

March 10, 2020

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

Re: 58 Great Lakes and Midwest Groups Comment Letter on Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act - CEQ-2019-0003

Dear Chair Neumayr:

Thank you for the opportunity to comment on the Council on Environmental Quality's (CEQ) proposed amendments to its National Environmental Policy Act (NEPA) regulations. Although some of the undersigned Midwest and Great Lakes organizations are joining more detailed technical comments responding to the proposed rules, these groups are taking this opportunity to emphasize how the proposed regulations would significantly harm the Great Lakes region and to highlight several critical concerns with the proposed rule.

Specifically, this letter raises three overarching concerns with the proposed rule:

- 1. The proposed regulations attempt to inappropriately limit the applicability and scope of the NEPA analysis;**
- 2. The proposed regulations would interfere with the integrity of, and limit the value of, the environmental review process; and**
- 3. The proposed regulations try to restrict input from the public and other agencies and interfere with judicial review.**

Introduction

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, is the bedrock environmental law in this country. It requires federal agencies to engage in careful and informed decision-making. It is the umbrella for consideration of numerous substantive laws, such as the Clean Air Act, Clean Water Act, Endangered Species Act, Migratory Bird Treaty Act, and protections under Section 4(f) of the United States Department of Transportation Act.

The NEPA process relies on three steps to distill a clear understanding of alternatives and consequences. First, an agency must define the purpose and need of a proposed project in a way that allows them to consider reasonable alternatives.¹ Second, an agency must “rigorously explore and objectively evaluate all reasonable alternatives” for achieving the purpose and goal of the project. §1502.14(a). Finally, the agency is required to take a “hard look” at the environmental consequences of the reasonable alternatives.² The goal is to “encourage productive and enjoyable

¹ *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997).

² *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983).

harmony between man and his environment” and to “prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321.

NEPA is not meant to create process and paperwork for its own sake. Rather, it helps agencies make fully informed and well-considered decisions by ensuring that significant environmental impacts are not overlooked or underestimated, and alternative methods for addressing an identified need are considered.³ Further, the process provides important information about a project to the public, which may then, in turn, assist the agency in making better decisions through the comment process.⁴

The CEQ’s current NEPA regulations are thoughtful, well-designed, and provide for successful implementation of NEPA. They have provided important guidance to federal agencies for decades. While the undersigned groups do not oppose limited updates to the regulations to take account of technological advances or to acknowledge the role of Tribes, this proposed rule goes far beyond that. This proposal seeks to roll back every major aspect of the NEPA requirements and process, from what types of actions NEPA applies to all the way through judicial review of NEPA compliance. It dismantles the three pillars that ensure we decide collectively and wisely, so that projects can complement rather than sabotage the health and wellbeing of communities, our region, and our nation. This is especially concerning in the face of the worsening climate crisis and other environmental stressors. Full and fair consideration of environmental impacts and informed decision-making is more important now than ever.

The undersigned groups are focused on protecting the Midwest and the Great Lakes. Accordingly, we are deeply concerned about how the proposed regulatory changes will impact the region’s communities and natural resources. The Great Lakes comprise the largest freshwater ecosystem on Earth—containing 20% of the world’s freshwater supply—and provide drinking water to over 40 million people. The Great Lakes watershed supports a wealth of wildlife and plants that depend on clean water, and the commercial and recreational fishing in the Great Lakes alone injects over \$5 billion a year into the economies of the surrounding states.

The NEPA process is critical to ensure projects do not exacerbate the numerous environmental challenges faced by the Midwest. Climate change is a significant threat to the Great Lakes ecosystem and the surrounding communities and economies that rely on them for safe drinking water, commerce, industry, and recreation. The changing climate is already affecting water levels, encouraging the spread of invasive species, and causing eutrophication and the spread of toxic algal blooms. Our nation’s breadbasket suffers record flooding and crippling drought, in a region where large areas of farmland are already being lost to development. Our farms face devastation,⁵ with repeated losses when they can least afford it.⁶

³ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

⁴ *DuBois v. U.S. Dep’t of Agriculture*, 102 F.3d 1273, 1285-86 (1st Cir. 1996).

⁵ Humeyra Pamuk, P.J. Huffstutter and Tom Polansek, *U.S. Farmers Face Devastation Following Midwest Floods*, Reuters, Mar. 20, 2019, <https://www.reuters.com/article/us-usa-weather-agriculture/us-farmers-face-devastation-following-midwest-floods-idUSKCN1R12J0>.

⁶ Mitch Smith, Jack Healy and Timothy Williams, *‘It’s Probably Over for Us’: Record Flooding Pummels Midwest When Farmers Can Least Afford It*, N.Y. Times, Mar. 18, 2019, <https://www.nytimes.com/2019/03/18/us/nebraska-floods.html>.

