



## Reason Foundation Comment on: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act. CEQ–2019–0003 (85 FR 1684).

We are grateful to the Council on Environmental Quality for the opportunity to provide this comment on the Council’s notice of proposed rulemaking to update the regulations implementing NEPA. The comment has been prepared primarily by Julian Morris, Senior Fellow at Reason Foundation, who has over 25 years’ experience as an environmental policy analyst, is the author of dozens of peer reviewed studies and other papers on environmental matters, and is a member of the editorial board of *Energy and Environment*.<sup>1</sup> Background research and initial drafting was undertaken by Kendra Okonski, an independent researcher with two decades of experience as an environmental policy analyst. In addition, Baruch Feigenbaum, Assistant Director of Transportation Policy at Reason Foundation, provided assistance on issues relating to transportation infrastructure.

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## Introduction

The National Environmental Policy Act (NEPA) of 1969 was introduced on the premise that the United States needed “a national policy to deal with environmental crisis, present or impending.”<sup>2</sup> However, in the ensuing decades, NEPA has arguably been used less as means of addressing environmental problems and more as a means of deterring certain kinds of economic activity, even when that activity is likely to yield net environmental benefits.

Many of the problems associated with NEPA emanate from its lack of a requirement to consider costs or even prioritization. This is true both for the original mandate and for the 1977 CEQ regulations that currently govern implementation of NEPA.<sup>3</sup>

Other problems are related to NEPA being ill-defined, broad and vague. In 2018, Congressman Rob Bishop (R, Utah) observed in a congressional hearing, which he hosted as then Chairman of the House Natural Resources Committee, that “Due to NEPA’s vague and ambiguous language, the law’s purpose and administration has largely been defined not by congressional intent or agency rulemaking, but rather litigation, court rulings, and ad hoc decision making of agencies operating out of fear of the next lawsuit for projects large and small. As a result, the NEPA process is now an ever-expanding coagulation of regulation, guidance, and caselaw.”<sup>4</sup> Meanwhile, as Daniel Mandelker has noted: “Experience has shown that [the NEPA] process is overelaborate, redundant, and not responsive to the needs in NEPA decision making.”<sup>5</sup>

Not unrelated is the Equal Access to Justice Act, which seemingly enables special interest groups (who claim to represent the public broadly) to litigate with impunity.<sup>6</sup> As Mark Rutzick has noted,

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<sup>2</sup> Report 91-296 (1969), “Report to accompany S. 1075”, Page 9 - <https://ceq.doe.gov/docs/laws-regulations/Senate-Report-on-NEPA.pdf>

<sup>3</sup> CEQ “Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act,” 42 FR 26967 (May 25, 1977).

<sup>4</sup> Oversight Hearing, House Committee on Natural Resources (2018) “The weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare” (April 25, 2018).

<https://www.govinfo.gov/content/pkg/CHRG-115hrg29883/html/CHRG-115hrg29883.htm>

<sup>5</sup> Mandelkar (2010), “The National Environmental Policy Act: A Review of Its Experience and Problems”, Washington University Journal of Law & Policy, Vol.32.

[https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1082&context=law\\_journal\\_law\\_policy](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1082&context=law_journal_law_policy)

<sup>6</sup> Mark C. Rutzick (2018). “A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It”, released by the Regulatory Transparency Project of the Federalist Society, October 16 (<https://regproject.org/wp-content/uploads/RTP-Energy-Environment-Working-Group-Paper-National-Environmental-Policy-Act.pdf>). Page 4. (“Citizen litigation under NEPA was bolstered in 1981 by Congress’ enactment of the Equal Access to Justice Act, 28 U.S.C. § 2412(d), which allows federal courts to award attorney fees to certain classes of plaintiffs, including non-profit groups such as environmental advocacy organizations, who successfully challenge government action that was not “substantially justified.”)

the resulting lawsuits by environmental groups have “vastly enlarged the already unreasonable NEPA reporting duties mandated by CEQ.”<sup>7</sup> But Rutzick notes that “The CEQ regulations—which fill over 30 pages of the Federal Register—lie at the heart of NEPA’s unexpected impact.”<sup>8</sup>

The proposed rulemaking, with its goal of “more efficient, effective, and timely NEPA reviews” is a venerable attempt to update the 1977 regulations. This comment analyses whether these overall objectives will be accomplished by the proposed rulemaking and what other measures might be taken to achieve these objectives. It focuses on the broad swath of reforms proposed in the NPRM and some specific elements of those reforms that seem particularly pertinent.

The comment begins with a description and analysis of proposed caps on the amount of time agencies take to complete final environmental impact statements (EISs) and the number of pages that may be included in such EISs. It focuses in part on problems created by the NEPA process for the Federal Highway Administration (FHWA), Bureau of Land Management (BLM), and U.S. Forest Service (USFS), and considers whether the proposed rulemaking will affect the ability of the FHWA to advance with highway infrastructure projects, and the USFS/BLM effectively to carry out their respective agency duties (i.e. land management).

