COLORADO WILD PUBLIC LANDS

Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Via Federal eRulemaking Portal: https://www.regulations.gov, Docket ID No. CEQ-2019-0003

March 5, 2020

Dear CEQ,

Thank you for the opportunity to provide comments on the proposed revision of CEQ's rule implementing the National Environmental Policy Act (NEPA), 40 CFR 1500 et seq., as described at 85 Fed Reg 1684 et seq., January 10, 2020.

I. INTRODUCTION

Our organization, Colorado Wild Public Lands (COWPL) is a 501(c)3 organization based in Basalt, CO, dedicated to the protection of public interest and integrity of our public lands, with a focus on proposed public to private land exchanges. NEPA is the key tool that allows us to do our work. NEPA requires public input and detailed analysis of proposed actions affecting public lands, e.g. Forest Service or BLM lands.

We believe that a strong NEPA is essential to ensure conservation of the nation's natural resources and in ensuring public involvement in decisions affecting these resources. While a very minimal amount of modernization, for example, to make agency information more accessible by publishing background reports and reference documents online, may be appropriate; overall NEPA, our bedrock environmental protection law, should be maintained in its current form.

In general, the administration's rollback proposal would allow more projects (e.g. roads or extraction activities) to occur without NEPA review, and when reviews are required, they'd be cursory, with less opportunity for public involvement. Fewer alternatives to a proposed action would be studied and cumulative effects would not be considered. Tighter required timelines would limit opportunities for accurate scientific study and public comment.

These proposed rollbacks appear to only have negative consequences compared with the scientifically informed and publicly accessible process that NEPA has provided over the last fifty years, resulting in better decisions for local communities' health and safety as well as for the environment. In addition, better projects result from a thorough consideration of alternatives and impacts. The proposed rule is unacceptable and should be withdrawn.

The long timeframe required to complete NEPA documentation is often a result of shortages of funding, staffing and training in the Federal agencies. Given the importance of implementing the NEPA regulations as they currently exist, we suggest that rather than minimizing the important role of the NEPA process as proposed, increasing financial, staff and training resources would make the process more effective and efficient.

II. THE INTENT OF NEPA AND WHY IT WORKS

The National Environmental Policy Act (NEPA) was enacted 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; and to establish a Council on Environmental Quality. Sec. 2 [42 U.S. Code § 4321].

This law, established in 1970, directed a studied approach to major decision-making including providing the public with a proactive voice in the process. Existing CEQ regulations state:

> NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. [40 C.F.R. § 1500.1(b)]
>
> Federal agencies shall to the fullest extent possible: ... (d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment. [40 C.F.R. § 1500.2]

And courts around the country have continuously held that adequate opportunity for public comment on EISs and EAs are an important element of this prescribed public engagement.

For almost 50 years, NEPA has served as the foundation of reasonable, balanced and transparent protections for our environment. Our health, safety, and environment depend on it.

NEPA establishes a baseline standard and requires all federal agencies to take a "hard look" at how their actions affect the human and natural environment and if there are ways to minimize negative environmental effects. NEPA promotes making prudent decisions after studying potential environmental effects. There are three key principles:

- Transparency – Informs the public of proposed actions and promotes co-ordination with other agencies and projects
- Informed Decision Making – Understand potential impacts and effects of proposed actions before moving forward
- Giving Voice to Local Communities - Public process promotes better projects

The new rule as proposed threatens to reduce the effectiveness of the three key principles. Per the proposed rule, lacking awareness of possible impacts and lacking planned mitigation or modifications to the proposed action, creates surprise reactions; litigation and costly clean-up are likely to occur. As a result of following the existing NEPA process, better projects are achieved and overall, the process promotes savings of time and money.

III. PURPOSE, MANDATE AND POLICY

Changing the Purpose, Mandate and Policy as proposed in Sections 1500.1, 1500.2 and 1500.3 is changing the basis of the NEPA rule. This is unacceptable. The proposed rule removes agency requirements and increases opportunities for agency discretion with less guidance and enforcement for minimum requirements. Making guidelines instead of regulations allows agencies too much discretion with resulting weakening of rules. In addition, a lack of clarity can cause inefficiencies in determining what the rules are or should be.

We object to the proposed removal of the following two sections. Both should remain in place:

> NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.

Proposed Rule 1500.1 (b)

> Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

Proposed Rule 1500. 2 (d)

IV. PUBLIC INPUT

Transparency and giving voice to local communities are key principles of NEPA. COWPL considers it critical that existing opportunities for public comment on proposed federal

actions be maintained as currently prescribed and NOT diminished as has been expressed in several locations in the proposed rule change. We do not believe that the current public engagement requirements (with their defined timelines) are a significant driver in the NEPA backlog, but that the longstanding policy of starving the agencies of the necessary staff and resources to perform NEPA work is a bigger driver.