Other environmental challenges include rapid loss of biodiversity and habitat, large-scale infrastructure projects that sacrifice public health and quality of life for the benefit of special interest groups, and continued development of fossil-fuel infrastructure that leads to air and water pollution, with the brunt often felt by our most vulnerable communities. However, there are also significant opportunities to encourage actions that support an advanced energy economy and a more sustainable future. Strong NEPA regulations are necessary to encourage innovative solutions. Instead, CEQ's proposed regulations would exacerbate existing problems in the Great Lakes region and encourage agencies to ignore alternatives that make our nation stronger, healthier, and more resilient.

1. The Proposed Regulations Attempt to Inappropriately Limit the Applicability and Scope of the NEPA Analysis.

The proposed regulations try to improperly narrow NEPA's applicability and scope. First, the proposed rule would seemingly restrict what constitutes a major federal action. For example, the rules appear to suggest that NEPA may not apply if a federal agency action is "in part" "non-discretionary." Proposed § 1501.1(a)(2), 1507.3(c)(2). If an action is only non-discretionary *in part*, that means the agency does have some discretion in the relevant action, and NEPA must apply. The rule also attempts to give agencies free rein to decide on their own whether NEPA compliance would be "inconsistent with Congressional intent" (proposed § 1501.1(a)(4), 1507.3(c)(5)) or whether other analyses or processes "serve the function" of NEPA. Proposed § 1501.1(a)(5), 1507.3(b)(6). This is entirely inconsistent with NEPA's mandate that agencies comply with NEPA "to the fullest extent possible." 42 U.S.C. § 4332.

The proposed regulations would also limit the alternatives that an agency need consider in three ways: (1) The rule directs agencies to determine the Purpose and Need for the action based on the applicant's goals and the agency's statutory authority (proposed §1502.13); (2) The rule strikes the requirement that agencies "rigorously explore and objectively" evaluate "all" reasonable alternatives (§ 1502.14(a)); and (3) The rule provides that agencies no longer have to consider alternatives outside the jurisdiction of the lead agency. § 1502.14(c).

The alternatives analysis is the "heart" of the NEPA review, although the proposed rule rewrite attempts to change the tone of the alternatives analysis by striking this language. Proposed § 1502.14. Improper narrowing of this analysis undermines the entire purpose of NEPA. A Midwest example is provided in *Simmons v. U.S. Army Corps of Engineers*. The court required the agency to re-do its analysis, using an appropriately broad purpose and considering "all reasonable alternatives." In other words, the agency had to consider alternatives to damming up Sugar Creek for a reservoir that would "drown a substantial area" and cause the "transformation or obliteration of the riverine habitats of several species."⁷ The agency relied on the NEPA analysis in ultimately denying a Clean Water Act permit due to the existence of less-damaging alternatives.

History has demonstrated why it is vital to study alternatives outside of the lead agency's jurisdiction to consider the best solution. In the early 2000s, the Illinois Department of Transportation proposed the construction of the Prairie Parkway, a new highway in northern Illinois. The Department only proposed two alternatives, which were routing variants of the same

⁷ *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997).

highway project. The NEPA process provided the public with time and valuable information to collaborate on and propose a third reasonable alternative to improve the network of local roads in the area. This alternative was built sooner than the Prairie Parkway would have been, reflected broad community support, better addressed the underlying congestion and mobility issues, cost less money, and was less environmentally destructive. This type of solution would be precluded by the proposed regulations.

The proposed rule also attempts to limit the type of environmental impacts that an agency can study and consider by removing the requirement to consider indirect and cumulative impacts. § 1508.7, 1508.8. Cumulative and indirect impacts are of great significance, and in many circumstances, may reflect even greater harm than direct impacts. For example, if the Forest Service allows timber cutting in a specific area in the Chequamegon-Nicolet National Forest in northern Wisconsin, but does not consider the cumulative impacts to wildlife from this loss of habitat in combination with habitat loss from other timber sales nearby, it misses a large piece of the picture. If the Bureau of Land Management authorizes oil and gas drilling on federal land in North Dakota, but fails to consider the cumulative air quality and climate impacts from the resulting oil and gas being burned, this analysis would also miss significant impacts. Death by a thousand cuts is just as lethal as from a single blow.

In one case, strong public participation in the NEPA review of widening a road through the first forest preserve in the nation exposed that the leading alternative could have led to the indirect effect of polluting groundwater that fed a nearby U.S. Army Corps wetland mitigation site and spraying road salt into an Illinois Nature Preserve area. Consideration of on-the-ground data submitted in public comments led to alternatives that better protected the Illinois Nature Preserve and prevented the loss of the high-quality wetlands.

