



BACKCOUNTRY HUNTERS & ANGLERS

March 10, 2020

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

Re: Docket Number **CEQ-2019-0003**
Comments Regarding Proposed Revisions to Regulations Implementing the National
Environmental Policy Act

Transmitted via regulations.gov

Dear Chairman Neumayr:

Please accept these comments on behalf of Backcountry Hunters & Anglers (BHA) regarding the Council on Environmental Quality's (CEQ) proposed changes to the regulations implementing the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq.

Backcountry Hunters & Anglers (BHA) is the voice for our wild public lands, waters and wildlife. With over 350,000 members and supporters and chapters in 45 states, two Canadian provinces, one Canadian territory and Washington, D.C. – all passionate about conserving the places and experiences that provide us with a shared, common identity. We represent the challenge, solitude, and adventure that only the backcountry can provide and we are working hard with boots on the ground to ensure that wild places are protected for the fish and wildlife that thrive there.

In addition to advocating for policies that protect the backcountry, we also work to curb illegal motorized use, promote ethical hunting and fishing practices, and protect special landscapes that have high quality fish and wildlife habitat values.

BHA also represents a dynamic and diverse set of young and committed public land and water activists. A 2019 demographic study shows 70 percent of BHA members are 45 years of age or lower, while 33 percent identify as Independent, 23 percent as Republican and 20 percent as Democrat. BHA embraces a philosophy fostering untraditional partnerships and welcoming people of all backgrounds and political persuasions.

Introduction

The comments that follow clearly indicate that selected provisions of the proposed rule will lead to uninformed federal decision-making that could seriously impact fish and wildlife

populations and destroy crucial terrestrial and aquatic habitats. It's imperative that we demonstrate responsible stewardship over our natural resources over easing regulatory considerations in favor of industry needs.

General Concerns

Indirect and Cumulative Impacts Analysis – Perhaps the most disastrous provisions in the proposed rule are those that eliminate consideration of indirect and cumulative impacts. This will translate into a failure to consider impacts and on-the-ground results likely to adversely affect wildlife species across the nation.

It is crucial that federal decision makers consider the impacts of their decisions. The regulations appear directed at eliminating inclusion of exactly these potentially dire impacts in the required analysis under NEPA.

Disregard for the Purposes, Goals and Requirements of NEPA – The proposed regulations are replete with provisions that fly in the face of NEPA and its key policy underpinnings. NEPA leads to better agency decisions because it: informs the decision maker; provides for orderly agency decision-making (for example, alternatives are considered at one time rather than seriatim); requires the agency to consider effects of the action on the environment, including the social and economic environment; and involves the public in agency decision-making. By, *inter alia*, eliminating the consideration of indirect and cumulative effects, limiting the range and altering the nature of alternatives to be considered, undermining the use of sound science, and expanding categorical exclusions, the proposed regulations are contrary to law and blatantly inconsistent with the informed decision making and public transparency that NEPA requires. We also note that the meaning of the NEPA statute and the regulations has been thoroughly litigated since enactment and promulgation several decades ago. Given this, the interpretation of the current regulations and the meaning of the regulatory terminology is generally well-settled. The extensive modifications proposed by the CEQ could well lead to several decades of uncertainty and added delay in federal approvals – precisely opposite the result apparently intended by the proposed revisions.

NEPA Requires an Environmental Analysis in this Rulemaking Process - CEQ in the preamble to the proposed regulations states that no environmental analysis under NEPA will be undertaken to inform the sweeping proposed changes to these NEPA regulations. This clearly controverts the requirements of NEPA and the current regulations and past practice. In fact, the preamble to the proposed regulations acknowledges that CEQ completed an environmental analysis pursuant to NEPA in the form of Environmental Assessments *both* when the NEPA regulations were initially promulgated in 1978 and when the regulations were amended in 1986. 85 Fed. Reg. 1711. See also 43 Fed. Reg. 55778 at 55989.

