



March 9, 2020

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ATTENTION: DOCKET NO. CEQ-2019-0003

*Submitted via Federal eRulemaking Portal:*  
<https://www.regulations.gov/comment?D=CEQ-2019-0003-0001>

RE: *Comments on Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*

Dear Chair Neumayr and Mr. Boling:

We are pleased to provide the Council on Environmental Quality (CEQ) with comments on the proposed update to regulations implementing the procedural provisions of the National Environmental Policy Act (NEPA), 85 Fed. Reg. 1684 (January 10, 2020), RIN 0331-AA03. We recommend that the Council not adopt the final rule as proposed, and that it issue a new proposal for public comment in order to correct major deficiencies in the current proposal.

## Introduction

The Henry M. Jackson Foundation has never before commented on proposed federal rule changes. We do so now for two reasons. First, we are able to offer a unique perspective. For over 35 years, the Foundation has furthered the work and ideas of Senator Henry M. Jackson, the principal author of NEPA in the United States Senate.

Second, as part of advancing Senator Jackson's legacy, the Foundation has worked to highlight the threats posed by climate change, particularly those

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involving our national security. For example, our nation’s military installations and their surrounding communities already face threats from sea-level rise. Extreme heat affects military training operations and mission readiness. And climate change can cause instability in fragile regions, necessitating costly intervention by our military forces.

Most recently, we partnered with the Center for Climate and Security on a groundbreaking report regarding the profound impacts that climate change is having on our national security, and how much worse those impacts will become if dramatic reductions in worldwide emission levels do not occur very soon.<sup>1</sup> Consequently, we are very concerned about any change in regulations that undermines the ability of federal decision makers to fully consider the long-term impacts of climate change.

With these perspectives in mind, the Jackson Foundation has many serious concerns with the proposed rule, but for the purpose of this letter will focus on three: (1) the dilution and distortion of NEPA’s fundamental purposes; (2) the elimination of essential elements of analysis, including consideration of cumulative impacts and reasonable alternatives; and (3) the need to encourage rather than constrain public participation in the NEPA process. These three issues are addressed in turn below.

## **I. THE PROPOSED REVISIONS WOULD DILUTE AND DISTORT NEPA’S FUNDAMENTAL PURPOSES**

CEQ’s current NEPA regulations begin with a statement of essential purposes (§1500). The first sentence provides that NEPA is “our basic national charter for the protection of the environment.” It goes on to provide that the NEPA process 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 information, expert agency comments, and public scrutiny are essential to implementing NEPA.”

The statement of purposes concludes with a requirement that federal agencies “use all practicable means, consistent with the requirements of the Act, and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their action upon the quality of the human environment.”

CEQ proposes to delete all of this language, thereby diluting and distorting NEPA’s purposes. Is NEPA no longer to be our basic national charter for the protection of the environment? Are accurate scientific information and public scrutiny no longer essential to implementing NEPA? Are agencies no longer to be required to avoid or minimize any possible adverse effects upon the quality of the human environment?

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<sup>1</sup> Guy, Kate et al. “A Security Threat Assessment of Global Climate Change: How Likely Warming Scenarios Indicate a Catastrophic Security Future.” Product of the National Security, Military, and Intelligence Panel on Climate Change. Edited by Femia, Francesco and Werrell, Caitlin. The Center for Climate and Security, an institute of the Council on Strategic Risks. Washington, DC. February 2020.

Senator Jackson's views in crafting NEPA inform the answers to these questions. In his statement introducing an amendment to S. 1075, which became NEPA's Title I, he said:

I introduced this measure because it is my view that our present knowledge, our established policies, and our existing institutions are not adequate to deal with the growing environmental problems and crises the nation faces . . . As a nation, we have failed to design and implement a national environmental policy which would enable us to weigh alternatives, and to anticipate the undesirable side effects which often result from our ongoing policies, programs and actions. Today it is clear that we cannot continue to perpetuate the mistakes of the past. We no longer have the margins for error and mistake that we once enjoyed.<sup>2</sup>

Senator Jackson also said:

A statement of environmental policy is more than a statement of what we believe as a people and as a nation. It establishes priorities and gives expression to our national goals and aspirations. It serves a constitutional function in that people may refer to it for guidance in making decisions where environmental values are found to be in conflict with other values.<sup>3</sup>

To avoid any implication that CEQ is abandoning the fundamental purposes of NEPA, the language of §1500 should be restored to its current form in the final rule. Doing so should also inform the CEQ's approach to the other elements of the proposed rule, discussed below.

## **II. THE PROPOSED REVISIONS WOULD ELIMINATE ESSENTIAL ELEMENTS OF ANALYSIS**

### **A. Restore Consideration of Cumulative Impacts**

CEQ proposes to strike the definition of "cumulative impact," and removes all references to this longstanding NEPA concept. Instead, the proposed rule provides that "analysis of cumulative effects is not required." §1508.1(g)(2).

The consideration of cumulative impacts is critical to the effective implementation of NEPA. Cumulative impact is defined as the impact on the environment that "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such action. Cumulative impacts can result from individually minor but collectively significant actions taking place over time."

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<sup>2</sup> Statement in National Environmental Policy: Hearing before the Committee on Interior and Insular Affairs, United States Senate, 91<sup>st</sup> Congress, 1<sup>st</sup> Session, April 16, 1969, Appendix 2, p.205.

<sup>3</sup> *Id.* at 206.

As stated above, the Senator intended NEPA as a national environmental policy under which alternatives would be weighed and the potential long-term consequences of decisions would be anticipated and analyzed. Without taking into account cumulative impacts over time, it is impossible to do so.