The comment then offers constructive suggestions for additional reforms that might further mitigate the problems imposed by NEPA. The final section raises some particular concerns and questions that should be considered, specifically because the proposed rulemaking could be more aggressive. As a public policy tool, NEPA can certainly enable agencies to achieve multiple goals—including infrastructure development, superior management of public lands, and environmental protection.

## Thresholds for Applicability of NEPA

One of the reasons NEPA currently imposes an excessive burden on federal agencies is that it is simply applied to *too many* projects. To address this problem, in the NPRM, CEQ proposes a new § 1501.1, “NEPA threshold applicability analysis.” The text is:

***1501.1 NEPA threshold applicability analysis.***

*(a) In assessing whether NEPA applies, Federal agencies should determine:*

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Also: EAJA “allows federal courts to award costs and fees to a prevailing party in a NEPA action against the government, provided that the government’s position is not substantially justified. Many cases have allowed successful public interest parties to recover their fees when there is a material alteration or a court-ordered change in the legal relationship between the parties. There is currently no opportunity, however, for project proponents to recover their costs and fees from private parties who initiate frivolous NEPA litigation.” John C. Martin (2005), Oversight Hearing of House Resources Committee – “NEPA – Lessons learned and next steps” (November 17, 2005) <https://www.govinfo.gov/content/pkg/CHRG-109hhr24682/html/CHRG-109hhr24682.htm>

<sup>7</sup> Rutzick (2018) Page 4

<sup>8</sup> Rutzick (2018) Page 5

- (1) Whether the proposed action is a major Federal action.*
  - (2) Whether the proposed action, in whole or in part, is a non-discretionary action for which the agency lacks authority to consider environmental effects as part of its decision-making process.*
  - (3) Whether the proposed action is an action for which compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute.*
  - (4) Whether the proposed action is an action for which compliance with NEPA would be inconsistent with Congressional intent due to the requirements of another statute.*
  - (5) Whether the proposed action is an action for which the agency has determined that other analyses or processes under other statutes serve the function of agency compliance with NEPA.*
- (b) Federal agencies may make these determinations in their agency NEPA procedures (§ 1507.3(c)) or on an individual basis.*

This seems like a reasonable way to address the problem. However, it then begs the question as to the definition of such terms as “major federal action,” which is currently defined in §1508.18.<sup>9</sup> CEQ proposes, further, “to amend the first sentence of the definition to clarify that an action meets the definition if it is subject to Federal control and responsibility, and it has effects that may be significant. CEQ proposes to replace ‘major’ effects with ‘significant’ in this sentence to align with the NEPA statute.”<sup>10</sup>

Two comments seem apposite regarding these changes to the threshold at which NEPA becomes applicable: First, a propos the alignment of terminology, it would seem appropriate to align the use of the term “significant” here with its use in E.O. 12866, under which a “significant regulatory action” is defined as:

*[A]ny regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.<sup>11</sup>*

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<sup>9</sup> 40 CFR § 1508.18

<sup>10</sup> <https://www.federalregister.gov/d/2019-28106/p-339>

<sup>11</sup> <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>

But E.O. 12866 was signed into law in 1993, so the threshold pecuniary effect ought logically to be raised at least in line with inflation, which would mean that **NEPA would only apply to federal actions with a value of at least \$175 million** (unless other considerations apply).

Second, the above change in wording proposed by CEQ also partially addresses the problem that NEPA is currently triggered if even a *de minimis* amount of funding is supplied by the federal government. For projects that are mainly funded by state and local governments, this obligation imposes an undue burden. It also creates perverse incentives on the part of state and local governments to abjure federal funding in order to avoid the strictures of NEPA review. By changing the threshold so that NEPA applies only if a project is “subject to Federal control and responsibility, and it has effects that may be significant,” the NPRM would certainly mitigate this effect. However, this could be improved further by requiring that **NEPA only be triggered if federal funding constitutes a minimum of 25% of total project costs and that significance in this case relates to the federal contribution**. In other words, for a project in which the federal government provides funding amounting to 25% of project costs, the total project cost must be at least \$700 million. Moreover, **where the federal government provides less than 50% of project costs, the minimum project size for which NEPA should apply ought to be at least \$500 million**.

The basis for the minimum percentage is that states should not have to follow federal rules if the vast majority of the funding comes from the state. All highways (except for park service and forest roads) are owned by the states and the local governments. Yet, even \$1 of federal funding adds these onerous environmental review rules. For the dollar figure, any major project is going to cost \$500 million or more. Projects less than that are minor and should not be subject to review.

## Speeding up the Process for Completing Environmental Impact Statements

A fundamental problem with NEPA in its current form is the excessive amount of time incurred in undertaking environmental impact statements (EISs). This results in delays to the implementation of projects, imposing significant costs on society. The problem is most acute for large-scale infrastructure projects.

