

# Commonwealth of Pennsylvania



DEPARTMENT OF  
ENVIRONMENTAL PROTECTION

DEPARTMENT OF  
CONSERVATION & NATURAL RESOURCES

March 10, 2020

Edward A. Boling  
Associate Director for the National Environmental Policy Act  
Council on Environmental Quality  
730 Jackson Place NW  
Washington, DC 20503

Attn: Docket No. CEQ-2019-0003-0001

Re: Update to the Regulations Implementing the Procedural Provisions of the National  
Environmental Policy Act (January 10, 2020).

Dear Mr. Boling:

The Pennsylvania Department of Environmental Protection (DEP) and the Department of Conservation & Natural Resources (DCNR) submit the following comments in response to the Notice of Proposed Rulemaking entitled *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, published by the Council on Environmental Quality (“CEQ”) on January 10, 2020 (85 FR 1684).

As part of these comments on the proposed rulemaking, DEP and DCNR incorporate by reference the contemporaneously filed comment letter submitted by the Attorneys General of the States of California, New York, Washington, the District of Columbia, and other state attorneys general.

The DEP and DCNR appreciate the opportunity to comment on this proposed rulemaking but are disappointed that the federal administration continues to change critical aspects of regulations at the expense of the environment. First and foremost, it is important to reaffirm the purposes of the National Environmental Policy Act (NEPA), stated below in the enabling legislation’s preamble (NEPA § 2, 42 USC § 4321):

*The purposes of this Act are: 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*

Secretary

Rachel Carson State Office Building | P.O. Box 2063 | Harrisburg, PA 17105-2063 | 717.787.2814 | [www.dep.pa.gov](http://www.dep.pa.gov)

*natural resources important to the Nation; and to establish a Council on Environmental Quality.*

NEPA provides an essential process for citizens and policymakers to fully analyze and review the environmental, cultural, and other cumulative impacts of a proposed project on our natural resources and local communities. NEPA is often times the only means for which state, county, and local stakeholders can provide substantive input on federally-funded projects.

In Pennsylvania, pursuant to the Environmental Rights Amendment to the Pennsylvania Constitution, all public natural resources are held in trust for the benefit of all the people. Pa. Const. art. I, § 27 (The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.)

In *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017), the Pennsylvania Supreme Court reaffirmed that Article I, Section 27 creates fundamental individual rights to ensure that neither private nor public actions are contrary to the public trust. The current procedural structure of NEPA is concomitant with the Pennsylvania Environmental Rights Amendment. The DEP and DCNR do not see a need for the CEQ to change its process and potentially undermine the public trust.

When comparing the CEQ's stated rationale for the proposed changes – reducing paperwork and delays, and promoting better decisions consistent with section 101 of NEPA – with the proposed changes themselves, the changes demonstrate minimal concern for environmental impact, public health and safety, and transparency, and do not promote better decisions or even decisions consistent with NEPA's stated purpose. Instead, they expediate the regulatory process and fast track development projects at the expense of a comprehensive environmental analysis.

The specific issues and concerns that DEP and DCNR have are listed in detail below.

### **Length of the Comment Period**

When federal agencies prepare environmental analyses under the NEPA framework for actions that occur in Pennsylvania, DEP and DCNR routinely submit comments. This is often the only avenue by which DEP and DCNR can ensure that the interests of the Commonwealth of Pennsylvania are reflected in the federal government's decision. The environmental laws of Pennsylvania at times have significant differences from federal law, and without Pennsylvania-specific comments, the federal government would only consider those matters that fall within the scope of federal law.

In the proposed rulemaking, section 1503.1(b) states that “An agency shall request comments and provide a 30-day comment period on the final Environmental Impact Statement's submitted alternatives, information, and analyses section.”<sup>1</sup> If DEP or DCNR should disagree with the

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<sup>1</sup> 85 FR 1722 1503.1(b). *Compare with* 40 CFR § 1503.1(b), which allows comments “before the decision is finally made” and “before the final decision.” Hereinafter, all references to the Federal

characterization or analysis of a project, for example one subject to Transportation or General Conformity Programs within the Air Quality context, a 30-day period is an inadequate amount of time to develop expert agency comments and have them approved for submittal. Comments made to federal agencies by the Commonwealth of Pennsylvania undergo a thorough review at many levels of state government; and as in the federal government, this may include interagency cooperation. The DEP and DCNR believe that this arbitrary time limit should be removed. If not, then a more realistic and productive public comment period – allowing for drafting, review, and approval – would be 60 to 90 days.