No other environmental threat necessitates an analysis of cumulative impacts more than climate change. Its broad implications involve threats to our national security, public health, and agricultural production. Rising seas and coastal erosion, increasing wildfires, more destructive storms, and worsening flooding and droughts put people and property at risk. Rather than each agency acting on a short-term, piecemeal basis, we must take a long-term, whole-of-government approach to addressing this existential threat.

This is not to say that the analysis of cumulative impacts is easy, or that it is always done well. Cumulative impacts analysis raises very challenging line-drawing questions, and the Jackson Foundation fully appreciates the frustration with “encyclopedic” Environmental Impact Statements that do little to distinguish significant facts from insignificant ones. But that is no excuse for completely dispensing with the careful consideration of cumulative impacts. Instead, that tool should be retained, with renewed efforts to use it wisely and effectively, particularly in the context of climate change.

#### B. Restore Consideration of All Reasonable Alternatives

A cornerstone of the NEPA process is the obligation to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize the adverse effects of those actions upon the quality of the human environment. See §1500.2(e). The proposed rule would eliminate that requirement, substitute a grossly narrow definition of reasonable alternatives (see §15008.1(z)), and eliminate (by deleting §1502.14(c)) the requirement to include reasonable alternatives not within the jurisdiction of the lead agency.

Senator Jackson designed NEPA to inform decision makers as to how they could avoid or minimize the adverse effects of major developments upon the quality of the human environment, and to require agencies to work together toward that end.

Facilitating coordination among federal agencies was a particular concern of Senator Jackson. According to Robert Kaufman’s biography of the Senator:

The controversies over the Central Arizona Project and the Colorado River during the Johnson administration had convinced Jackson that the nation sorely needed comprehensive legislation to establish national priorities on the environment and to coordinate the actions of the federal government, whose constituent parts too often worked at cross-purposes.<sup>4</sup>

Kaufman went on to explain that Senator Jackson held a series of hearings in 1967 and 1968 and used the conflict among federal agencies over Everglades National Park to

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<sup>4</sup> Robert G. Kaufman, *Henry M. Jackson: A Life in Politics*. (Seattle: University of Washington Press, 2000), 202-203.

illustrate the inadequacy of the existing approach. In testifying about their respective plans -- each of which would affect the park -- it soon became obvious that the Secretary of Transportation, the head of the Corps of Engineers, and the Secretary of the Interior had little or no recognition that their programs were in conflict with one another. Senator Jackson's solution was to create a mechanism to force federal decision makers to identify objectives and conflicts before they committed funds and undertook irreversible actions.<sup>5</sup>

The proposed revisions would substantially impair our ability to assess alternatives that would avoid or minimize the adverse impacts of development, and the ability of federal agencies to identify cross-purposes that might cause unnecessary environmental damage. The proposed revisions regarding reasonable alternatives should therefore be rejected.

### C. Do Not Foreclose New Scientific and Technical Research to Inform Analysis

Senator Jackson highly valued and sought out scientific data, academic research, and analysis for his decision and policy making. In contradiction to this spirit, Section 1502.24 of the proposed rule states that agencies are "not required to undertake new scientific and technical research to inform their analyses." But sometimes new research will be needed to understand the implications of choices – this is particularly true with respect to new technologies, new challenges, and particularly risky or unprecedented activities. Returning to Senator Jackson's statement introducing an amendment to S. 1075, which became NEPA's Title I, he said:

The purpose of this legislation is threefold: First, to establish a national policy on the environment; Second, ***to authorize expanded research and understanding of our natural resources, the environment, and human ecology***; and Third, to establish in the Office of the President a properly staffed Council of Environmental Quality Advisors. (Emphasis added.)<sup>6</sup>

The Jackson Foundation believes that scientific inquiry and fact-based decision making are no less important today than fifty years ago. With our greater understanding of the environmental impacts from greenhouse gas emissions, including potentially catastrophic effects of climate change, now is not the time to constrain scientific research.

## III. PUBLIC PARTICIPATION IN THE NEPA PROCESS SHOULD BE ENCOURAGED RATHER THAN CONSTRAINED

Under the proposed rule, an applicant can prepare its own environmental impact statement and assessment, thus affording applicants too central a role in crafting the environmental assessments of their own projects. Meanwhile, the rule also deletes the conflict-of-interest provision as well as restricts the timelines for environmental reviews and public comment.

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<sup>5</sup> Id. at 203.

<sup>6</sup> Statement in National Environmental Policy: Hearing before the Committee on Interior and Insular Affairs, United States Senate, 91<sup>st</sup> Congress, 1<sup>st</sup> Session, April 16, 1969, Appendix 2, p.205.

NEPA calls for informed, public decision making in the interest of future generations. The Jackson Foundation recommends that CEQ restore NEPA's facilitation of public participation and withdraw the proposed changes that allow applicants to prepare their own EISs and EAs (proposed 106.5(c)).

## **Conclusion**

Senator Jackson crafted NEPA to help protect our environment for future generations. For a half-century, it has served that purpose by requiring that the best information be gathered, that all reasonable alternatives be considered, that federal agencies work together, and that the public be fully included in the process.

The Jackson Foundation is concerned that the proposed regulatory changes would unravel these common sense steps just as we are grappling with an unprecedented challenge to both our environment and our national security – climate change. The Foundation therefore recommends that the CEQ withdraw the proposed rule and substantially revise it for further public comment. In that event, we pledge to work with you toward maintaining NEPA as a valuable tool in the effort to preserve the long-term viability of our planet.

Sincerely,

Kathryn Terry  
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