

American Fisheries Society • Coastal and Estuarine Research Federation
Ecological Society of America • Freshwater Mollusk Conservation Society
International Association for Great Lakes Research • North American Lake Management
Society Phycological Society of America • Society for Freshwater Science
Society of Wetland Scientists • The Wildlife Society

10 March 2020

U.S. Council on Environmental Quality
730 Jackson PI NW
Washington, DC 20506

RE: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act [CEQ-2019-0003]

On behalf of the undersigned professional science societies, we respectfully submit the following comments on the proposed rulemaking updating the Council on Environmental Quality (CEQ) regulations for implementing the National Environmental Policy Act (NEPA) procedures.

Our societies collectively represent more than 35,000 individuals with diverse expertise in natural resource sciences. Our members work in the private sector, academia, and various tribal, state, and federal agencies. We support science-based policy making, and work to advance healthy ecosystems that are critical to maintaining fish and wildlife. Natural resource professionals play an integral role in all aspects of the NEPA process including the development of NEPA documents, direct and indirect consultation, and drafting of public and agency comment. The experience and subject-based knowledge they bring to the environmental review process is substantial.

In response to increasing public concern about the effects of human activity on the environment, the National Environmental Policy Act established a procedural framework obligating all federal agencies to consider environmental impacts prior to taking any “major Federal actions significantly affecting the quality of the human environment.” For fifty years, NEPA’s implementing regulations have ensured federal agencies make decisions with an understanding of the environmental consequences of those actions and disclose these effects to the public.

Unfortunately, the proposed changes to the regulations implementing NEPA would dismantle one of our nation’s bedrock environmental laws by undermining these fundamental tenets. The proposed revisions would reduce the range of alternatives evaluated, exclude the consideration of critical types of impacts, place arbitrary time and page limits on NEPA documents, and reduce public opportunities to review and comment on proposed projects. It is essential that the Act’s core tenets of ensuring proposed federal actions thoroughly consider and relay possible environmental impacts remain intact.

Revisions to the Purpose and Function of the Act

In establishing the National Environmental Policy Act, Congress’ stated purpose was to “declare a 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” (42 USC §4321).

Existing Council on Environmental Quality regulation reflects these goals, providing that “NEPA is our basic national charter for protection of the environment.” In this proposal, CEQ aims to remove all mention of environmental protection and instead focus on the procedural nature of NEPA in supporting agency decisions.

Modifying NEPA guidelines to be devoid of a link to the ultimate objective of improving environmental outcomes of agency action is in stark contrast to the Congressional intent of the legislation. **The original purpose of the Act must be preserved if future decisions are to reflect current scientific natural resource management that prioritizes a vetting of alternatives.**

Definition of “effects or impacts”

As reflected in the Congressional intent of this legislation, humans operate within connected ecological systems. Rivers cross not only state lines, but international borders. Ducks and other waterfowl use the North American flyways to migrate between Mexico, the United States, and Canada every year. Fish swim not only in large navigable waters, but their tributaries, including ones that are small, intermittent or even ephemeral; some fish, in early life stages, live in wetlands.

In accordance with these connected systems, NEPA reviews have historically considered a variety of effects of a proposed federal action, including direct, indirect, and cumulative effects. Indirect effects are generally those caused by a project, but separated by time or space. Cumulative effects can be described as the combined effects of incremental direct and indirect effects of the project, the effects of other actions, and effects of reasonably foreseeable future actions.

The Council on Environmental Quality’s proposal to change the definition of “effects or impacts” to no longer include indirect effects or impacts, as well as the elimination of the requirement to analyze cumulative effects of an action, would have long-lasting repercussions on the ability of natural resource professionals to plan and mitigate for system-level changes that a project may put into motion. Agencies would no longer be required to look beyond their jurisdictional boundaries when undergoing the NEPA process, causing them to consider impacts in a vacuum. Examples of effects that may no longer be considered include:

- **A project resulting in conditions that displace large carnivores from their home range:** Large carnivores such as grizzly bears, wolverines, and Canada lynx often require large home ranges and do not tolerate the presence of others of their own species. If a project displaced an individual or caused a reduction in habitat, bears, wolverines, and other large carnivores may migrate into an already occupied area. This increased competition for space in an area removed from the footprint of the project could affect a carnivore’s access to resources, but would not be subject to analysis under the proposed changes.
- **A project resulting in conditions that extend the migration time of a spawning fish:** Migratory fish may be impacted by a project creating a physical barrier or resulting in conditions that fish avoid during migration. This may result in lower spawning success or inability to spawn. If the project was not present, no migratory delay would occur. However, the spawning site may be well beyond the project’s narrow geographic scope, and any reduction in spawning rate may not be noticeable for several years. Under the proposed modifications, neither of these factors would be subject to NEPA review.

In addition, by eliminating a cumulative impacts analysis, NEPA becomes a short-sighted exercise rather than a forward-thinking review. Attention must be paid to the proposed rule’s impacts on the consideration of climate change and its myriad effects in the review process. Regulatory changes discounting the importance of considering climate-related impacts of federal actions would impede informed decision making to effectively manage our nation’s resources long-term.

