighting of communications towers and different approaches to NEPA compliance.

3. Climate Change -- Under existing law, cumulative and indirect impacts must be considered, thus requiring that the climate change impacts from a federal action must be considered in the environmental analysis.

Under the proposed regulations:

1. Cumulative impacts – Cumulative analysis is no longer required. As a result, the significant impact of communications siting and lighting on bird populations across the country would be lost if analysis is only site-by-site. In addition, the significant benefits of a broad-based analysis taking into account cumulative impacts and providing a basis for tiering for site-specific projects would be lost.

2. Alternatives -- Under the proposed regulations the requirements for seeing a broader range of alternatives is eliminated. Further, alternatives are not to be considered unless they serve the purposes of the permit applicant and are technically and economically feasible. Alternatives protective to birds, or for which the public may not have information as to cost or feasibility, would be ruled out. We cannot know whether the current lighting approach would have emerged under this limited approach, but in general more creative and thoughtful approaches are less likely to be identified and evaluated under the proposed regulations.

3. Climate change -- Climate change is not considered. Thus the impacts of communications towers placement and lighting on birds when combined with the effect of climate change on those species as outlined in the National Audubon Society Report cited above will not be considered, leading to far less informed decision making and regulation.

Summary of communications tower siting and lighting: Because of its obligations to comply with several laws including NEPA, the FCC (and FAA) have been required to evaluate more effective approaches to protecting bird populations from colliding with communications towers by requiring more effective lighting on those towers. Without the thoughtful examination required by the present NEPA regulations—particularly the cumulative impacts requirements—these protections may not have developed. Moreover, if the proposed regulations are adopted and upheld, the types of protections developed here may not be identified or considered for placement of 5G communications facilities.

Example #5: Approving Oil and Gas Leases on Public Lands that Have Been Identified as Important to Protect Sage-Grouse Without Adequate Environmental Analysis, Including Examination of Climate Change, May Endanger the Sage-Grouse.

Summary: By failing to meet the requirements of NEPA for effective and comprehensive environmental analysis, Federal government decisions and actions are likely to endanger the sage-grouse, a species in grave danger.

[Example based on Western Watersheds Project et al. v. Schneider, Case No. 1:15-CV-83-BLW, ____F. Supp. 3d___ (D. Idaho, Oct. 16, 2019),
2019 U.S. Dist. LEXIS 181043, app. pending].

The Greater sage-grouse is a bird species that is greatly in danger because of the loss, degradation, and fragmentation of its native sagebrush habitats across the interior West. The Department of the Interior and the Forest Service developed a significant planning strategy to protect the sage-grouse that the agencies believed, if implemented, would avoid the need to list the sage-grouse as threatened or endangered under the ESA. The Federal agencies worked extensively with Governors and others throughout the West to develop the plan. This September 2015 Greater Sage-Grouse Planning Strategy was implemented through a series of Federal agency plan amendments; based on those actions, the FWS determined that listing of the sage-grouse was "not warranted" under the ESA. 80 Fed. Reg. 59858, 59876 (Oct. 2, 2015).

After the individual plan amendments were developed and put into place under the Sage-Grouse Strategy, the new Administration took actions to revise the Strategy and the individual plans to permit leasing and development of oil and gas resources on public lands that had been set aside from development under the sage-grouse protection strategy. In addition, the Trump Administration took action to delete requirements for mitigation for certain surface disturbances. Plaintiffs Western Watersheds and others challenged the Supplemental Plans issued in March 2019 as adversely affecting habitats and populations of sage-grouse and sought and obtained a preliminary injunction because the agencies in developing the Plan Amendments failed to comply with several federal laws including NEPA. An appeal is pending.

The NEPA Analysis:

Under Current Regulations:

1. Cumulative impacts -- Presently agencies must evaluate and consider cumulative impacts of both oil and gas development and of the multiple other threats to sage-grouse at the regional and range-wide level. This includes the consideration of connectivity between sage-grouse populations and habitat across state lines.

2. Climate change -- Climate change may affect the current and prospective habitats of sage-grouse. In addition, the oil and gas developed may have an impact on climate change (burning fossil fuels is a significant contributor). Consideration of information related to climate change would inform the decision-maker and could well require steps to better protect sage-grouse habitat and populations.

3. Alternatives -- A range of reasonable alternatives must be considered, including no or limited leasing for each of the leasing actions at issue in the case. In particular, a meaningful no action alternative and more alternatives than simply the one the agency wants to select must be evaluated.

4. Hard look -- An agency must examine and respond to comments on the EIS, especially those that, for example, raise serious concerns about the effect of the action on environmental problems or raise questions about applicable science.

5. Bias/conflict of interest -- The agency itself must develop or closely supervise the environmental analysis under NEPA.

Under the Proposed Regulations:

1. Cumulative impacts -- The proposed regulations do not require consideration of cumulative impacts. Given the imperiled status of the sage-grouse, failure to look at all the assaults to the species—not just those from a lease-by-lease impact analysis—is the only way meaningfully to make sound decisions. As the court noted in issuing an injunction, cumulative impacts include connectivity of habitat and scope of the sage-grouse's range across state lines that are essential components of protective sage-grouse habitat and must be included in a sound NEPA analysis.

2. Climate change -- Climate change information and analysis is not required under the proposed regulations. The impacts of climate change when combined with other habitat changes outlined above would not be evaluated, to the detriment of the sage-grouse and the public more generally.

3. Alternatives -- Under the proposed regulations, consideration of alternatives will be significantly curtailed to the detriment of the environment. Under the revised definitions, alternatives must "meet the goals of the applicant" and be "technically and economically feasible." Proposed regulation at 1508.1(z) (definition of "Reasonable alternatives."). Thus alternatives that may be more protective of the sage-grouse, such a no or limited leasing, may not be evaluated. The Administration in the 2019 Plan Supplement preliminarily enjoined by the court has already failed to look at the range of reasonable alternatives the Court found important for protection. Such limits will lead to less informed decisions and may well lead to decisions that cause far greater harm to sage-grouse populations and to the public.

4. Hard look -- Under the time and page constraints of the proposed regulations (*see* Proposed regulation at §§ 1501.5, 1501.10, 1502.7), careful review of concerns raised and effective response --falling under the category of "hard look"—will be constrained. The failure of the agency to take this hard look concerned the court that issued a preliminary injunction against the Supplemental Plan because it would lead to less effective protection for the sage-grouse.

5. Bias/conflict of interest -- Under the proposed regulations, the permit applicant may develop the EIS or EA (*see* Proposed regulation at § 1506.5(c)). Particularly coupled with other limits such as those on alternatives and limits on the requirements for developing new, needed, and scientifically sound information such EAs and EISs may be problematic.

Conclusion

As the foregoing examples demonstrate, the proposed regulations, if adopted and not overturned by the courts, could have significant adverse effects, even disastrous impacts on bird species and their habitats. Given the grave threats to bird species posed by climate change as documented in "Survival by Degrees: 389 Bird Species on the Brink" October 2019, this is not the time to gut one of our bedrock environmental laws. The proposed amendments to the NEPA regulations should not be adopted.

We hope to see CEQ take into account these and other comments that point out the significant conflicts between these proposed regulations and NEPA.

Sincerely,

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