



Board of County Commissioners

970-328-8605

970-328-8629(f)

eagleadmin@eaglecounty.us

www.eaglecounty.us

March 10, 2020

Mary B. Neumayr, Chair
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Submitted via web portal: <https://www.regulations.gov/document?D=CEQ-2019-0003-0001>

RE: Eagle County Comments on Proposed Rule “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,” Docket ID No. CEQ-2019-0003-0001

Dear Chair Neumayr,

Thank you for considering Eagle County’s comments regarding the Council on Environmental Quality’s proposed changes to its National Environmental Policy Act (NEPA) regulations. Federal agencies are responsible for managing extensive public lands located within Eagle County. These agencies are critical partners, as our community relies on the public lands they manage for our quality of life. These areas provide clean water, a healthy environment, and opportunities for recreation that are a major economic driver for our community. The careful stewardship of these lands is critical to the physical and economic well-being of our community. NEPA has been vital to ensuring coordination of local, state and federal jurisdictions with the public and engaged stakeholders, by requiring a “look before you leap” approach using the best available science to consider not just the environmental, but the social, cultural, and economic impacts of, and alternatives to, proposed actions.

Eagle County understands the need for more efficient NEPA processes and finds that the proposed rule offers some useful measures to create more efficient NEPA procedures, especially if they are paired with additional funding and staffing. Examples include: enhanced coordination with federal agencies and cooperating agencies, many of whom are often local governments; and a joint single Environmental Impact Statement (EIS) between multiple agencies taking proposed actions for the same project. As a lack of resources is cited as the primary reason for delays in the development of EISs and Environmental Assessments (EAs),¹ Eagle County believes these changes should be paired with increased staffing and funding for CEQ and federal agencies most commonly administering NEPA in order to attain the efficiencies envisioned in this rulemaking.

¹ Toni Horst et al., *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance*, AECOM for U.S. Treasury, 1 (Fall 2016), <https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf> (accessed March 3, 2020).



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Eagle County is concerned that elements of this proposed rule would reduce public and local government input and reduce the analysis of impacts from proposed agency action, especially indirect and cumulative impacts. These elements erode the fundamental purpose of NEPA and may lead to agency decisions that fail to disclose or take into account the full range of impacts of federal actions. Eagle County recommends striking portions of this rulemaking which erode foundational goals of NEPA, as outlined below.

- 1. Proposed 40 C.F.R. § 1508.1(g) would no longer require analysis for cumulative impacts or indirect impacts.** Disclosing cumulative and indirect impacts is one of the most important tasks of NEPA, as these are impacts not immediately obvious to decision makers and the public. Climate change is one of the classic examples of a cumulative impact that will be ignored by NEPA if these rule changes go into effect. Climate change is already affecting Eagle County's recreation and tourism economy and available water supply, with regional temperatures increasing, spring snowmelt coming one to four weeks earlier than it did thirty years ago, and reduced stream flows in the Colorado River.² Because of the long-term, compiling nature of cumulative impacts, these are often the greatest impacts to communities and the environment and should not be omitted from NEPA analysis. Eagle County is committed to taking climate action and we expect no less from our federal agency partners.
- 2. Proposed 40 CFR § 1501.3(b) clouds agency evaluation of "significant" federal action.** Statute requires an EIS for any "major Federal actions significantly affecting the quality of the human environment..." 42 USC § 4332(C)(emphasis added). Current regulations define "significantly" to require considerations of both context and intensity, with further guidance to evaluating each. 40 CFR § 1508.27. The proposed rule eliminates the intensity and context focus of NEPA, and any definition of "significantly" at all. The proposed rule instead broadens agency discretion to determine project significance, specifying that "in considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action" Proposed 40 CFR § 1501.3(b). This language is vague and fails to provide any guidance on how to evaluate significance under NEPA. This proposed rule change should be omitted in favor of the existing definition of "significantly."
- 3. Proposed 40 CFR § 1508.1(q) would exclude agencies from NEPA if "minimal" Federal funding or involvement.** NEPA applies to any "major Federal actions," as defined in 40 CFR § 1508.1(q). 40 CFR § 1501.1(a). The proposed rule would amend the definition of "major federal action" to "not include non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project." Proposed 40 CFR § 1508.1(q). This change could lead to significant narrowing of projects that are subject to NEPA review, and essentially conduct NEPA-like analysis of a project's impacts to determine whether impacts are "minimal," outside of the public NEPA process. Also, this proposed provision is certain to create

² Stephen Saunders and Tom Easley, *Climate Change in the Headwaters: Water & Snow Impacts*, Rocky Mountain Climate Org. & NWCCOG, 2018, available at <http://nwccog.org/wp-content/uploads/2018/02/Climate-Change-in-the-Headwaters.pdf>.



significant litigation over the ambiguity around the meaning of “minimal” and whether an agency “cannot control the outcome.”

