March 9, 2020

Council on Environmental Quality
730 Jackson Place NW
Washington, D.C. 20503
Docket No. CEQ-2019-0003

Transmitted via the Federal eRulemaking Portal: https://www.regulations.gov

Re: National Tribal Water Council Comments on: *The Council on Environmental Quality Proposed Rule: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*

Dear Council Members:

On January 10, 2020 the Council on Environmental Quality (CEQ) published the proposed rulemaking "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act." 85 Fed. Reg. 1684. The National Tribal Water Council (NTWC) has a number of concerns regarding the proposed rule. While we agree that certain portions of the National Environmental Policy Act (NEPA) regulations could be updated, we urge the CEQ to consider whether it is beneficial to enhance the efficiency and timeliness of NEPA actions at the expense of thoroughness and the full inclusion of all affected parties. We also urge the CEQ to consider whether the proposed changes will truly enhance efficiency and timeliness, or will instead create confusion among agencies, project proponents, and the public and lead to additional litigation delays.

The NTWC was formed by the U.S. Environmental Protection Agency (EPA) to provide EPA with technical input from Indian Country, the lands inhabited by Tribal communities and members, to strengthen EPA's coordination with federally-recognized American Indian and Alaska Native Tribes, herein referred to as "Tribes," and to allow EPA to better understand issues and challenges faced by Tribes that relate to EPA water programs and initiatives. The NTWC provides Tribes and associated tribal communities and tribal organizations with research and information for decision-making regarding water issues and water-related concerns.

Further, the NTWC advocates for the best interests of Tribes and tribally-authorized organizations in matters pertaining to water. The NTWC advocates for the health and sustainability of clean and safe water, and for the productive use of water for the health and well-

being of Indian Country. The NTWC takes its role seriously and has provided input to EPA on many water issues since the Council's inception.

Many projects undergoing NEPA reviews would have impacts on water resources. The NTWC reminds the CEQ that, when it crafts the final NEPA regulations, it should bear in mind that virtually all Tribes maintain a deep personal, cultural, and spiritual relationship to water. No matter the water body size, whether an ocean, lake, river, stream, creek, spring, or seep, the water is treated with respect and dignity as a living entity and held sacred. The NEPA regulations must provide opportunities to Tribes to comment on the water-related (and other) impacts of a proposal in light of these perspectives.

Background

The proposed rule would result in a comprehensive rewrite of the NEPA regulations, which govern how federal agencies identify, analyze, and mitigate anticipated environmental impacts of major federal actions.

The proposed changes have been succinctly summarized by James McElfish, of the Environmental Law Institute (ELI), in ELI's Practitioner's Guide to the Proposed NEPA Regulations (ELI, February 2020). The NTWC agrees with McElfish that:

> *Many of the changes published in the January 10, 2020, proposal—such as elimination of the definition of "significantly," removal of "cumulative effects" as an element of NEPA analysis, similar treatment of "indirect effects," deletion of conflict-of-interest provisions, the creation of agency-certified "conclusive presumptions," and others—raise a substantial set of new issues that go beyond "modernizing" and "clarifying" the regulations.*
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> *If adopted as proposed, the regulations would, as CEQ recognizes, necessarily sweep away all existing CEQ guidance documents and handbooks (85 Fed. Reg. 1710). They would also require complete revision of the NEPA procedures of all federal agencies, as well as all of their handbooks, manuals, forms, and guidance documents, within what is likely to be a chaotic period of up to 12 months. This transition period will in turn raise concerns about federal actions undergoing NEPA review and/or entering the process, or being reconsidered or addressed on remand. A substantial technical literature on NEPA practice would also be superseded.*
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> *At the same time, the substantive changes would call into question the continuing applicability of a half-century of federal court decisions and administrative tribunal decisions, creating future issues of whether these precedents concerning "cumulative" impact analysis, "indirect effects," "reasonable alternatives," or "significance" were interpretations of the NEPA statute or simply of the prior regulations. Nearly every word of the 1978 regulations has been litigated many times over. If adopted, the proposal would create new interpretive issues for litigators, judges, and agencies.*
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> *Finally, the proposed rule, if finalized, will likely draw challenges in scores of federal district courts across the country. In addition to substantive issues, it can*

be expected that there will be fierce contests over standing, ripeness, deference or lack thereof, retroactivity, and the relationship of current agency NEPA procedures (embodied in regulations, handbooks, and contracts) to new CEQ regulations.