The most recent analysis by the National Association of Environment Professionals, provided in its 2018 Annual Report, demonstrates the gravity of the situation:

*The average time required by all federal agencies combined to prepare a final EIS has increased since the year 2000. From 2000–2018, the annual average EIS-preparation time for all agencies has increased at an average rate of +39.5 days per year. Approximately 79% of the increase reported for the period 2000–2018 is accounted for by the increase in the preparation times of drafts EISs. The remaining*

*increase is the result of increases in the time to prepare the final EIS from the draft EIS.<sup>12</sup>*

Data published in NAEP’s 2018 Annual Report state that the overall average for all agencies to go from Notice of Intent to complete Final EIS (and Supplemental EIS) is 4.9 years. However, this average hides the scale of the problem facing the four agencies, representing over 60 percent of final EIS<sup>13</sup>—the BLM, FHWA, USACE and USFS—which have an average time from Notice of Intent to Final EIS of 5.7 years. Of these, the FHWA experiences the most onerous delays, at 8.1 years followed by USACE (7 years), BLM (3.9 years) and USFS (3.9 years). The 23 other agencies, which produced a total of 53 EISs, took on average 2.8 years.

CEQ proposes to reform time limits to complete both environmental assessments and environmental impact statements for each and every agency.<sup>14</sup> Specifically, CEQ proposes to require that EA be completed within one year and EIS be completed in no more than two years.

For the 23 agencies that completed their EIS within an average of 2.8 years, the two-year time limit on final EIS would on average provide some benefit. But undoubtedly the reduction in duration of the completion of final EIS at the four agencies whose EISs take four to eight years each would have a far greater beneficial effect. For these agencies, the proposed time limit in theory would shave two to six years off the NEPA process—six years in the case of the FHWA—and likely would yield significant economic and environmental benefits.

A 2015 study by Common Good estimated the cost of an additional six years of delay for big infrastructure projects,<sup>15</sup> which includes “direct costs, opportunity costs of lost efficiencies, and environmental costs of the status quo.”<sup>16</sup> The study concluded:

*Rough as they are, the results are astonishing. We estimate a six-year delay cost of over \$3.7 trillion; the total cost of modernizing American infrastructure, according to the 2017 “report card” by the American Society of Civil Engineers, is about \$4 trillion. These costs aren’t abstract: our aging power grid wastes the output of 200 coal-burning plants annually; freight bottlenecks lead to hundreds of thousands of unnecessary truck trips from container shipping ports every day; deteriorating water infrastructure is responsible for rising rates of water-borne illness.<sup>17</sup>*

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<sup>12</sup> NEPA Annual Report 2018.

[https://naep.memberclicks.net/assets/documents/2019/NEPA\\_Annual\\_Report\\_2018.pdf](https://naep.memberclicks.net/assets/documents/2019/NEPA_Annual_Report_2018.pdf)

<sup>13</sup> GAO (2014) “National Environmental Policy Act – Little Information Exists on NEPA Analyses.” Page 9.

<https://www.gao.gov/assets/670/662543.pdf>

<sup>14</sup> <https://www.federalregister.gov/d/2019-28106/p-548>

<sup>15</sup> Two Years Not Ten Years – Redesigning Infrastructure Approvals, Philip K. Howard (2015)

<https://www.commongood.org/wp-content/uploads/2017/07/2YearsNot10Years.pdf>

<sup>16</sup> “Summary of Common Good’s Report: Two Years, Not Ten Years: Redesigning Infrastructure Approval” (2015)

<https://americaninfrastructuremag.com/summary-common-goods-report-two-years-not-ten-years-redesigning-infrastructure-approvals/>

<sup>17</sup> Ibid.

## Improving Public Land Management with NEPA Reforms

For over three decades the NEPA process has also become a hurdle for agencies such as the USFS to carry out public land management. In combination with the Equal Access to Justice Act, interest groups have used litigation to stymie the purview that agencies have over public lands and the ability to carry out their respective duties.

As observed in a 2015 study of litigation in the U.S. Forest Service Region 1 by the Bureau of Business and Economic Research at the University of Montana:

*When a project is litigated, it is typically the agency's analysis of the project that is being questioned, and the agency with its legal counsel must defend the analysis. Once in litigation, the agency generally does not or legally cannot conduct new/more analysis or make change to the analysis—unless ordered to do so by the court... The time that the project/case is in litigation is essentially “dead time” where very limited amounts of work—analytical or on-the-ground—can be performed, especially if a TRO/PI [temporary restraining order/preliminary injunction] is involved.<sup>18</sup>*

A recent opinion article explains the devastating economic toll that litigation has taken on the communities of USFS Region 1:

*At the heart of the decline in harvest and forest health is the fact that Montana is ground zero for litigation. Since the Equal Access to Justice Act (EAJA) was amended in 1988, to allow nonprofits to sue the federal government, Montana has lost 30 mill manufacturers, resulting in the loss of over 3500 jobs.*

*Region One has paid out \$1,204,636.90 in litigation payments under the EAJA to environmental groups in Montana in the past five years alone. No wonder the Alliance for the Wild Rockies has had R-Y Timber in its crosshairs for well over a decade. Dating back to 2007, the Alliance litigated or threatened to litigate 24 of R-Y's timber contracts equaling over 100mmbf. It's hard to run a business with a dark litigation cloud hanging over head.<sup>19</sup>*

