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MEAN's IRP Must Not Be Approved

Dear Ms. Lebeau and Mr. Barnhart:

Please accept this letter written on behalf of Sustainable Development Strategies Group and numerous concerned constituents of the Municipal Energy Agency of Nebraska (MEAN).

It is our understanding that MEAN is currently submitting their drafted 2022 Integrated Resource Plan (IRP) to the Western Area Power Administration (WAPA) for review and approval. We implore you to approach this drafted IRP with great care, as there was a tremendous lack of attention to public participation with which it was prepared.

Public Participation

WAPA's regulations state:

> "The IRP must evaluate the full range of alternatives to provide adequate and reliable service to a customer's electric consumers at the customer's or member's lowest system cost. Ideally, the planning process assesses new generating capacity, power purchases, energy conservation and efficiency, cogeneration and district heating and cooling applications and renewable energy resources. **Robust public involvement should be a part of the process**, as well, allowing the utility to share upcoming challenges with its consumers and to get their input on solutions that best address the community's diverse wishes and concerns."[1]

Here is a summary of the difficulties we encountered while attempting to participate in the planning process:

- **MEAN did not make information about public meetings easily accessible**
  - Notices of public meetings were primarily posted in person at MEAN's headquarters. MEAN serves 69 communities across four states and the Arkansas River Power Authority, constituents are not located in Lincoln and able to regularly visit the headquarters to learn of meetings
  - Notices of public meetings that were posted online were not even on MEAN's website. To find these notices, we had to search through NMPP Energy's website

- **MEAN imposed a 25 day limit on the comment period**
  - In a letter submitted to MEAN in April of 2022, SDSG expressed numerous concerns about the public comment process
    - Concern was expressed that 30 days (the original length of the comment period) was not enough time for the public to effectively engage with the lengthy document
    - Concern was expressed that the comment period was set to end on the same day that the IRP is voted on, giving minimal time for directors to review comments submitted toward the end of the period
  - In response to these concerns, MEAN **shortened** the public comment period to 25 days, rather than lengthening it

[1] https://www.wapa.gov/EnergyServices/IRP/Pages/irp.aspx

- **MEAN released the IRP draft late at night to further shorten the comment period**
    - The draft IRP was released at 10:15p.m. local Nebraska time on April 19th, 2022
        - The **only** public meeting in which virtual attendance was offered was held at 10:00a.m. Nebraska time on April 21st, 2022
            - **This means the public had less than 36 hours—in the middle of a work week—to review the 231 page document and prepare comment**

- **MEAN held only one meeting with a virtual attendance option once the draft IRP was released**
    - When there was finally a document to discuss, only **one** meeting was held in which individuals could attend virtually
        - As stated above, the public had less than 36 hours to prepare for this meeting
    - During this meeting, public comments were limited to 3 minutes or less, and no more than 10 individuals were permitted to speak

- **MEAN's Board meeting to approve the draft IRP was not easily accessible**
    - As stated above, there was only one virtual meeting held once the IRP was released. This is because **the Board of Directors meeting on May 19th, 2022 was—at the last minute and without announcement—moved to a location without teleconference capability**
    - No public comment was received because no one could travel to Kearney, Nebraska at short notice
        - We would like to stress once again that MEAN serves 69 communities across four states and the Arkansas River Power Authority, asking constituents to attend in person meetings is a large barrier to participation

MEAN has consistently met attempts to publicly participate with defensiveness and evasiveness. This is not how our energy future should be decided.

The essence of public power is public participation**.**

We request that MEAN's IRP be rejected and returned for revision on the grounds of insufficient public participation and failure to promote the enhancement of the environment. We also request that WAPA holds its own public hearing on MEAN's IRP.

The IRP Should Not Be Approved Without Thorough Review

We believe that the Western Area Power Administration should conduct an independent review of MEAN's Integrated Resource Plan before approving it. This should include an opportunity for public participation.

There should be no approval until it is clear that the IRP complies with all elements of the existing regulations and relevant provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq., as part of that process.

WAPA, as an agency within the Department of Energy (DOE), is charged with selling power generated from federal facilities in 11 states at cost to rural electric cooperative and municipal utility customers spanning a 15-state region of the western and central United States. As organizations whose memberships include retail customers of these end-use power providers, we have a vested interest in ensuring that WAPA is applying the rule of law to its oversight responsibilities as they pertain to IRPs.