### **Accelerating the Process**

The proposed rulemaking would establish a default time limit of two years to prepare an Environmental Impact Statement (“EIS”) and of one year for an Environmental Assessment (“EA”).<sup>2</sup> This would restrict the ability of the federal government to conduct thorough review of proposed projects. According to CEQ’s own data, the average time to complete an EIS is 4.5 years.<sup>3</sup> The proposal would be cutting this to less than half.

These narrow time limits would obstruct the development of detailed analysis, reduce public protection, and limit the exchange of information in complex situations that warrant greater care. This is particularly critical for Environmental Justice Areas, where communities have historically been less engaged, involved, and aware with respect to government procedures and environmental factors affecting their health. These time limits would restrict the subject matter of NEPA reviews, and thereby restrict the subject matter upon which DEP could comment.

The CEQ also stresses the length and timeline of the EIS/EA over the substance of the studies or the quality of the review. The NPRM would limit EAs to 75 pages and EISs to 300 pages. These studies are intended to be comprehensive so that they can inform key stakeholders and decision makers on the cumulative impacts of a proposed project. The CEQ does not provide a legitimate rationale for connecting the scope of the required studies with a page limitation.

Because they directly impact DEP and DCNR’s own work, DEP and DNCR recommend removing the default time limits and page limitations for Environmental Impact Statements and Environmental Assessments.

The proposed rulemaking would also promote the use of modern technologies for information sharing and public outreach.<sup>4</sup> DEP and DCNR support this goal as strongly in the public interest.

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Register (“FR”) indicate the proposed rulemaking, and all references to the Code of Federal Regulations (“CFR”) indicate the existing regulations.

<sup>2</sup> 85 FR 1717 1501.10(b); *compare with* 40 CFR § 1501.8, which requires the lead agency to set time limits if the applicant for the proposed action requests them, but without default values. The consideration of time limits must involve eight enumerated factors, seven of which are retained in the proposed rulemaking.

<sup>3</sup> Executive Office of the President, Council on Environmental Quality, Environmental Impact Statement Timelines (2010-2017) (December 14, 2018).

<sup>4</sup> 85 FR 1721 1502.24 (broadening the list of appropriate data sources); 85 FR 1722 1503.1(a)(2)(v) (the agency shall request the comments of the public “in a manner designed to

However, the proposed rule changes significantly reduce transparency in the NEPA process overall. The agencies would no longer be required to publish a Notice of Intent during the scoping process. The CEQ's recommendation to codify the purpose of NEPA based on a statutory language, presidential directives, legislation, and "certain case law" would intentionally limit the scope of a NEPA study, further rubber-stamp the process, and could significantly limit the ability for stakeholders to meaningfully participate in the NEPA process as well as litigate the implementation of NEPA. These changes, along with the reduced timelines noted above, would limit the time for the public and key stakeholders to prepare comments and responses to the proposed project.

### **Limiting Applicability**

New criteria are proposed in section 1501.1 to determine whether NEPA review applies to a particular federal action.<sup>5</sup> The first required element is that the federal action be "major." The DEP and DCNR are concerned about using this term as a threshold, because there are many proposed actions which are not by themselves "a major Federal action" that could still have major environmental impacts.

This exclusion would curtail NEPA's oversight of cumulative impacts of a joint federal-state funded project and limit the ability for impacted stakeholders to offer relevant feedback. This exclusion would have severe implications for the millions of acres of land that DCNR is entrusted to protect, through its state park and forest systems, where projects may be funded primarily by state or local funds yet still use federal dollars. CEQ should return the language to the original formulation of section 1501.1, which was devoted to the "Purpose" of NEPA.