A Seventh Circuit decision emphasized the importance of evaluating the cumulative impacts of a proposed road on the Milwaukee region in light of several other planned road projects. To fail to consider such would “facilitate suburban sprawl and its associated environmental effects, such as the destruction of natural areas.”⁸ By only studying the effects that could be expected to occur within the immediate vicinity of a proposed road, agencies “run the risk of overlooking an environmental effect that emerges on a regional level.”

Furthermore, the proposed elimination of the requirement to consider cumulative effects will significantly hinder considerations of environmental justice impacts. CEQ’s Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses (April 1998) demonstrates the long-recognized importance of understanding the relationship between multiple environmental exposures and cultural, human health, economic and social impacts that disproportionately affect minority, low-income, and tribal communities. The 1998 CEQ guidance concluded that agencies “should consider these multiple, or cumulative effects, even if certain effects are not within the control or subject to the discretion of the agency proposing the action.”

⁸ See *Swain v. Brinegar*, 517 F.2d 766, 777 (7th Cir. 1975) (explaining that highway construction has “a profound influence on population growth, high-density urbanization, industrial expansion, and resource exploitation” (internal citations and quotations removed)). See also CEQ’s *Considering Cumulative Effects Under the National Environmental Policy Act* (Jan. 1997) at 2, Table 1-1 (listing “cumulative commercial and residential development and highway construction associated with suburban sprawl” as a potential cumulative effect of FHWA action).

Eliminating the cumulative effects analysis and related guidance opens the door to the precise kinds of environmental harms from which NEPA was intended to protect our most vulnerable populations.

2. The Proposed Regulations Would Interfere with the Integrity of, and Limit the Value of, the Environmental Review Process.

The proposed regulations would also significantly interfere with the integrity of the environmental review process, and accordingly, limit its value. This is especially concerning because the rule is written to actually prohibit agencies from going beyond its limited requirements, even if an agency wants to do a better analysis that more fully complies with NEPA. Proposed § 1507.3(a).

First, the regulations would eliminate conflict of interest restrictions and allow applicants (and other entities with a financial interest in the project) to carry out the NEPA review for their own projects. § 1506.5(c). This would put the fox in charge of guarding the hen house. It is not realistic to expect applicants to be unbiased in a review of their own projects. While federal agencies would still be ultimately responsible for the content of the NEPA documents, the proposed rule impermissibly attempts to let agencies pass off more of their statutory responsibilities.

Second, CEQ proposes to revise the regulations to suggest that agencies may be more lax about the information used to support their analyses. Proposed § 1502.24 would add the following language: “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.” While it is, of course, appropriate for agencies to use existing reliable information, in most instances, new scientific and technical research *would* be necessary for an adequate NEPA analysis. We are also concerned that this amendment encourages agencies to rely on “desktop” reviews of natural resources for their analysis, even when on-the-ground studies would yield more comprehensive and accurate information. In other words, it could encourage agencies to use things like aerial imagery to determine whether wetlands would be impacted by a project, rather than requiring actual on-the-ground surveys. Reliance on “remotely gathered information” will in most cases be far from adequate for a meaningful analysis of the affected environment and potential impacts.

Over-reliance on remotely gathered information and pre-generated GIS-based spatial layers is already problematic. An ongoing Environmental Assessment for a proposal to widen a road through a 6,000-acre nature preserve area relied on “existing data” that omitted numerous conservation easements and more recent state-protected natural land. The route alternatives then had to be re-designed. This expense and delay could have been avoided by “ground truthing” the information and consulting with stakeholders earlier on in the process.

Third, the proposed regulation would roll back restrictions on actions that can be taken during the NEPA process, allowing the acquisition of land interests and equipment. Proposed § 1506.1(b). This is wholly inappropriate and undermines the purpose of NEPA: to analyze and consider impacts and alternatives before action is taken. The acquisition of property improperly tips the balance in favor of building the proposed project and away from full and fair analysis of alternatives, including the no-action alternative. This is especially true when it leads to political

pressure pushing for the original proposal, which then essentially becomes a pre-determined outcome.

3. The Proposed Regulations Try to Restrict Input from the Public and Other Agencies and Interfere with Judicial Review.

CEQ's proposed regulations also attempt to restrict public input and impermissibly interfere with judicial review. The proposed rule no longer requires agencies to "respond to" comments. § 1502.9. Instead, it can "address" comments by summarizing the comments and then certifying that it has considered the public comments. Proposed §§ 1502.17, 1502.18. Under this approach, agencies are less likely to carefully and thoughtfully review public input. Indeed, it all but invites government agencies to make the essential process of public input a box-checking exercise.

The rule goes even further by attempting to limit judicial review. The rule states that after the summary of comments is published, members of the public have only 30 days to raise any objections. Proposed § 1503.3(b). Any comments not raised in that time are deemed forfeited. Even further, the agency's certification that it properly considered public comments would create a "conclusive presumption" that it actually did so. Proposed § 1502.18. These are illegal attempts to limit the arguments that can be raised in court, and to create presumptions of compliance. An agency does not have the authority to impair judicial review of its own, or other agencies', decisions. This is an attempt to usurp judicial power and violates the separation and balance of governmental powers.