Different legal outcomes in multiple jurisdictions, including differences in the scope of remedial relief, may be further complicated by CEQ's own proposal that all sections of the new rule be deemed "severable" (proposed §1500.3(e)). This may mean that for much of the next several years portions of the regulations may be applicable in some districts and not others; and federal agencies may need to manage NEPA processes differently across their portfolio of lands, planning and leasing activities, and permit actions in different geographic jurisdictions. States, Tribes, and local governments, as well as applicants, will be faced with complex challenges as the rule is litigated.

Relatedly, the NTWC believes the proposal presents an incomplete picture of comments received by Tribes and Tribal organizations from the advance notice of proposed rulemaking (ANPR). In the section on Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, CEQ states that it responds in part to "Tribal government comments supporting the expansion of the recognition of sovereign rights, interest, and expertise of Tribes in the NEPA process." 85 Fed. Reg. at 1711. As explained below, the NTWC supports CEQ's recognition of tribal interests and expertise, but CEQ's response addresses only a portion of the tribal comments it received. For example, the National Congress of American Indians commented that:

It is our general [sic] that the current CEQ NEPA regulations are sufficient and do a satisfactory job of promoting the purpose and intent of NEPA. Agencies, courts, and other stakeholders have four decades of experience with the existing regulations, which has created a body of settled law and expectations on all sides. While there are certainly areas where improvements can be made, we would strongly caution against major structural amendments or "change for change's sake." Wholesale changes will lead to a lengthy period of tremendous uncertainty and frequent litigation, undermining the fundamental objectives (efficiency, predictability) on which the ANPRM is based.

Moreover, any efforts to amend the regulations for the sake of timeliness or to achieve greater efficiency should not increase the burdens on tribes and other interested parties to participate in the NEPA process. With that in mind our comments generally involve increased recognition of tribal nations as governments and the adoption of a more appropriate scope of tribal interests within the regulations.

Although the proposal partially addresses Tribal participation and interests in the NEPA regulations, it ignores (and in fact does the opposite) of the comments' main point: wholesale changes are not necessary and will lead to confusion, and changes should not increase the burdens on Tribes or the public. Further, CEQ does not state, either in the Executive Order 13175 section or elsewhere, whether it consulted with Tribes that requested consultation regarding the ANPR, as it was required to do.

NTWC Comments on the Proposed Rule

1) The NTWC notes and supports the CEQ's proposal to add "Tribes" to the phrase "State and local" throughout the rule and agrees that early coordination is desirable. The NTWC also notes and supports the proposal to change the provision for agencies to provide public notice from "Notice to Indian tribes when effects may occur on reservations" to "Notice to affected Tribal governments." 85 Fed. Reg. at 1692, 1725. These changes will give tribal governments the same participatory footing as state and local governments. They also will help ensure that consultation and coordination with Tribes will take place, as appropriate, throughout the NEPA process, thereby recognizing Tribes as sovereign governments. Tribal participation leads to a more robust environmental assessment (EA) or environmental impact statement (EIS) and helps tribal voices and concerns be heard. Section 1501.8(a) of the proposed rule should also allow Tribes, not just federal agencies, to appeal any denial of participation by the Lead Agency. Of course, federal agencies should already be including Tribes in the manner proposed, and to the extent they are not the NTWC suggests that CEQ instruct agencies on this responsibility without waiting for a final rule.

   The proposed language that a Tribal "agency of similar qualifications may, by agreement with the lead agency, become a cooperating agency," 85 Fed. Reg. at 1716 (proposed § 1501.8), is problematic in that the terms "similar" qualifications and "agreement" are subjective and thus open to interpretation and litigation. The proposal's preamble does not explain or clarify this provision. Participation in NEPA processes as a cooperating agency should be contingent only on a Tribe's interest, and should occur to the maximum extent possible based on the Tribe's resources, with full funding support from the lead agency.

   The NTWC supports the CEQ's statement that the regulations facilitate the use of existing studies, analyses, and environmental documents prepared by Tribes, along with states and local governments, 85 Fed. Reg. at 1691, although it is not clear where or how this assertion is codified in the regulatory text. To the extent it is not included, the NTWC asks that the CEQ add a provision that clarifies this intent.

   Related to the topic of tribal participation, the NTWC offers comments on language in the proposed rule Section 1500.3(b) that addresses "exhaustion," meaning that issues that were not raised by a particular party during public comment will be deemed "unexhausted" and "forfeited" by that party (85 Fed. Reg. at 1693). This proposal would be disadvantageous for Tribes, as Tribes are often not informed about NEPA processes and products in a timely manner or are unable to respond immediately due to resource limitations. Again, Tribes are not able to employ experts in every conceivable field and may not be able to immediately address an issue even though they have been informed of it; instead, Tribes may need to rely on other parties to raise certain issues in the first instance. For all these reasons, Tribes should be able to raise claims based on issues that were raised during the public comment period, even if they were raised by another party.