4. Proposed 40 CFR §§ 1502.13, 1502.14, 1508.1(z) would weaken the purpose and need statement and alternatives analysis. During formulation of the EIS, the proposed rule would allow a federal agency to “base the purpose and need on the goals of the applicant.” Proposed 40 CFR §1502.13. Adopting the purpose and need for federal action as a project proponent’s goals is concerning, as it may limit the alternatives that are analyzed. The federal agency should adopt its own independent analysis, not that of the project proponent. Additionally, the proposed rule would narrowly permit consideration of only alternatives that are “economically and technologically feasible” for the project proponent. Proposed 40 C.F.R. §§ 1502.14, 1508.1(z). In other words, the proposed rule change would permit agencies to ignore alternatives that meet public, environmental, land management, and other goals along with the project proponent’s goals. Without disclosing and analyzing varied alternatives, decision makers will not understand whether the preferred action is the best overall decision that considers public benefits.

5. Proposed 40 CFR §§ 1501.5(e), 1501.10(b), and 1502.7 impose strict timelines and page limits that favor efficiency over NEPA goals. The proposed rules institute tight timelines for EISs (2 years) and EAs (1 year). Proposed 40 C.F.R. § 1501.10(b). These timelines are a new imposition to the NEPA process and may be unrealistic for certain projects. Often, the process which identifies the “scope” of issues that need to be analyzed (the “scoping process”) can take upwards of a year. These timelines would rush an EIS or EA to completion without even having a full understanding of what issues and impacts need to be analyzed to fully disclose impacts of a proposed action. The proposed rules allow for an extension of time, but only after approval from a senior agency official. Proposed 40 CFR § 1501.10(b-c). Because the length of time will already be nearly impossible to achieve, especially for the most complex of projects, it’s difficult to believe that such an approval process will lead to anything but further backlogging of EISs and EAs.

While the page numbers in the proposed rule are the same as the recommended limits in the current regulation (75 pages for an EA, 150 for an EIS and 300 for an EIS of particular complexity), the proposed rule makes these page limits a mandatory presumption. Without adequate funding and staffing to complete these EISs and EAs quickly and succinctly, it’s difficult to imagine these limits are attainable, especially in the most complex and impactful projects. And like the time limits, the page limits can be overridden, but only with the significant hurdle of senior official approval. The current rule’s similar page limits without creating additional bureaucratic backlogs should be maintained.

Alternatively, Eagle County may be able to support the page limit and time limit with a pathway for expanding those timelines and lengths given just cause. However, we would request additional information on whether these limits are achievable from the perspective of the various agencies conducting NEPA processes on the ground and with additional evidence that the approval process from the senior agency official will not contribute to NEPA inefficiencies.



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6. Risking conflicts of interest in preparation of environmental reviews. Under proposed rule 40 C.F.R. § 1506.5(c), companies would be allowed to write environmental impact statements on their own projects, and federal contractors would no longer need to disclose conflicts of interests or financial stakes in the projects they are reviewing. This would increase the potential for the analysis to be skewed to minimize a project's damage, and would decrease public confidence in the impartiality of the analysis. NEPA should improve, not diminish, the transparency of federal decisions.

Conclusion. While the current NEPA regulations are not perfect, they have largely achieved the twin goals of requiring agencies to look before they leap and of permitting the public a voice in decisions that impact their communities, their air, their water, and wildlife. We believe that the proposed regulations fail to fully live up to these goals. We therefore request that the specific provisions identified above be stricken from the proposed rule.

Please feel free to contact Maureen Mulcahy, Environmental Policy Planner, with any questions: maureen.mulcahy@eaglecounty.us or (970) 471-8830.

Sincerely,

Board of County Commissioners

Kathy Chandler-Henry

Chair

Matt Scherr

Commissioner

Jeanne McQueeney

Commissioner