To this end, we are greatly concerned that the Administration may not be appropriately taking into account the environmental impacts of its IRP approvals, including impacts to species listed as threatened or endangered and their critical habitats. WAPA may be missing key opportunities to more effectively advance clean energy and safeguard the resources of the American West.

WAPA communicated in its September 23, 2013 response that the Administration believes it is not required to analyze or assess the impacts of reviewing and approving customer IRPs under NEPA, or consult with appropriate agencies in accordance with section 7 of the Endangered Species Act (ESA). This position does not seem consistent with the requirements of the IRP process, including its statutory underpinnings, as well as the plain requirements of NEPA and the ESA.

Accordingly, we strongly urge you to assess WAPA's IRP review and approval process to ensure that the review of the MEAN IRP is conducted in accordance with the environmental and health safeguards afforded by NEPA and the ESA.

The IRP Process

Below, we explain the basis for our concerns and request. The IRP Process under the Energy Policy Act of 1992, as a condition of purchasing wholesale electric energy through WAPA under a long-term firm power service contract, requires customers to prepare, submit, and implement IRPs. See 42 U.S.C. §§ 7276(a) and 7276b(a); 10 C.F.R. § 905.10(a).[2]

[2] A long-term firm power service contract is any contract for the sale of power by WAPA of firm capacity, or energy capacity that is guaranteed to be available 24 hours a day, which is to be delivered over a period for more than one year. See 42 U.S.C. § 7275(4).

The integrated resource planning process "evaluates the full range of alternatives, including new generating capacity, power purchases, energy conservation and efficiency, cogeneration and district heating and cooling applications, and renewable energy resources, to provide adequate and reliable service to a customer's electric consumers at the lowest system cost." 42 U.S.C. § 7275(2); 10 C.F.R. § 905.2.

The requirement that IRPs be prepared and implemented was enacted in 1992 to promote investment in conservation, energy efficiency, and renewable energy resources. Among other things, IRPs must identify available resource options (including all practicable energy efficiency and energy supply resource options), designated least cost resource options (taking into account life-cycle system costs and giving priority to energy efficiency and renewable resources, to the extent practicable), describe specific actions that will be taken to implement the IRP, minimize adverse environmental effects, including the effects of new resource acquisition, and provide for public participation. See 42 U.S.C. § 7276b(b); 10 C.F.R. §905.11(b). IRPs must be revised and submitted to WAPA every five years. See 42 U.S.C. §7276b(a).

The Duties of WAPA

WAPA is charged with reviewing IRPs, including revised IRPs, to determine whether they meet the specific statutory and regulatory criteria set forth at 42 U.S.C. § 7276b(b)(1)-(8) (also set forth at 10 C.F.R. § 905.11(b)(1)-(6)). 42 U.S.C. § 7276b(a). If an IRP meets the criteria set forth at 42 U.S.C. § 7276b(b) and 10 C.F.R. § 905.11(b), it must be approved.

This means that if it does not meet those criteria, it should not be approved. And WAPA has no way to determine whether the criteria are met without a careful and thorough review.

If an IRP does not meet the criteria set forth under 42 U.S.C. § 7276b(b) and 10 C.F.R. § 905.11(b), WAPA must "disapprove" the IRP. See 42 U.S.C. § 7276b(b); 10 C.F.R. § 905.18(b). Disapproval subjects the customer to penalties. See 42 U.S.C. § 7276b(e)(1); 10 C.F.R. § 905.20(b).

A surcharge of 10% of the purchase price of power initially applies if a plan is not submitted and approved within 12 months of disapproval. See 10 C.F.R. § 905.20(d)(1). Where a plan is not submitted and approved within a second 12-month period, a 20% surcharge applies, and a surcharge of 30% applies every year thereafter that a plan is not approved. See Id. WAPA also has the option of curtailing the amount of power sold to a customer if it would be "more effective to ensure customer compliance." 10 C.F.R. § 905.20(d)(3)(i). WAPA has the option of reducing the amount of power delivered to a customer under a long-term firm power contract by 10% following the first 12 months after disapproval and imposition of the 10%

surcharge. Id. Ultimately, penalties apply until the customer's contract terminates. See 42 U.S.C. § 7276b(e)(1).