But the toll is far from merely economic; NEPA has fundamentally impeded good environmental stewardship. By delaying and raising the cost of undertaking thinning projects—and even preventing salvaging of burned timber—NEPA has effectively undermined the Forest Service's

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<sup>18</sup> Todd Morgan and John Baldrige (2015). “Understanding Costs and Other Impacts of Litigation of Forest Service Projects: A Region One Case Study”, Bureau of Business and Economic Research, U. of Montana, <http://www.bber.umt.edu/pubs/forest/BBERLitigationRpt2015.pdf>

<sup>19</sup> [https://helenair.com/opinion/columnists/timber-dependent-communities-deserve-better-than-what-some-environmentalists-dish/article\\_9e959826-2b11-5383-92d5-91dc7ec6bae5.html](https://helenair.com/opinion/columnists/timber-dependent-communities-deserve-better-than-what-some-environmentalists-dish/article_9e959826-2b11-5383-92d5-91dc7ec6bae5.html)

ability to manage the national forests in a way that mitigates fire risk. The result has been a massive increase in the scale of fires, with devastating environmental consequences.<sup>20</sup>

Moreover, because to date there have been few if any time limits inherent to the NEPA process, it has simply been used to delay other potentially valuable projects that would be beneficial to local communities, especially those in non-urban localities of the western U.S. with high unemployment rates. A case in point is a potential mine to be sited in the Kootenai National Forest (largely situated in Lincoln County, Montana) which has been subject to a protracted NEPA process that has extended for more than two decades.<sup>21</sup>

The proposed reforms to the NEPA process are likely to enable agencies to overcome these hindrances and thus enable more effective management of public lands.

### Limiting the Length of Environmental Impact Statements to 300 Pages

EIS have become excessively voluminous.<sup>22</sup> In its own study of 568 EIS (comprising all actions for which a final EIS was available, out of 631 actions for which EPA published a notice of availability for an EIS between January 1, 2013 and December 31, 2017), CEQ found:

*Across all Federal agencies, that for draft EISs, the average (i.e., mean) document length in this sample was 586 pages, and the median document length was 403 pages. One quarter of the draft EISs were 288 pages or shorter (i.e., the 25th percentile), and one quarter were 630 pages or longer (i.e., the 75th percentile).*

*CEQ also found that, for final EISs, the average document length was 669 pages, and the median document length was 445 pages. One quarter of the final EISs were 299 pages or shorter (i.e., the 25th percentile), and one quarter were 729 pages or longer (i.e., the 75th percentile). CEQ also found that, on average, the change in document length from draft EIS to final EIS was an addition of 83 pages or a 14 percent increase (shown in Figure 3).*

*The median change in document length from draft to final EIS was an addition of 32 pages. One quarter of EISs increased by up to 6 pages between draft and final EIS (i.e., the 25th percentile), and one quarter increased by 105 pages or more between draft and final EIS (i.e., the 75th percentile). The main reason for this is the vast body of NEPA case law that agencies must contend with. CEQ noted in 1997 that the length of EIS has grown in tandem with litigation relating to NEPA.<sup>23</sup>*

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<sup>20</sup> <https://reason.org/policy-brief/forest-fires-management-reform/>

<sup>21</sup> See <http://deq.mt.gov/Mining/hardrock/Montonore> and ] <https://www.federalregister.gov/documents/2005/07/14/05-13846/mines-management-inc-montanore-project-kootenai-national-forest-lincoln-county-mt>

<sup>22</sup> <https://www.federalregister.gov/d/2019-28106/p-91>

<sup>23</sup> [https://ceq.doe.gov/docs/nepa-practice/CEQ\\_EIS\\_Length\\_Report\\_2019-7-22.pdf](https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Length_Report_2019-7-22.pdf)



This is in spite of the fact that under 1502.7 of the current guidelines, EISs must be limited to 300 pages!

CEQ proposes to “reinforce the page limits for EIS set forth in 1502.7”<sup>24</sup> and we agree with its statement that it “believes that page limits will encourage agencies to identify the relevant issues, focus on significant environmental impacts, and prepare concise readable documents that will inform decision makers as well as the public. Voluminous, unfocused environmental documents do not advance the goals of informed decision making or protection of the environment.”<sup>25</sup>

## Requiring Each Agency to Estimate How Much It Costs to Produce an Environmental Assessment or Environmental Impact Statement

As noted by many analysts, the aggregate cost of preparing EA and EIS is enormous and yet remains largely unquantified, except in the case of the Department of Energy. One estimate—based on a conservative assumption that preparation would cost half of what it costs the DoE—ranges from \$450 million to in excess of \$1 billion every year (“an estimate [that] only covers direct contractor costs”).<sup>26</sup> At the same time, analysts note that federal agencies have small budgets and insufficient staff to conduct NEPA studies.<sup>27</sup>

The proposed rule says that “senior agency officials should ensure that agency staff have the resources and competencies necessary to produce timely, concise, and effective environmental documents.”<sup>28</sup>

Also, CEQ proposes to amend 1502.11 (“cover”) to require each agency to calculate a “cost” figure that is stated on the “cover” page of the EA/EIS—along with other significant information.<sup>29</sup> This proposed reform is a move in the right direction because it will increase transparency and accountability. Each agency has limited resources to devote to NEPA analysis. The cost-calculating exercise will enable the agency, other relevant government departments, interested parties, and taxpayers to gain valuable insight into how agencies divert their scarce resources to comply with the NEPA process.