It is also proposed, in this same section, that the federal action in question must not be one "for which compliance with NEPA would be inconsistent with Congressional intent due to the requirements of another statute."<sup>6</sup> The principles of statutory construction would ordinarily govern this determination. It is confusing at best to address it in this way, and this new language should be removed entirely.

### **Removing Cumulative Effects**

Connected to the applicability of the NEPA rules is the issue of what subject matter is considered during review. The proposed rulemaking would remove the requirement of federal agencies to analyze cumulative effects, meaning to consider the incremental impacts of proposed actions over the long term.<sup>7</sup> Cumulative effects are the single most important aspect of a NEPA document.

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inform those persons") and (c) (the agency shall provide for electronic submission of public comments).

<sup>5</sup> 85 FR 1714 1501.1(a)(1); *compare with* 40 CFR § 1501.1, which contains no "NEPA threshold applicability analysis."

<sup>6</sup> 85 FR 1714 1501.1(a)(3) and (4) and 85 FR 1728 1507.3(c)(4) and (5).

<sup>7</sup> For example, section 1508.7, defining "cumulative impacts," was removed entirely; section 1508.8 states that "analysis of cumulative effects is not required," and the definitions of "direct effects" and "indirect effects" were deleted. See 85 FR 1728-29.

Most concerning is that the proposed rule changes would severely limit consideration of climate change in NEPA's studies. The removal of cumulative effects would likely eliminate consideration of the effects of climate change in proposed projects. Climate change threatens the health, welfare, and livelihoods of people in the US and around the world. Climate change is the most serious environmental crisis we face. To erase climate science and its potential impacts from NEPA would be irresponsible and unjust. Further, in August 2016, CEQ issued guidance that consideration of greenhouse gas emissions, and ultimately climate change, could be considered under cumulative effects analysis.<sup>8</sup> The proposed change would be an abrupt departure with inadequate justification.

Cumulative effects also go to the core of Environmental Justice concerns and are a critical protection for communities. NEPA is essential in fighting against environmental racism and injustice. NEPA promotes environmental justice by requiring federal agencies to include a proposed project's potential environmental, economic, and public health impacts on low-income, minority, and rural communities. Environmental justice areas, which represent high concentration of low-income and/or minority populations, are scattered throughout Pennsylvania and include rural and urban communities. Elimination of cumulative effects would weaken NEPA significantly and would increase the vulnerability of environmental justice communities, which already are faced disproportionately with pollution and other environmental hazards.

Because the proposed change would restrict the subject matter available for comment, CEQ should restore the original text with respect to cumulative effects.

### **Categorical Exclusions**

The proposed section 1500.4(a) states, "Agencies shall reduce excessive paperwork by: (a) Using categorical exclusions to define categories of actions which do not have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement."<sup>9</sup> DEP and DCNR believe that categorical exclusions can be a valuable tool for limiting unnecessary production and review of NEPA documents by limiting applicability to only projects that have more than a *de minimis* adverse effect on the environment. DEP and DCNR would like to see more information on how the categorical exclusion process would be implemented.

In the air quality context, Transportation and General Conformity requirements have similar mechanisms to limit consideration of project types that have little adverse environmental consequences. These project types generate annual emissions that are either *de minimis* for transportation conformity or fall well below a regulatory emissions threshold that would require a general conformity determination. Pertaining to these, project types that fall below the general conformity emissions threshold are called "presumed to conform," and a federal agency may include these project types on the federal agency's presumed to conform list. When a project type is placed on the presumed to conform list, the federal agency does not need to develop an air

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<sup>8</sup> Executive Office of the President, Council on Environmental Quality, Memorandum for Heads of Federal Departments and Agencies (August 1, 2016).

<sup>9</sup> 85 FR 1713 1500.4(a).

emissions analysis for these projects. Unfortunately, only one federal agency, the Federal Aviation Administration, has listed projects on the presumed to conform list.

The proposed amendments to the NEPA process to allow categorical exclusions do not describe how this process will impact NEPA review. However, the proposed rulemaking does alter the sections discussing categorical exclusions by removing all references to cumulative effects.<sup>10</sup> This means that some federal actions could fall under a categorical exclusion even though, if cumulative effects were still allowed to be considered, they would not be excluded. Particularly, some actions that only have cumulative effects on the environment still have very large impacts. Removing this alters rather than improves the use of categorical exclusions.