The IRP process therefore is a critical, statutorily endorsed means for WAPA to leverage wholesale power sales to compel its customers to afford greater and more objective attention to environmental impacts, to energy efficiency and renewable energy resources, and to public process. Given that the purchase of wholesale power from the federal government is a major portion of many customers' generating portfolios, the IRP process is, in effect, an important incentive program. In exchange for the opportunity to secure cheap, reliable, and long-term power, customers need only exhibit basic accountability to the environment, to a full range of resource options, to giving full consideration to life-cycle resource costs, and to the public. If customers do not wish to meet these requirements, they foreclose the opportunity to enter into long-term firm power service contracts with WAPA.

The IRP Process and its Clear Relation to NEPA

In the context of WAPA's duty to ensure customer IRPs effectively minimize adverse environmental impacts, consider a range of resource alternatives, and involve the public, it greatly concerns us that the Administration believes NEPA does not apply to review and approval of IRPs. Indeed, it appears WAPA approval of IRPs is exactly the kind of action that must be guided by NEPA.

"NEPA is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It is meant to "foster excellent action," intended to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). At a basic level, NEPA requires that, prior to undertaking an action that affects the environment, federal agencies analyze and assess environmental consequences (i.e., effects), consider a range of reasonable alternatives, and make a well-informed decision based on these considerations. To this end, NEPA requires that "high quality" environmental information be relied upon and made available to the public before actions are taken, noting that "accurate scientific analysis, expert agency comments, and public scrutiny" are essential components of NEPA compliance. 40 C.F.R. § 1500.1(b).

More specifically to WAPA, Department of Energy regulations explain that NEPA "applies to any [WAPA] action affecting the quality of the environment of the United States[.]" 10 C.F.R. § 1021.102(b).[3] An action includes any "project, program, plan, or policy" that is subject to WAPA control and responsibility, such as an Integrated Resource Plan. See 10 C.F.R. § 1021.104(b). Before carrying out an action, WAPA must determine the level of NEPA analysis required. One of three levels of analysis may be required, depending on the significance of the impacts: 1) An

[3] WAPA, as an organizational element of the Department of Energy, must comply with the DOE's relevant NEPA regulations, just as any other DOE component.

"environmental impact statement" ("EIS"), which is required for any action that may significantly impact the environment; 2) An "environmental assessment" ("EA"), which is required for any action that does not significantly impact the environment; and 3) A "categorical exclu[sion]," which is required for actions that do not require an EIS or EA. 40 C.F.R. § 10.1021.300(a). An EIS must be prepared in accordance with procedures at 10 C.F.R. §§ 1021.310-1021.315, including that WAPA must provide adequate public notice and opportunity for comment. Documentation and public notice does not need to be given for categorical exclusions that apply to "general agency actions," but documentation and public notice of categorical exclusions that apply to "specific agency action" must be provided. 10 C.F.R. § 1021.410(e).

Here, WAPA action to approve or disapprove IRPs is an "action" as defined by 10 C.F.R. § 1021.104(b). Approval or disapproval of IRPs is a "project" or "plan" subject to WAPA control and responsibility. Furthermore, it is not a "ministerial" action for which WAPA has no discretion, which is not considered an "action" under Department of Energy rules. Under the plain language of the Energy Policy Act of 1992, as well as WAPA's own regulations, the Administration must exercise discretion in reviewing customer IRPs to ensure they meet relevant criteria.

WAPA's assessment of whether a customer "to the extent practicable, minimized adverse environmental effects of new resource acquisitions" in accordance with 42 U.S.C. § 7276b(b)(4) is a clear example of where Administration discretion is invoked. The fact that the Energy Policy Act of 1992 explicitly contemplates disapproval of IRPs, as well as the imposition of penalties and potentially even the termination of a long-term firm power service contracts with WAPA, further indicates the Administration's review involves the application and exercise of discretion. **Review and approval of IRPs is not a ministerial action or a foregone conclusion; it requires analysis and application of judgment that only WAPA can provide. There is no room here for "rubber stamp" approvals.**

WAPA action to approve or disapprove IRPs also clearly poses effects to the quality of the environment. The Energy Policy Act of 1992 expressly states that in assessing and designating a "least cost option," that "life-cycle system costs, including adverse environmental effects," be minimized to the extent practicable (42 U.S.C. § 7275(3)), indicating that environmental impacts are an expected outcome of IRP approval. To this end, in assessing existing and future resource options (including supply-side and demand-side options), WAPA rules expressly state that "environmental impacts," among other factors, may be considered. 10 C.F.R. § 905.11(b)(1)(iii). The Energy Policy Act further contemplates that customer acquisition of new resources poses environmental effects. The law explicitly requires that the adverse environmental impacts of new resource acquisition be "minimized" to the extent practicable. 42 U.S.C. § 7276b(b)(4).