We recommend retaining the existing definitions of “effects or impacts” and “cumulative effects” to ensure CEQ does not restrict the effects considered and exclude possible effects that could have long-lasting and severe consequences for effectively conserving natural resources.

Reasonable Alternatives

The alternatives analysis is the “heart of the environmental impact statement.” CEQ proposes a substantial change to the definition of alternatives. Under current practice, agencies must rigorously explore and objectively evaluate all reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment.

The proposed rule would contract the scope of alternatives by defining reasonable alternatives as those that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant. This new definition would fundamentally alter the alternatives analysis by eliminating the requirement for a federal agency to examine alternatives based on the ability to reduce or avoid

impacts, a core tenet of NEPA. **Any definition of “reasonable alternatives” must preserve decision-making agencies ability to examine alternatives that would mitigate the environmental impacts of a proposed action.**

Limits on the Ability to Comment

In published revisions, the Council on Environmental Quality proposes to fundamentally alter the public comment provisions by shifting the burden to the commenter to provide specific objections and catalogue all impacts of a project.

In current practice, the agency is required to provide evidence for dismissing a comment (§1503.8(a)(5)). In the proposal as drafted, the burden of evidence would be shifted from the agency’s response to the commenter’s comments. The commenter is directed to reference the corresponding section or page number of the draft environmental impact statement, propose specific changes to those parts of the statement, where possible, and include or describe the data sources and methodologies supporting the proposed changes (§1503.3(a)).

As scientific organizations, we are accustomed to gathering data to support our positions. However, this requirement would place an undue burden on a member of the public who may have a valid reason to oppose an alternative, but not have the skills or access to targeted data sources to provide the information required. It is one thing to encourage commenters to provide information that may be useful to the agency; it is another to require a level of specificity in public comments arguably beyond what the agencies themselves have to produce. **Our organizations recommend this proposed regulatory revision be reconsidered to allow for a full vetting of public concerns.**

Page limits and deadlines

The Council on Environmental Quality proposes to establish page limits and timelines for environmental reviews, allowing one year and 75 pages for environmental assessments (EAs) and two years and 150 pages for environmental impact statements (EISs). Express approval by senior agency officials would be required for any additional length or time to be allowed. According to the proposal, “CEQ has concluded that revisions to the CEQ regulations to advance more timely reviews and reduce unnecessary paperwork are warranted. CEQ has determined that improvements to agency processes, such as improved coordination in the development of EISs, can achieve more useful and timely documents to support agency decision making.”

Under the current framework, no such arbitrary deadlines are in place. In 2018, the Council on Environmental Quality evaluated the federal agency processes of completing EISs in the preceding eight years. It found that the average time to complete an EIS was 4.5 years and the median amount of time was 3.6 years. Additionally, it found that the average length of a final EIS was 669 pages.

While our organizations understand the desire to complete environmental reviews in a timely manner and in a reasonable length, we are concerned that simply imposing hard limits does nothing to address how coordination can be improved. Instead, **these new requirements could lead to reviews that do not adequately consider possible effects of the proposed federal actions as required by law.**

NEPA requires that the level of review be commensurate with the potential for impacts. While we agree that some EAs and EISs are longer than necessary, limiting the number of pages does not ensure more focused documents, nor does it guarantee better analyses. **Our organizations recommend an alternative directive that encourages agency coordination on the expected levels of impacts on each resource area to create tailored EAs and EISs that more specifically focus on resources at risk.**

Third party reviews

The Council on Environmental Quality has proposed to allow third parties involved in a project requiring environmental review to conduct their own review under relaxed federal supervision. Until now, reviews of a project have occurred from the perspective of the regulating agency, not the third party making the request.

In current third-party reviews, the federal agency selects and hires the reviewers, directs the review, and has oversight and final approval on the documents produced. The proposed changes would be a major departure from this longstanding practice, and allow a project proponent to take over these responsibilities.

Our organizations request this proposed change be withdrawn. Without a requirement to pursue alternatives that include additional mitigation or monitoring, it is reasonable to assume a project proponent would judge their preferred and limited approach as adequate. Even if due diligence is taken, this revision may result in review documents being prepared by employees without the necessary training and experience to consider all impacts as required by law. Federal agencies have internal guidance and processes which ensure NEPA documents are appropriately prepared; there is no guarantee that third parties working for a project applicant would have such safeguards in place.

We stress the foundational role that the National Environmental Policy Act plays in ensuring that federal decisions are thorough and consider all possible effects on natural resources. As noted above, the proposed changes would arbitrarily limit the geographic and temporal scope of environmental reviews, shift the burden of assessing the adequacy of alternatives considered from the agency to the public, remove the original environmental protection purpose of the Act, ignore the interconnectedness of environmental processes, and fail to consider the long-term implications of federal decisions.

Any changes to the regulations that currently implement NEPA should keep this central role in place and ensure that environmental reviews continue to appropriately analyze proposed federal actions for their impacts to natural resources.

Thank you for considering the views of natural resource professionals. If we can be of any further assistance, please contact Caroline Murphy, Government Relations Manager at The Wildlife Society (cmurphy@wildlife.org; 301-897-9770 x 308) or Drue Winters, Policy Director at American Fisheries Society (d winters@fisheries.org; 301-897-8616 x 202)

Sincerely,

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