



Andrew Gottlieb  
Executive Director

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BOARD OF DIRECTORS

Council on Environmental Quality  
730 Jackson Place NW  
Washington, DC 20503

Charles Sumner  
President

Pat Hughes  
Vice President

**RE: Docket No. CEQ-2019-0003**  
**Update to the Regulations Implementing Procedural Provisions of the National Environmental Policy Act**

Bob Ciolek  
Treasurer

Maureen O'Shea  
Clerk

To Whom It May Concern:

John Cumbler

The Association to Preserve Cape Cod (APCC), in response to the Notice of Proposed Rulemaking concerning the above captioned update to the regulations implementing the procedural provisions of the National Environmental Policy Act ("NEPA" or the "Act"),<sup>1</sup> respectfully submits its comments.

Margo Fenn

DeeDee Holt

Thomas Huettner

APCC is the Cape Cod, Massachusetts, region's leading nonprofit environmental organization, working for the adoption of laws, policies and programs that protect and enhance Cape Cod's natural resources and quality of life. Since 1968, APCC has been the voice for environmental protection on Cape Cod, with over 3,000 members that support its mission. APCC has serious concerns about the significant negative impacts the proposed regulations would have on the environment of Cape Cod and on efforts to protect the environment for present and future generations. APCC's comments are as follows:

Pat Hughes

Steven Koppel

Jack Looney

Cheryl Lubin

Elysse Magnotto-Cleary

Blue Magruder

Eliza McClennen

**The Propose Regulatory Amendments are Inconsistent with  
the Letter and Spirit of NEPA**

Stephen Mealy

Kris Ramsay

Robert Summersgill

Multiple court rulings have been clear: "Agency regulations, in order to be valid, must be consistent with the statute under which they are promulgated."<sup>2</sup> A federal agency cannot simply override Congress with a regulation.<sup>3</sup> Regulations that

Taryn Wilson

<sup>1</sup> 42 U.S.C. § 4331 *et seq.*

<sup>2</sup> *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 133 S. Ct. 1326, 1334 (2013) (quoting *United States v. Larinoff*, 431 U.S. 864, 873, 97 S. Ct. 2150 (1977)).

<sup>3</sup> *Louisiana Public service Commission v. Federal Communications Commission*, 476 U.S. 355, 375, 106 S. Ct. 1890 (1986).

contravene congressional intent are invalid.<sup>4</sup> The intent of Congress in enacting NEPA is specifically articulated in Section 101 of the Act entitled “The Congressional Declaration of National Environmental Policy.”<sup>5</sup> In that provision, Congress declared “that it is the continuing policy of the Federal Government, in cooperation with state and local governments and other concerned public and private organizations to use all practicable means and measures, including financial and technical assistance in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” (Emphasis added). In the existing version of 40 C.F.R. § 1500.1 concerning the purpose of NEPA, the regulation describes the Act as the “basic charter for the protection of the environment” and makes it clear that it ensures that federal agencies “act according to the letter and spirit of the Act.”

In its Notice of Proposed Rulemaking and in the proposed revision to §§ 1500.1(a) and 1500.1(b), the Council on Environmental Quality attempts to characterize NEPA solely as a procedural statute and the proposed updated rules as merely procedural changes in order to simplify the process. The proposed updated rules, however, seek to eliminate important procedural and substantive requirements of NEPA meant to protect the environment, foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, inform the public of environmental concerns, and encourage public involvement. The proposed updated regulations are contrary to the letter and spirit of NEPA. They are inconsistent with the congressional intent in enacting NEPA and, thus, are invalid.

APCC’s comments on several specific provisions of the proposed regulations are discussed below.

#### **Proposed Updated Regulations that are Legally Inconsistent with NEPA**

- **§§1500.3(b)(3), 1503(a)(3)(b):** These provisions unfairly limit comment periods to 30 days. Both provisions require that any objections to draft environmental impact statements and the submitted alternatives, information, and analyses sections in final environmental impact statements shall be submitted within 30 days of the notice of availability of the draft and final environmental impact statements. The current regulation § 1501.8 rejects universal time limits for the NEPA process as being too inflexible. It requires that time limits be appropriate to the individual actions. These amendments, which set inflexible 30-day limits for public comments on technically complex documents containing environmental alternatives and analyses of a project, put citizens at a distinct disadvantage in challenging a final environmental impact statement. This is contrary to the policy of encouraging public input in the review process, which was specifically articulated by Congress in enacting NEPA.