We object to the proposed changes cited below:

> (3) For consideration by the lead and cooperating agencies, comments must be submitted within the comment periods provided and shall be as specific as possible (§§ 1503.1 and 1503.3). Comments or objections not submitted shall be deemed unexhausted and forfeited. Any objections to the submitted alternatives, information, and analyses section (§ 1502.17) shall be submitted within 30 days of the notice of availability of the final environmental impact statement.

Proposed Rule Section 1500.3

It is unfair and unrealistic to ask the public to comment directly on specific sections. Most lay people understand the general intent but not the technical detail of a proposal. Voicing a simple yay or nay to a proposal for a fair reason should be the right of every American citizen. We also object to any reduction in or shortening of public comment periods as currently prescribed.

Other proposed changes that would present obstacles and even barriers to meaningful public input include:

> Generally, the expanded use of Categorical Exclusions (CEs) to exempt projects from NEPA review as there are no public notice or engagement requirements for CE designated projects. Proposed Rule Section 1500.4(a) and 1508.4 (See below for more on our objections to this proposed practice.)
>
> Regulations mandating page limits [Proposed Rule Section 1500.4(c)] including direction to minimize the inclusion of important background information [1500.4(h)]. This information helps to provide context for thoughtful analysis and substantive comments.
>
> Direction to use the Scoping process to narrow the scope of an EIS [Proposed Rule Section 1500.4(i)] which eliminates agency discretion to consider more issues raised by the public rather than less. The agencies are not infallible and should be receptive to different thinking, especially early in the NEPA process. Meaningful Scoping can prevent a lot of time and cost savings. Remove this language.
>
> Eliminating the requirements for scoping such as holding public meetings, publishing relevant information, and relying on agency discretion regarding these

important portals for engaging the public will result in less public engagement [Proposed Rule Section 1501.9(c)]. Leave the existing language.

Direction to favor the use of program rather than project specific EISs [Proposed Rule Section 1500.4(k)]. Programmatic EISs reflect a vision of how certain policies and plans may be implemented, whereas project specific EISs describe specific actions in specific locations. The programmatic documents are almost hypothetical in that they suggest what could happen in a given location. But projects are where the rubber meets the road for most people; the documents describing them make it much easier for people to understand how the proposals will impact themselves and their communities. Projects should be subject to NEPA applicability analysis.

Allowing the agency to substitute review required by other statutes to substitute for NEPA review [Proposed Rule Section 1501.1(a)(5)]. Most statutes lack the public engagement requirements of NEPA. Remove this section.

If there is to be a reliance on "Incorporation by Reference" [Proposed Rule Sections 1501.6(b), 1501.12 and others], it must be accompanied by requirements to make the referenced materials available at the time of the opening of any accompanying comment periods; agency websites make this very simple. The public should not have to initiate FOIA requests for this important, supporting documentation.

Remove the second sentence in Section 1502.4(d) which basically allows the agencies to avoid offering details on subsequent actions that may have additional impacts. If such an action is warranted to mitigate potential impacts, the public should have access to the details regarding whether and how this subsequent action would achieve the prescribed mitigation.

Proposed Section 1503.3(b) eliminates agency discretion as to whether and how to address comments submitted after the close of the comment period. One never knows from whence important information will come. Remove the last sentence of this section and leave intact the agency discretion.

Leave Sections 1504.3 (d)(3)(e), (f)(3). The agency referral requirements of NEPA are an important part of integrated and coordinated processes, and the agencies' ability to conduct public hearings and take public comment on referred project analyses supports the integration and coordination.

Additionally, the existing language in Proposed Rule Sections 1506.6 (e)and (f) which preserves agency discretion to hold unrequired public hearings and make extra information available to the public should remain intact. We support agency discretion for additional public outreach beyond minimum requirements. Extra efforts to engage and inform the public early in the process help to avoid controversies later that may slow the process down.

Change the language in Proposed Rule Section 1506.6(b)(3)(x) to read "shall not be limited" instead of "may not". While using digital platforms for the dissemination of information to the public saves time and money and makes information accessible to most people, there are still widespread communities with no reliable access to the internet; field offices vetting proposals in these areas must make extra efforts to make all relevant information available to the affected public.

The Proposed Rule does include one element that we see as a benefit to public engagement. Section 1503.4(b) recommending that substantive comments be attached to an FEIS does help to inform the public, albeit too late in the process to allow meaningful impact. If this recommendation were applied to the release of documents in each stage if the process (i.e. scoping comments attached to DEIS or DEA, and comments on drafts attached to final documents), this is an element we could fully support.

V. ALTERNATIVES TO THE PROPOSED ACTION

Analyzing alternatives to the proposed action is essential as there are always a variety of ways of solving a problem or doing a project. There are many variables involved and those need to be compared and balanced with each other to identify the best solution.