The fact that the Energy Policy Act not only contemplates, but demands, that WAPA disapprove IRPs if customers do not appropriately address environmental impacts, including minimizing life-cycle system costs and the adverse environmental effects of new resource

acquisitions, clearly indicates that WAPA action on an IRP poses direct, indirect, and cumulative impacts. Indeed, WAPA disapproval of an IRP is likely to compel a customer to further minimize adverse environmental impacts in order to secure the privilege of purchasing wholesale power, or at least prevent the federal government from subsidizing (through the sale of wholesale power) unacceptable adverse environmental consequences.

There are many customers of WAPA that own and operate coal-fired resources, including, but not limited to, the Platte River Power Authority, Salt River Project, Deseret Power, Basin Electric, Colorado Springs Utilities, Sunflower Electric Power Corp., Utah Associated Municipal Power Systems, Nebraska Public Power District, Otter Tail Power Company, and Minnkota Power Cooperative. WAPA's review and approval of IRPs for these customers further underscores that the process must be guided by NEPA. Here, there is no doubt that such actions are major, that they pose potentially significant adverse environmental impacts, and that WAPA has discretion to influence the outcome of the IRP process to minimize these impacts.

Despite this, WAPA has confusingly taken the position that NEPA does not apply to its review and approval of IRPs and appears to be making no effort to analyze and assess the impacts of IRP approval accordingly, or to involve the public in its review and approval of IRPs.

WAPA has in the past conducted no analysis or assessment of adverse impacts, did not consider any alternatives to ensure that environmental impacts were effectively minimized, and furthermore provided no public notice of its proposed approval and final action. Plainly, its decision was not based on a demonstrated understanding of environmental consequences.

Given that the IRP review and approval process appears to be precisely the type of federal action that should be governed by NEPA, perhaps it is no surprise that the Energy Policy Act of 1992 states that NEPA applies to WAPA review and approval of IRPs. As the Act states, "The provisions of the National Environmental Policy Act of 1969 [42 U.S.C. et seq.] shall apply to actions of the Administrator implementing sections 7275 to 7276c of this title in the same manner and to the same extent as such provisions apply to other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 7276c(a). Here, the IRP review and approval process is an action by WAPA implementing sections 7275 to 7276c (specifically, review and approval is guided by 42 U.S.C. § 7276(b). It thus appears clear that NEPA applies "in the same manner and to the same extent" to IRP review and approvals as it applies to other federal actions under NEPA.

Conclusion

1. WAPA must take steps to ensure that MEAN's IRP is properly reviewed under NEPA, as appropriate. At a minimum, WAPA must ensure that public notice of its proposed actions is provided and that MEAN's IRP is reviewed using the appropriate level of NEPA documentation (an EA or EIS given that there is no categorical exclusion for IRP approvals).

2. In accordance with 40 C.F.R. §§ 1500.6 and 1507.3(a), WAPA must review its policies, procedures, and regulations and revise them as necessary to guide future IRP reviews to ensure full and consistent compliance with NEPA at all times. Any revision to WAPA's policies, procedures, and/or regulations must be completed in consultation with the Council on Environmental Quality in accordance with 40 C.F.R. § 1507.3(a).

With coal-fired energy generation taking a toll on our climate, waters, air quality, and the land, WAPA cannot simply rubber stamp IRPs without meaningfully analyzing whether customers are actually minimizing adverse environmental impacts.

We appreciate your time and attention to this matter. If WAPA disagrees with our concerns, or otherwise disagrees that the aforementioned actions are warranted, we request the Administrator provide us an explanation in writing. As you can imagine, it concerns us that such a significant federal program, whose aim is to ensure that adverse environmental impacts are minimized, could avoid even basic environmental scrutiny. If we are in error, a detailed explanation would be enormously helpful in shedding further light on these issues and reassuring us that WAPA is, in fact, effectively marketing federal power and working with customers to address the adverse environmental impacts of their IRPs.

Regardless, we would appreciate a written response to this letter within 30 days. Copies of this letter have been sent to the White House Council on Environmental Quality, given their important role in overseeing implementation of NEPA.

Thank you again for your time and attention to this matter.

Respectfully,

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223 N. Iowa Street
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cc: Mr. Parker Wicks, Rocky Mountain Region Contracts and Energy Services Manager

cc: Brenda Mallory, Chair, President's Council on Environmental Quality