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<sup>4</sup> *National Labor Relations Board Union v. Federal Labor Relations Authority*, 834 F. 2d 191 (D.C. Cir. 1987).

<sup>5</sup> 42 U.S.C. § 4331a.

- **§ 1500.4 (a):** Under the guise of reducing excessive paperwork, this proposed amendment allows an agency to create a category of actions whereby an agency's requirement to prepare an environmental impact statement is exempted by using "categorical exclusions" to define categories of actions that the agency determines as not having a significant effect on the human environment. Coupled with the definition of categorical exclusion contained in revised § 1508.1(d) (discussed below), this revision allows an agency to ignore the individual and cumulative effects of an action without consideration of the unique potential environmental impacts in the location of the proposed action. For example, if all interstate highways to be sited in undeveloped, underpopulated, rural areas are determined to be included in the category of excluded actions that do not require an environmental impact statement, the potential adverse effects on critical natural resources found at a particular location where a highway is proposed, such as effects on surface waters, ground water, and aquifer recharge areas in such locations, would not be considered. Yet negative impacts to water quality in the area of such an excluded action clearly has a significant effect on the human environment. The creation of categories of excluded actions has the potential for abuse, as well as the likelihood of overlooking all the potential environmental damage caused by a proposed agency action. This is specifically what NEPA was enacted to prevent.
- **§§1501.1, 1508.1(q), 1508.1(q)(1):** These proposed amendments, taken together, eliminate large categories of federal actions from regulation under NEPA. Pursuant to § 1501.1, "NEPA Threshold Applicability Analysis," for NEPA to apply, federal agencies must determine whether the proposed action is a "major federal action." §1508.1(q) defines *major federal actions* as those actions subject to federal control and responsibility with effects that may be significant. The definition of major federal actions does not include non-federal projects with minimal federal involvement where the agency cannot control the outcome of the project. Under the proposed §1508.1(q)(1), major federal actions would not include funding assistance in the form of general revenue sharing funds with no federal agency control over the subsequent use of such funds. Additionally, the new definition excludes loans, loan guarantees, or other forms of financial assistance where the federal agency does not exercise sufficient control and responsibility over the effects of the action. This eliminates a substantial number of projects that receive federal funding. APCC maintains it is vitally important that whenever taxpayer funds are provided for projects undertaken by private parties, NEPA's protections must apply.
- **§ 1502.1:** APCC notes with great concern that, in describing the primary purpose of an environmental impact statement, the proposed revision in this section eliminates the true overarching primary purpose of the environmental impact statement, that being: to ensure the policies and goals defined in NEPA are infused into the ongoing programs and actions of the federal government. The proposed revision simply states that the purpose of the environmental impact statement is to ensure that environmental impacts of the "federal action" are *considered* in the decision-making process. The

congressional goals in enacting NEPA to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans are ignored. The proposed change blatantly conflicts with the clear policy directives of Congress.

- **§ 1502.18:** This new regulation creates a certification process whereby, based upon the summary of the submitted alternatives, information, and analyses section, the decision maker for the lead agency shall certify in the record of decision that the agency has considered all of the alternatives, information, and analyses submitted by public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement. This certification process in the new provision entitles the decision maker of the lead federal agency to a conclusive presumption that the agency environmental impact statement has considered the information included in the submitted alternatives, information, and analyses submitted by public commenters. Conclusive presumptions of actions by agencies are rare in law and are obviously subject to abuse. By inserting a doctrine of conclusive presumption in the decision-making process, the new provision would effectively prevent public challenge to an agency environmental impact statement that failed to take into serious consideration all information, analysis and alternatives to protect the environment. Such an action is arbitrary, capricious and contrary to the letter and spirit of NEPA. The new provision is therefore inconsistent with the Act.
- **§ 1506.6(f):** The updated regulation eliminates the ability of the public to be provided with copies of environmental impact statements, the comments received, and any underlying documents without charge. The new rule would require compliance with the fee provisions of the Freedom of Information Act. Members of the public seeking documents in order to comment on a federal action would be required to pay the “reasonable standard charge” for copies of such documents. This amendment could serve to discourage and seriously limit public involvement in actions that have significant impact to the environment. Limiting public participation is inconsistent with the letter and spirit of NEPA.
- **§1508.1(d):** The updated regulation amends the definition of *categorical exclusion*. It is defined in the proposed regulation to be those actions that “normally” do not have a significant effect on the human environment. In the current regulation, the term is defined as those actions that “individually or cumulatively” do not have a significant effect on the human environment. The term “normally” is not defined and can cause substantial confusion in attempting to interpret its meaning. Does “normally” take into consideration the totality of the effects of actions in a specific, environmentally sensitive location, rather than those actions that normally have no effect in a less environmentally sensitive location? The cumulative effects of an action on all aspects of