However, the preamble goes on to state that CEQ is not undertaking environmental analysis of the impacts of the proposed revisions to the NEPA regulations. According to CEQ, this is because the agency has “determined that the proposed rule would not have a significant effect

on the environment because it would not authorize any activity or commit resources to any project that may affect the environment.” 85 Fed. Reg. 1711.

This failure to undertake an environmental analysis conflicts with the fundamental requirements of NEPA. Clearly the promulgation of these regulations, which comprise a wholesale revision of how environmental analysis will be undertaken and considered by decision makers throughout the federal government, is a major “federal action significantly affecting the human environment,” triggering NEPA requirements.

First, NEPA itself (see Section 102) and the regulations currently in effect (and indeed the proposed regulations themselves) state that major federal actions include “[a]doption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act...” 40 C.F.R. § 1508.18 (b)(1). The present rulemaking precisely fits this definition – and is indeed a “major federal action.”

Furthermore, the proposed changes in the regulations will “significantly affect the human environment.” See, for instance, the environmental concerns and harms detailed in each of the five examples below. To maintain that the proposed changes to the regulations would have no significant environmental effect is to ignore the fundamental changes being made by the proposed regulations and the importance of having a sound opportunity for public input and a fully informed decision maker. For example, certainly it is reasonably foreseeable that decision making under the proposed regulations, if adopted, will result in significant environmental impacts by failing to provide the decision maker with information on the indirect and cumulative impacts (such as climate impacts). Also, expanding the use of categorical exclusions could have profound on-the-ground impacts. Proposed regulation at §§ 1500.4(a), 1500.5(a). Explicitly allowing the substitution of other documents for NEPA analysis (i.e., promoting the use of “functional equivalents”) also is likely to undermine the information before the decision maker, leading to serious adverse impacts on the environment. Proposed regulation at § 1507.3(b)(6). These are just a few of the many provisions contained in the proposed regulations that are likely lead to significant environmental effects.

For these reasons, environmental analysis of the proposed revisions to the regulations is needed in order to comply with NEPA and must be undertaken to permit a fully informed decision on the proposed changes to the regulations.

Consultation under the Endangered Species Act is Required – Section 7 of the Endangered Species Act (ESA) provides that, federal agencies “shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species. . . .” 16 U.S.C. § 1536(a)(1). Section 7 further requires that agencies must “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The obligation to “insure” against a likelihood of jeopardy or adverse modification

requires the agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987).

An agency must initiate consultation with the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service whenever it takes an action that “may affect” a listed species or its critical habitat. *See* 50 C.F.R. § 402.14(a). “The minimum threshold for an agency action to trigger consultation with FWS is low.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011). In this situation, the revision of the CEQ’s NEPA regulations will reduce environmental analysis of proposed actions, thus increasing the risk of effects on listed species. For instance, by permitting agencies to ignore cumulative and indirect impacts, as well as narrowing the definition of effects to limit the scope of impacts considered, a broad range of potential environmental impacts will not be considered before decisions are made. As a result, CEQ must engage in formal consultation under the ESA before revising the NEPA regulations.

Conclusion

America’s public lands and waters are a proud legacy stitched together by wild places that not only support some of the best fish and wildlife habitat we have, but ground outdoor traditions like hunting and fishing and the rural economies that depend on durable policies that provide a sustainable future for local communities.

We encourage you to maintain the integrity of what may be America's best and most effective law for our natural resources. While imperfect, improvements to NEPA should be done to address real problems and create real solutions that reduce redundancies, generate greater efficiencies and do more to safeguard fish and wildlife habitat. As the previous comments indicate, the proposed regulations, if adopted and not overturned by the courts, could have significant adverse effects, even disastrous impacts on wildlife species and their habitats.

We respectfully ask CEQ to take into account these and other comments that point out the significant conflicts between these proposed regulations and NEPA. Thank you for your consideration. BHA looks forward to working with you to advance more thoughtful policies that benefit our wild public lands, waters and wildlife.

Sincerely,

John W. Gale