An important section of the existing rule reads as follows: Agencies shall…(a) [r]igorously explore and objectively evaluate all reasonable alternatives…". The corresponding section in the proposed rule reads: "Agencies shall…[e]valuate reasonable alternatives to the proposed action".

To ensure every EIS covers the entire range of possible reasonable alternatives and explores all reasonable ways to reduce impacts while accomplishing a project, the language from the current rule should generally be retained.

Any revised rule should also retain language, currently at 1502.14(c), requiring agencies to consider alternatives not within the jurisdiction of the agency, if part of the purpose and need could be met under such an alternative and the impacts would likely be less than with other alternatives under the agency's authority.

VI. EXCLUSIONS FROM NEPA

We are deeply concerned about the proposed reduction in the use of NEPA for projects that currently require the NEPA process to inform and hear from the public, and to analyze potential actions and their impacts. This is proposed through increased use of Categorical Exclusions and decreased requirements for Environmental Assessments (EA's) and Environmental Impact Statements (EIS's).

We request that the Agency meet its stated goal:

> to hold true to its commitment to deliver to decision makers scientifically based, high-quality analysis that honors its environmental stewardship responsibilities while maintaining robust public participation.

Rule Preamble at 27544.

Proposed rule at 1501.6(c). With no EA and FONSI, there is no accountability for agencies to enforce mitigation necessary to keep impacts from becoming significant.

Section 1507.3(c) would encourage agencies to identify in their procedures what projects are exempt from NEPA. This could include proposed non-major federal actions. Id. at (c)(1). An action cannot be excluded from NEPA just because it is considered to be a "non-major" action. Many proposed actions have impacts that may not appear to be significant, but still need analysis in an EA.

The CEQ's existing guidance on formulating rules about Categorical Exclusions warns:

> If used inappropriately, categorical exclusions can thwart NEPA's environmental stewardship goals by compromising the quality and transparency of agency environmental review and decision-making, as well as compromising the opportunity for meaningful public participation and review[1].

The proposed rule's expanded use of CEs will do precisely this, eviscerating the quality and transparency of the agency decision making and the opportunity for meaningful public participation through review and comment. The new rules will allow numerous actions currently analyzed under Environmental Analyses and Impact Statements and subject to scoping and public comment to be implemented with no analysis, no advance notice, and no opportunity to comment. <u>It also increases the use of agency discretion without guidance for minimum requirements</u>. It is reasonable to assume, given the limited budgets and high workloads of the agency, that decision makers will exercise their discretion to avoid extra work that discretional public engagement and analysis would require.

Categorical Exclusion, Environmental Assessments and Environmental Impact Statements are well defined in the current rules and are appropriate to be used as they have been under the status quo. There should be no weakening of existing requirements or processes for evaluating proposed projects. Therefore, remove the proposed new Section 1501.4 Categorical Exclusions.

[1] Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, November 23, 2010.

VII. CUMULATIVE EFFECTS

In the current rule, cumulative impact is defined as:

> impact on the environment which results from the incremental impacts[s] of the [proposed] action when added to other past, present, and reasonably foreseeable future actions, regardless of what other agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant impacts taking place over a period of time.

Existing rule at 1508.7. Cumulative impacts must be disclosed in EIS and EAs, along with other impacts.

It is very important to disclose such impacts to the public and agency decisionmakers because examining only the incremental impacts of a currently proposed action understates the sum of these incremental impacts over time.

Here is one example - a federal agency action to permit a facility that emits pollutants into the air that might not generate significant impacts on its own, but when added to air emissions from existing and foreseeable future facilities, might cause a violation of air quality standards and make the air unhealthy for humans and other mammals.

Another important example are the cumulative impacts that would contribute to climate change, i.e. increasing carbon dioxide in the atmosphere. Such actions might include oil and gas extraction, coal mining and clearcutting (the latter removes trees that absorb carbon dioxide).

In COWPL's experience reviewing three recent proposed public to private land exchanges in Colorado, we have seen unmitigated impacts in all three proposals on the rare and sensitive Harrington's Penstemon and its habitat. This plant exists only in six Colorado mountain counties and its arid, high altitude habitat is fragile. Cumulatively, these exchanges will have a quantifiable impact on the Penstemon's viability as a species.

A possible side effect of the proposed rule change will be the deconstruction of large projects into a series of smaller projects. Individually, these smaller projects may have minimal impacts, but considered together, the impacts might be significant.

Not requiring a careful examination of <u>all</u> impacts, especially cumulative ones, (and possibly encouraging a series of smaller projects) is a violation of the spirit and letter of NEPA. This is unacceptable.

VIII. DOCUMENT LENGTH AND TIMEFRAME

The proposed rule would establish a "presumptive time limit for EAs of 1 year and a presumptive time limit for EISs of 2 years". Preamble, ibid.; proposed section 1501.10(b) would establish these limits. Similarly, proposed section 1502.7 would limit EISs to 150 pages, or to 300 for projects of "unusual scope or complexity".