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<sup>24</sup> <https://www.federalregister.gov/d/2019-28106/p-253>

<sup>25</sup> <https://www.federalregister.gov/d/2019-28106/p-225>

<sup>26</sup> Rutzick 2018, p. 14

<sup>27</sup> See for instance Robert Smythe and Caroline Isber (2003), “NEPA in the Agencies: A Critique of Current Practices,” *Environmental Practice*, 5(4): 290–297.

<sup>28</sup> <https://www.federalregister.gov/d/2019-28106/p-254>

<sup>29</sup> <https://www.federalregister.gov/d/2019-28106/p-259>

To fully avail of each agency's cost calculations for their EAs/EISs, the specifics of the calculation could be included as an appendix to the EAs/EISs.<sup>30</sup> This requirement could also enable CEQ to develop a standard formulation of costs across agencies, using a "pro forma" approach. Such standardization could also help address the proposed changes in 1502.22 regarding "reasonable" costs.<sup>31</sup>

In the future, the numbers and data gained through these calculations could help to form the basis of a more robust cost/benefit decision-making framework that could be applicable within NEPA. Agencies could then be encouraged to adopt one another's "best practices" for producing analyses in a timely and cost-effective manner.

## Indirect and Cumulative Effects

One specific element of current NEPA regulations that has contributed substantially to the duration and cost of undertaking EIS is the requirement explicitly to consider indirect and cumulative effects. This requirement has been interpreted expansively to entail analysis of effects that are only tenuously related to the proposed action. As a result, all manner of largely hypothetical consequences are assessed in order to cover all potential bases that might otherwise be challenged by opponents of the action.

To address this problem and provide some semblance of sanity to the NEPA process, CEQ proposes "to make amendments to simplify the definition of effects by consolidating the definition into a single paragraph and striking the specific references to direct, indirect, and cumulative effects."<sup>32</sup> Specifically:

*CEQ proposes to amend the definition of effects to provide clarity on the bounds of effects consistent with the Supreme Court's holding in Department of Transportation v. Public Citizen, 541 U.S. at 767-68. Under the proposed definition, **effects must be reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives; a "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA.** [EMPHASIS ADDED] This close causal relationship is analogous to proximate cause in tort law. *Id.* at 767; see also *Metro. Edison Co.*, 460 U.S. at 774 (interpreting section 102 of NEPA to require "a reasonably close causal relationship between a change in the physical environment and the effect at issue" and stating that "[t]his requirement is like the familiar doctrine of proximate cause from tort law."). CEQ seeks comment on whether to include in the definition of effects the concept that the close causal*

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<sup>30</sup> As noted in the discussion, this would be based on "an estimate of environmental review costs, including costs of the agency's full-time equivalent (FTE) personnel hours, contractor costs, and other direct costs related to the environmental review of the proposed action")

<sup>31</sup> <https://www.federalregister.gov/d/2019-28106/p-277>

<sup>32</sup> <https://www.federalregister.gov/d/2019-28106/p-327>

*relationship is “analogous to proximate cause in tort law,” and if so, how CEQ could provide additional clarity regarding the meaning of this phrase.*

The proposed rulemaking has been criticized by legislators and advocacy groups for revising the meaning of “cumulative effects.” Indeed, certain advocacy groups have claimed, hyperbolically, that these reforms are intended to “gut NEPA.”<sup>33</sup> This appears to be a misreading of the proposed reforms.

A recent legal analysis observes: “Litigation regarding the proper scope of a cumulative effects analysis has historically been used as a tool by climate change activists to challenge and impede projects. The Proposed Revisions will make it easier for federal agencies to comply with NEPA, thereby making such legal challenges less apt to succeed.”<sup>34</sup>

Yet, far from harming the environment, the reforms are likely to generate environmental benefits, including through enabling reduced use of energy and associated pollution, as well as emissions of CO<sub>2</sub>. This is because the delays associated with lengthy attempts to evaluate “cumulative effects” prevent or delay projects that lead to innovation, improve efficiencies, expand access to lower carbon fuels, and reduce congestion. For example, in congressional testimony, the author of the aforementioned Common Good study noted that “a six-year delay in rebuilding our nation’s crumbling highway infrastructure would release an extra 51 million tons of CO<sub>2</sub> emissions.”<sup>35</sup>