While some agencies may conduct thoughtful scientific analyses of environmental impacts, there are numerous examples of agencies ignoring impacts in a way that demonstrates the need for meaningful judicial review. For example, the Illiana Tollway in Illinois was proposed to run along the border of the Midewin National Tallgrass Prairie, which is renowned for globally imperiled habitat for grassland birds that are in steep decline. The Draft Environmental Impact Statement claimed that light, noise, and air pollution from the tollway would not negatively impact the Tallgrass Prairie because "it is commonly believed that relatively mobile birds and wildlife would move away from such sources." This conclusion contradicted known science and years of data showing that these birds could not simply relocate to another area and would likely be lost. The agency also asserted that lighting along the tollway could be a conservation benefit because it would drive away federally threatened Northern Long-eared bats that otherwise could be struck and killed by vehicles. Driving a threatened species away from part of its habitat should never be considered an environmental "benefit."

For another Illinois transportation project, the agency found that when bridge pylons were built in a river, mussels would move out of the way. Mussels have very limited mobility and would not be easily able to move out of the way of construction; even if they could, mussels are very intolerant of degraded water quality and would still be impacted by the resulting sedimentation. The agency similarly asserted eighty-one stream crossings would have no bearing on state-endangered fish because they would swim out of the way. In other words, the agency ignored the impacts from destroying and disrupting the habitat of an already endangered species. These kinds of statements demonstrate the importance of meaningful judicial review.

The regulation attempts to limit input even by other government agencies. For example, a cooperating agency is required to “limit its comments to those matters for which it has jurisdiction by law or special expertise.” Proposed § 1501.8(b)(7). This is bad policy. If a cooperating agency has information or ideas about alternatives or impacts, this information should not be excluded from consideration by the lead agency simply because it is not within the cooperating agency’s legal jurisdiction or special expertise. This is simply another attempt to weaken the environmental review process.

Conclusion

CEQ’s proposed rule would create bad policy and undermine the purpose of NEPA, and it goes beyond CEQ’s legal authority. Furthermore, The revisions CEQ proposes would actually have the opposite effect of that intended—the revisions would increase litigation, slow down project delivery, and lead to more uncertainty. Virtually every word in NEPA has been litigated over the past several decades, and the body of collective understanding memorialized in CEQ’s current regulations ensure predictability in the current process. The dramatic changes proposed in these rules will lead to years of additional litigation not only over the rules themselves but the “domino effect” of resultant regulatory changes by numerous federal agencies, and ultimately, their application to particular projects.

The undersigned groups strongly oppose the rule and urge CEQ to reconsider its approach in revising its NEPA regulation.

Sincerely,

Active Transportation Alliance
Advocates for a Clean Lake Erie
Alliance for the Great Lakes
Bird Conservation Network
Center for Neighborhood Technology
Clark Street Beach Bird Sanctuary, Evanston IL
Clean Water Action Minnesota
Concerned Citizens of Cattaraugus County
Cranbrook Institute of Science
Detroit Audubon
Environment Michigan
Environment Minnesota
Environmental Law & Policy Center
Evanston Environmental Association
FLOW
Freshwater Future
Friends of the BWCA
Friends of the Forest Preserves
Friends of the Rouge
Holy Spirit Missionary Sisters, USA-JPIC
Hoosier Environmental Council

Huron River Watershed Council
Illinois Council of Trout Unlimited
Illinois Environmental Council
Illinois Paddling Council
Illinois PIRG
Indiana Wildlife Federation
Izaak Walton League of America - National Great Lakes Committee
Izaak Walton League of America - Ohio Division
Izaak Walton League of America Pa.Divison
Lake County Audubon Society
League of Women Voters of Indiana
League of Women Voters of Michigan
League of Women Voters of the United States
League of Women Voters of Wisconsin
League of Women Voters-Lake Michigan Region
Michigan Wildlife Conservancy
Midwest Sustainability Group
Milwaukee Riverkeeper
New York State Division, Izaak Walton League of America
Onondaga Audubon
Openlands
Religious Coalition for the Great Lakes
Respiratory Health Association
River Alliance of Wisconsin
Save Lake Superior Association
Save Our Sky Blue Waters
Save the Dunes
Schlitz Audubon Nature Center
Sierra Club - Illinois Chapter
The Watershed Center Grand Traverse Bay
The Wetlands Initiative
Tip of the Mitt Watershed Council
Transportation Riders United (TRU)
Will County Chapter of the Illinois Audubon Society
Wisconsin Metro Audubon Society
Wisconsin Public Interest Research Group Foundation
Wisconsin Wetlands Association