We do not believe it is appropriate to set such time limits for completing a NEPA document or page limits for the size of the resulting documents. Hard time lines do not consider the range of sizes or critical nature of projects being evaluated. Artificial deadlines may cause agency staff to rush completion of data gathering, analysis, and document writing in order to meet the completion date. The result may be an incomplete and/or inaccurate analysis of impacts and ways to avoid or mitigate them. It could also lead to a less than full analysis of reasonable alternatives.

Page limits may not necessarily be a time saver as it could take a preparer longer to edit/shorten the original scientific study to fit the page limit than to include the whole study in the document.

Imposing shorter timeframes on development of NEPA documents is inappropriate and should not be part of the proposed rule. There are many reasons the NEPA work could take longer, for example, shortage of agency staff and lack of agency funding. The NEPA analysis needs to be thorough and complete and should not be compromised as a result of other factors.

IX. USE OF STUDIES BY OTHER AGENCIES

Per the proposed rule agencies may use each other's documents, however there is no requirement that the other Agencies' documents are directly relevant to the new proposal.

> (j) Eliminating duplication with State, Tribal, and local procedures by providing for joint preparation of environmental documents where practicable (§ 1506.2), and with other Federal procedures by providing that agencies may jointly prepare or adopt appropriate environmental documents prepared by another agency (§ 1506.3).

Proposed Section 1506.3

We object to the proposed use of other Agencies' documents as described in this section and elsewhere in the proposed rule, for example the blanket discretion to use old studies per section 1506.3 Adoption.

X. INTEGRITY OF NEPA DOCUMENTS

Existing Section 1502.13 states:

> The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

Proposed Section 1502.13 reads as follows:

> The statement shall briefly specify the underlying purpose and need for the proposed action. When an agency's statutory duty is to review an application for authorization, the agency shall base the purpose and need on the goals of the applicant and the agency's authority.

The proposed added (and deleted) language is egregious, making public interests subservient to private interests. Surely our public lands are managed based on the purpose, needs and goals of the agency serving as an agent of the public and working in the interest of the public? In addition, the existing section describes how to specify the purpose and need for the alternatives as well as for the primary proposed action. This indicates that the NEPA process is intended to analyze alternatives, not just one proposed action. The NEPA process is also intended to determine whether a proposal is in the public interest, not in the interest of a private applicant. Please leave Section 1502.13 as it is currently.

The current rules regulate conflicts of interest. The proposed rule does not, and will create conflicts by giving proponents control over the NEPA process:

> Applicants and contractors would be able to assume a greater role in contributing information and material to the preparation of environmental documents, subject to the supervision of the agency.

Preamble at 1705.

The proposed rule has the following language, which is similar to the existing rule, for information submitted by an applicant: "The agency shall independently evaluate the information submitted and shall be responsible for its accuracy." Proposed rule at 1506.5(a).

But this is not sufficient to ensure that a contractor doesn't have a financial stake in the outcome of the agency's NEPA and decision-making processes. Also, if a contractor hired by the applicant is preparing an entire EIS, it means the agency might not be directly involved in the document preparation and maybe not even in the selection and preparation of supporting documentation. Thus, the agency's ability to influence and evaluate the information used in the document might be limited.

We believe it is appropriate and necessary, given the increasing use of contractors for NEPA preparation, to require these contractors to sign a disclosure statement certifying they have no interest in the outcome. The language from the existing rule must be retained.

XI. REMEDIES

We strongly object to the Proposed Section 1500.4(3)(d) allowing agencies to require bonds for administrative or judicial review. While this is currently allowed under certain circumstances for judicial review, it is done at the discretion of the courts, which have no

vested interest in the outcome, and therefore, no vested interest in the disposition of the bond money. The Proposed Rule allows the agencies' a financial stake in the outcome of review processes. Moreover, it is an inequitable provision favoring moneyed interests. This "pay to play" provision is a deterrent to public engagement by small interested parties and will discourage individuals such as aggrieved neighbors and small, community based, grass-roots organizations from pursuing administrative review; it is much less likely to influence decisions to pursue remedies by corporations and large advocacy groups. Remove this section.

XII. CONCLUSION

The outcome of implementing these rule changes could potentially increase costs to the Agency in reacting to unanticipated project outcomes and negative public reactions or lawsuits due to lack of ability to be heard up front.

The proposed rule does not solve the problems cited by the Agency and instead would result in many negative impacts. It must be withdrawn.

Sincerely,

Suzanne Jackson, Colorado Wild Public Lands Staff
Franz Froelicher, Jean Perry, James Katzenberger, Anne Rickenbaugh, Stefanie Davis and Hawk Greenway; Colorado Wild Public Lands Board of Directors