The environmental effects of delaying much-needed water infrastructure projects are also likely enormous. The Environmental Protection Agency regularly assesses the infrastructure needs for delivering safe, potable water and meeting environmental objectives across the United States. In its most recent report, the EPA found that the deficit in investment in water infrastructure had nearly doubled in 20 years, from \$253.6 billion in 1995 to \$472.6 billion in 2015.<sup>36</sup> The EPA notes the potential consequences of this infrastructure investment deficit for the environment and human health:

*A substantial portion of the transmission and distribution need is for replacing or refurbishing aging or deteriorating transmission and distribution mains. These projects are critical to the delivery of safe drinking water and can help ensure compliance with many regulatory requirements. Failures in transmission and distribution mains can interrupt the delivery of water and introduce dangerous contaminants into the drinking water supply.*<sup>37</sup>

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<sup>33</sup> <https://biologicaldiversity.org/w/news/press-releases/trump-move-gut-nepa-bedrock-us-environmental-law-would-slash-protection-air-water-wildlife-2020-03-10/>

<sup>34</sup> <https://www.jdsupra.com/legalnews/proposed-elimination-of-cumulative-82244/>

<sup>35</sup> <https://www.commongood.org/wp-content/uploads/2017/11/Philip-Howard-11.29.17-House-Testimony-w.-Attachment.pdf>

<sup>36</sup> [https://www.epa.gov/sites/production/files/2018-10/documents/corrected\\_sixth\\_drinking\\_water\\_infrastructure\\_needs\\_survey\\_and\\_assessment.pdf](https://www.epa.gov/sites/production/files/2018-10/documents/corrected_sixth_drinking_water_infrastructure_needs_survey_and_assessment.pdf)

<sup>37</sup> Ibid. at p. 23.

These are merely two broad examples of ways in which, by reducing the burden that NEPA imposes, in terms of delays and cost, the proposed reforms might generate very substantial environmental benefits. There are many others.

For example, until recently there has been very little fracking on federal land.<sup>38</sup> Although the amount of fracking has increased recently (in part due to changes put in place by the Trump administration in 2017), it remains small compared to the amount of fracking on private and state land.<sup>39</sup> While there are no doubt multiple reasons for this, compliance with NEPA is almost certainly among them. Indeed, several anti-development groups recently sued the BLM over a plan to permit fracking on BLM land in California—arguing that it was in violation of NEPA.<sup>40</sup>

Since fracking has contributed to a dramatic increase in the availability of and reduction in price of natural gas, thereby enabling power generators to switch from coal to gas, it has arguably done more than any other technology to reduce carbon dioxide emissions from electricity generation.<sup>41</sup> So, were NEPA reform to enable more fracking on federal lands, it would additionally contribute to reduced CO<sub>2</sub> emissions.

In testimony for a 2017 congressional hearing on modernizing NEPA, James Willox, County Commissioner for Converse County, Wyoming, makes an important observation about NEPA with regard to replacing or building infrastructure (regardless of the size of the project):<sup>42</sup>

*When NEPA was passed in 1969 there was no way to anticipate changes in technology like horizontal drilling, or the necessity of deploying fiber in rural areas as our country shifted almost overnight from voice telephone service to a broadband economy. As a procedural law only, NEPA should be flexible enough to account for these changes while adhering to its original goals.*

## Section 1508.8 - Specific Recommendations

Section 1508.8b: For the language “related to induced changes in the pattern of land use, population density or growth rate,” add language exempting projects that induce 10% or less new traffic and a 1% or lower annual growth rate.

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<sup>38</sup> <https://www.instituteforenergyresearch.org/fossil-fuels/gas-and-oil/oil-and-natural-gas-production-booms-on-private-and-state-lands-plummets-on-federal-lands/>

<sup>39</sup> <https://www.forbes.com/sites/davidblackmon/2018/10/29/the-drilling-boom-on-federal-lands-is-driven-more-by-price-than-policy/#338cb7786c15>

<sup>40</sup> <https://thehill.com/policy/energy-environment/478236-greens-accuse-blm-of-not-sufficiently-considering-fracking-impacts>

<sup>41</sup> <https://eidclimate.org/eia-u-s-carbon-emissions-fall-2017-mainly-natural-gas/>

<sup>42</sup> Testimony to House Natural Resources Committee (2017), “Modernizing NEPA for the 21<sup>st</sup> Century”, <https://docs.house.gov/meetings/II/II00/20171129/106653/HHRG-115-II00-Wstate-WilcoxJ-20171129.pdf>

Section 1508.8c: Eliminate the terms “aesthetic”, “historical”, “cultural” and “social.” None of these has anything to do with the environment. Each can add significant delays.

## Other NEPA/CEQ Reform Ideas to Support Better Environmental Outcomes

Eliminate NEPA/EIS/CE review for all projects that do not change roadway capacity. Currently, there are numerous projects that will convert free lanes to toll lanes. By requiring drivers to pay tolls on these lanes, congestion is reduced, with associated reductions in emissions. Yet all these projects are subject to NEPA, even though there is no change in roadway capacity.