DEP and DCNR believe that CEQ should provide more detail on the use of categorical exclusions and strongly encourage federal agencies to make use of them. Until that happens, DEP believes it is unlikely that merely calling for categorical exclusion of projects will limit unnecessary NEPA document production and review. DEP supports the additional language in the proposed § 1500.4(a) but reserves its objection to the elimination of cumulative effects as stated in the previous section of this letter.

### **Economic Considerations**

When agencies develop alternatives to a proposed federal action, this proposed rule would require those alternatives to be “technically and economically feasible.”<sup>11</sup> Agencies would also be required to include in the final analysis “economic and technical considerations, including the economic benefits of the proposed action.”<sup>12</sup> The practical application of “economically feasible” is unclear. It is also not clear whether “feasible” relates to the federal agency or another party performing work under the project. If it relates to the agency, then information would need to be provided on the agency’s budgetary constraints. If it relates to another party, then it is less clear how that would be demonstrated.

These changes could significantly weaken the “no action” alternative as well as reasonable alternatives and place a higher priority on the applicant’s needs rather than on that of the environment, community, or other resources. The DEP and DCNR encourages an all-inclusive approach, including the vetting of all available alternatives and including actions that specifically serve to restore or protect the environment. All language requiring economic feasibility should be removed unless further detail is also provided to ground “feasible” in a practical context.

### **Conflict of Interest**

The proposed rule would formalize the practice where agencies rely on the applicants or applicants’ consultants to prepare the EAs and EISs, with support of the lead agency. There should

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<sup>10</sup> While the existing regulations allow categorical exclusions for “categories of actions which do not individually or cumulatively have a significant effect on the human environment” (see, *inter alia*, 40 CFR §§ 1500.4(a), 1500.5(a), 1501.4(a)), the proposed language eliminates “individually or cumulatively.”

<sup>11</sup> 85 FR 1730 1508.1(z).

<sup>12</sup> 85 FR 1720 1502(16)(a)(10).

be specific criteria put in place to ensure that the study is not partial towards the applicant and/or a particular project goal or action. The lead agency must ensure an independent, unbiased review process.

It is also proposed to remove the existing conflict of interest requirements for contractors who prepare documents on behalf of the federal government.<sup>13</sup> The value of this is not understood. Protecting against conflicts of interest always increases the faith of the public in the government. This applies to not only individual citizens, but also organizations in the private sector, including those who compete with each other for these contracts. Environmental analysis under NEPA should be performed with the highest level of government honesty. The DEP and DCNR recommend restoring the original text with respect to conflicts of interest.

### **Conclusion**

The DEP and DCNR have significant concerns with the Council on Environmental Quality's proposed changes to the regulations implementing the National Environmental Policy Act. NEPA protects the health and safety of Pennsylvanians by ensuring that constituents along with state and local policy makers are properly informed on and have the opportunity to weigh in on federal projects that could adversely impact their communities.

The DEP and DCNR are strongly opposed to any changes that weaken the NEPA process and suppress the commonwealth's efforts to protect and conserve natural resources, improve the health and quality of life of Pennsylvanians, and mitigate the impacts of climate change. DEP and DCNR hope that the CEQ reconsiders this regulation. DEP and DCNR are committed to fulfilling their duties under the Commonwealth's Constitution and the state environmental laws that provide their authority. This proposed rule, if finalized, would restrict DEP and DCNR's ability to fulfill those duties. DEP and DCNR strongly urge CEQ to make the changes noted herein.

Thank you for your time and consideration of this important matter.

Sincerely,



Patrick McDonnell  
Secretary



Cindy Adams Dunn  
Secretary

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<sup>13</sup> Compare 85 FR 1725 1506.5(c) with 40 CFR § 1506.5(c), from which was removed, "It is the intent of these regulations...to avoid any conflict of interest" in the selection of contractors, as well as the currently required financial disclosure statement.