the environment must be considered in determining if certain actions will or will not have a significant adverse impact.

- **§ 1508.7:** This section, which currently contains the definition of *cumulative impact*, is deleted from the proposed regulations. In the existing regulations, *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 other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. The elements contained in the existing definition are consistent with the congressional intent of NEPA to use all practicable means and measures in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. The deletion of this term is inconsistent with the letter and spirit of NEPA.
- **§ 1508.1(g):** The updated regulations amend the definition of *effects* to mean effects of the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. This new definition allows federal agencies to ignore the action's individual or cumulative contribution to effects that it determines are not reasonably foreseeable or do not have a reasonably close causal relationship to the proposed action. The use of this definition is an attempt to support the present administration's rejection of the overwhelming science related to the effects of climate change and how it negatively effects the environment and human welfare. APCC is keenly aware of the negative effects of climate change on Cape Cod, including sea level rise, accelerated coastal erosion and increased frequency and severity of coastal storms. Climate change has been caused by, and is continuing to be caused by, human actions. The scientific process that supports this conclusion is consistent with the original congressional policy that created the goals of NEPA.<sup>6</sup> As referenced several times in this comment letter, NEPA requires federal agencies to use all practicable means and measures, including financial and technical assistance in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony. A defined term that allows an agency to ignore the effect that an action has on climate change, in spite of the scientific evidence, is inconsistent with NEPA's policy to use all means and measures to maintain conditions under which man and nature can exist in productive harmony.
- **§ 1508.1(g)(2):** This provision creates a new *but for* provision in the definition of effects. It states that a *but for* causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. This means that effects should not be considered

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<sup>6</sup> See, [www.bostonglobe.com/2019/09/26/climate-change-cape-cod/story](http://www.bostonglobe.com/2019/09/26/climate-change-cape-cod/story).

significant if they are remote in time, geographically remote, or the product of a lengthy causal chain. Under this new provision, effects do not include effects that the agency has no ability to prevent due to its limited statutory authority or that would occur regardless of the proposed action. Analysis of cumulative effects would not be required. This provision is another example of the attempt to ignore the effects that an action may have on climate change and is inconsistent with NEPA's policy to use all means and measures to maintain conditions under which man and nature can exist in productive harmony.

- **§ 1508.1(aa):** This provision proposes a definition of *reasonably foreseeable*. Under this proposed definition, *reasonably foreseeable* means sufficiently likely to occur such that “a person of ordinary prudence” would take it into account in reaching a decision. It is highly unusual for agencies that employ staff with substantial scientific and technical expertise regarding the environmental effects of a proposed federal action to adopt an ordinary man standard to conclude the reasonably foreseeable consequences of such an action. This proposed definition is but another example of the agency's attempt to ignore the reasonably foreseeable effects, supported by the latest available science, that an action may have on climate change and is inconsistent with NEPA's policy to use all means and measures to maintain conditions under which man and nature can exist in productive harmony.

### Conclusion

As discussed in detail above, the proposed regulations are inconsistent with the letter and spirit of NEPA and are simply an attempt to override by regulation the clear legislative intent of Congress in the adoption of NEPA. As such, the proposed regulations are inconsistent with NEPA and are therefore invalid regulations.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Andrew Gottlieb', with a long horizontal flourish extending to the right.

Andrew Gottlieb  
Executive Director