Develop and require agencies to follow a pro-forma/standardized approach to Environmental Assessments and Environmental Impact Statements. The current approach to development of EA and EIS is arcane, discretionary, and in some respects arbitrary. The CEQ’s proposed amendments discussed in this comment would to some extent reduce that discretion. But the CEQ could go much further in creating a standardized system for undertaking EAs and EISs. For example, it could have required the use of standardized evaluations, flow charts, and standardized cost calculations, as discussed above. This would have made the entire process clearer, more predictable, inherently less costly and less subject to judicial review.

Enact legislative reform: As proposed by Benjamin Zycher, “NEPA itself needs legislative reform by Congress, as under current rules it has institutionalized three perverse conditions—a status quo bias, the “completeness” requirement, and the cost-shifting problem—each of which is inconsistent with sound benefit-cost analysis of proposed projects and environmental concerns.”<sup>43</sup>

Clarify federal nexus: Another possible reform by Congress was suggested by Converse County (Wyoming) Commissioner James H. Willox: Congress could “write new rules on what constitutes a federal nexus in the first place so that agency personnel and county governments can focus their time, resources, and attention on projects that actually do have an impact on federal lands themselves.”<sup>44</sup>

Exempt NEPA from the EAJA: To facilitate the original intent of NEPA, this would ensure the ability of agencies to produce their analysis in an impartial manner and without the constant threat of lawsuits. Consider the following table,<sup>45</sup> which illustrates the vast amount of money that

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<sup>43</sup> Benjamin Zycher (2020) “Reform of the National Environmental Policy Act”, <https://www.aei.org/articles/reform-of-the-national-environmental-policy-act/>

<sup>44</sup> Testimony to House Natural Resources Committee (2017), “Modernizing NEPA for the 21<sup>st</sup> Century”, <https://docs.house.gov/meetings/II/II00/20171129/106653/HHRG-115-II00-Wstate-WilloxJ-20171129.pdf>

<sup>45</sup>Todd Morgan and John Baldrige (2015). “Understanding Costs and Other Impacts of Litigation of Forest Service Projects: A Region One Case Study”, Bureau of Business and Economic Research, U. of Montana, <http://www.bber.umt.edu/pubs/forest/BBERLitigationRpt2015.pdf>

has been paid to interest groups across the USFS Regions over the decade 2003–2013. It notes that “Of the 133 Region 1 cases in the past 11 years, the majority (75) were by repeat litigants.”

Apply the English Rule by default: Regardless of whether NEPA is exempted from the EAJA, the incidence of frivolous—but expensive—lawsuits would be much diminished if the courts were required by default to award costs against the losing party.<sup>46</sup>

Reinforce the English Rule by requiring the posting of a bond or purchase of liability insurance: To ensure that funds are available from the plaintiff if they engage in litigation, do not win, and are forced to pay the costs of the defendant, they could be required to post a bond or demonstrate that they hold sufficient insurance to cover the defendant’s costs.

**Table 1: Number of Cases, Attorney and EAJA fees by NFS Region, 2003-2013**

Region	Number of cases	Cases with fees	Sum of Atty/EAJA Fees
1	133	25	\$1,086,668
2	59	7	\$379,592
3	80	11	\$204,422
4	83	18	\$658,986
5	105	25	\$1,847,782
6	128	27	\$1,743,300
8	51	5	\$368,779
9	36	5	\$372,291
10	22	5	\$228,000
WO	41	7	\$846,066
<b>Grand Total</b>	<b>738</b>	<b>135</b>	<b>\$7,735,886</b>

Give the time limit teeth via a “drop dead” clause: At present, the CEQ’s proposed time limit lacks any apparent teeth; there is no obvious penalty for exceeding the one-year limit for an EA or two-year limit for an EIS. To give the time limits some teeth, CEQ might consider requiring that if, after the specified time limit, the agency has been unable to produce a final EIS for reasons that demonstrably result from litigation, the draft EIS will become the final EIS and the project will proceed.

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<sup>46</sup> Helland, E., & Yoon, J. (2017). Estimating the effects of the English rule on litigation outcomes. *Review of Economics and Statistics*, 99(4), 678-682. [https://doi.org/10.1162/REST\\_a\\_00653](https://doi.org/10.1162/REST_a_00653)

## Constraining the Definition of “Stakeholders”: Analysis of Thousands of Comments Supplied in this NPRM (CEQ-2019-003)

Regarding stakeholder participation and feedback in the NEPA process, the proposed rulemaking offers CEQ the opportunity to seek to define the term “stakeholder” more narrowly, with the goal of limiting the influence of those who use NEPA as a delay tactic and/or to advance an agenda.

In the context of this specific NPRM, the CEQ should disregard identical comments that are clearly the result of highly coordinated internet campaigns.<sup>47</sup>

As of March 9, 2020, over 160,000 comments were made in response to this NPRM on regulations.gov.

Nearly one-eighth of these comments (19,785) have been submitted that contain the phrase “negative impact on birds” and over 7,000 include the phrase “national park lover”. These appear to be the same comments submitted thousands of times, but which contain little analysis. The images below show screen captures of regulations.gov illustrating the number of submissions with these two sample phrases.

The screenshot shows a web browser window displaying the regulations.gov website. The page title is "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act". The search bar contains the text "negative impact on birds" and shows "19,785 results for 'negative impact on birds'". The search results are filtered by "Document Type" and "Posted". Two sample comments are visible:

**Comment from Scott Hemler,**  
Dear Council on Environmental Quality, I oppose the proposed rule amending the National Environmental Policy Act regulations. This rule would have a negative impact on birds and...

**Comment from Deanna Simmons,**  
Dear Council on Environmental Quality, I oppose the proposed rule amending the National Environmental Policy Act regulations. This rule would have a negative impact on birds and...

<sup>47</sup> Rachel Augustine Potter (2017), “More than spam? Lobbying the EPA through public comment campaigns”, Brookings <https://www.brookings.edu/research/more-than-spam-lobbying-the-epa-through-public-comment-campaigns/>

The screenshot shows the CEQ Docket Browser interface. At the top, it displays the docket ID (CEQ-2019-0003), agency (Council on Environmental Quality), and parent agency (Executive Office of the President). Below this is a search bar containing the text "national park lover" and a search button. To the right of the search bar are options for "New Search within this Docket" and "Search Within Results".

On the left side, there are filter options under "Filter Results By...". The "Document Type" filter is expanded, showing options like "Notice (0)", "Proposed Rule (0)", "Rule (0)", "Supporting & Related Material (0)", "Other (0)", and "Public Submission" (which is checked). Below this are filters for "Posted" and "Comments Due", both set to "Search All".

The main content area shows "7,246 results for 'national park lover'". It lists several public submissions, each with a title, a brief description, and metadata including the date posted and the submitter's name. The first three entries are:

- Comment from William Crimbring:** As a national park lover, I believe that the recently proposed revisions to the National Environmental Policy Act (NEPA) represent a dangerous shift away from science-based...  
Public Submission | Posted: 02/07/2020 | ID: CEQ-2019-0003-8928 | Submitter Name: William Crimbring
- Comment from June Elliott-Cattell:** As a national park lover, I believe that the recently proposed revisions to the National Environmental Policy Act (NEPA) represent a dangerous shift away from science-based...  
Public Submission | Posted: 02/07/2020 | ID: CEQ-2019-0003-8929 | Submitter Name: June Elliott-Cattell
- Comment from Wendy Rosenfeld:** As a national park lover, I believe that the recently proposed revisions to the National Environmental Policy Act (NEPA) represent a dangerous shift away from science-based...  
Public Submission | Posted: 02/07/2020 | ID: CEQ-2019-0003-8927 | Submitter Name: Wendy Rosenfeld

The fourth entry is partially visible:

- Comment from Melissa Nelson:** As a national park lover, I believe that the recently proposed revisions to the National Environmental Policy Act (NEPA) represent a dangerous shift away from science-based...  
Public Submission | Posted: 03/09/2020 | ID: CEQ-2019-0003-44146

A similar random sample analysis of the 12,500+ comments made in response to ANPRM showed that a majority of these appeared to be in a copy/paste format (e.g. the same comment) and there were numerous duplicate entries that appear to be included in the overall comment count.<sup>48</sup> Such comments are likely to have originated with the same interest groups whose existence is tied to NEPA litigation (and thus are the very source of the problems that the NPRM is trying to address).<sup>49</sup> As noted by CEQ:

*Most of the **substantive** [EMPHASIS ADDED] comments [in the ANPRM] supported some degree of updating of the current regulations. Many noted that overly lengthy documents and the time required for the NEPA process remain real and legitimate concerns despite the NEPA regulations' explicit direction with respect to reducing paperwork and delays. In general, numerous commenters requested that CEQ consider revisions to modernize its regulations, reduce unnecessary burdens and costs, and make the NEPA process more efficient, effective, and timely.<sup>50</sup>*

<sup>48</sup> <https://www.federalregister.gov/d/2019-28106/p-156> ; comments available at

<https://www.regulations.gov/searchResults?rpp=50&so=ASC&sb=title&po=12500&s=CEQ-2018-0001>.

<sup>49</sup> See Potter (2017), "Table 1: Top Advocacy Group Sponsors of Comment Campaigns, by Number and Size"

<sup>50</sup> <https://www.federalregister.gov/d/2019-28106/p-156>



## Conclusion

The proposed rulemaking is certainly a step in the right direction. It should help to overcome some of the bureaucratic hurdles and legal wrangling that has characterized NEPA reviews, making them inefficient, ineffective, and extremely time-consuming. The proposed reforms will likely help streamline the NEPA process and result in fewer preliminary injunctions being issued by courts, which historically have been based on mistakes or oversight that is “sometimes trivial and commonly hypothetical in preparing an EIS or EA.”<sup>51</sup>

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<sup>51</sup> Rutzick (2018), p.6