   The NTWC also opposes CEQ's proposal to require Tribes and other parties to object to an agency's summary of comments within 30 days of the EIS or forfeit claims based on those comments. 85 Fed. Reg. at 1693, 1722 (proposed § 1503.3(b)); *see also id.* at 1720

(proposed § 1502.17). It is unclear what benefits this proposed new requirement would provide: it seems unlikely that an agency would change its analysis based on objections to a summary, and so this requirement would only serve to delay resolution of any claims.[1] Moreover, it would add a new burden on Tribes to have to review new material and submit additional comments within a short timeframe.

2) The NTWC supports the well-documented position that a thorough environmental analysis leads to better agency decision making. NEPA and the CEQ's current implementing regulations help promote thorough analyses of proposed projects' environmental impacts, including water quality and climate impacts. Although NEPA does not require any particular decision to be made, these environmental analyses are essential for the decision-making federal agency as well as for impacted Tribes. Instead of "foster[ing] and promot[ing] the improvement of environmental quality," as the CEQ is required to do, 42 U.S.C. § 4344(4), the proposed rule would weaken federal environmental review obligations. The proposed rule would, contrary to NEPA, require or allow agencies to make decisions with an incomplete picture of the proposed projects' environmental impacts. Tribes and tribal environmental programs generally view their relationship with the environment in a holistic manner, and tend to manage their interactions with the environment accordingly. The proposal would reduce the information available to Tribes regarding a proposed project's environmental impacts, including water quality impacts, as well as impacts to other natural resources that are bound up with water quality. Tribes rely on that information to understand environmental interactions and to protect their communities. The NTWC objects to the proposed rule as written; the CEQ should withdraw it.

3) The NTWC appreciates the intentions of the CEQ to improve and streamline the NEPA process and its implementation. However, due to the nature and extent of the proposed changes, the NTWC believes that the proposed rule, as written, would have many, some possibly unintended, some perhaps intended, adverse impacts on environmental protections afforded to Tribes. The impacts will necessitate considerable additional work by the Tribes, regulating agencies, and state and local governments, are likely to result in much litigation, and create much uncertainty for Tribes concerning NEPA processes going forward. The NTWC believes that the proposed rule was developed without consideration for the very considerable impacts that the proposed changes, if adopted, will have on Tribes.

4) The CEQ proposes changes to relevant definitions in Part 1508. Importantly, the CEQ proposes to state that analysis of cumulative effects is no longer required under NEPA and to strike the definitions of "cumulative," "direct," and "indirect" effects. 85 Fed. Reg.

[1] Proposed § 1503.3(b) says, "Comments not provided within 30 days shall be considered exhausted and forfeited, consistent with § 1500.3(b)." 85 Fed. Reg. at 1722. This language is confusing and perhaps in error. If the CEQ recognizes the comments are exhausted then they should not be forfeited. *See* 85 Fed. Reg. at 1713 (proposed § 1500.3(b)(3) (stating comments must be submitted within the comment period or "be deemed unexhausted and forfeited"). Because the various provisions are confusing and do not provide adequate notice to the public, if the CEQ intends to move forward with this provision, it should withdraw the proposal and publish a new proposal that makes sense.

at 1708, 1721. The CEQ also asks whether the final rule should make the same statement for indirect benefits, *id.* at 1708. These changes would have grave implications, not just for Tribes, but for the environment as a whole, and would differ substantially from previous NEPA practice. They would violate NEPA's statutory requirement that agencies include a detailed statement on the environmental impact of the proposed action, which includes cumulative and indirect impacts. *See, e.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390, 409-10 (1976) (citing 42 U.S.C. § 4332(2)(C)). The NTWC believes that the CEQ's existing guidance documents on how to address cumulative effects properly reflect the law and should be retained. *See, e.g.*, James L. Connaughton, Chairman, Council on Environmental Quality, Guidance on the Consideration of Past Actions in Cumulative Analysis (June 24, 2005); Council on Environmental Quality, Considering Cumulative Effects Under the National Environmental Policy Act (1997); *see also* Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 81 Fed. Reg. 51866 (Aug. 5, 2016).

Adequate environmental consideration cannot be given to any proposed action without looking at combined impacts from existing and future projects or impacts from existing and future neighboring projects, especially for fossil fuel development, mining projects, and pipelines. Many pollutants have cumulative effects in humans or animals, and existing body burdens are also an important consideration.

Without consideration, analysis, or evaluation of cumulative effects, Tribes are assured a future of ever-declining environmental quality, because the baseline against which environmental impacts are assessed will be diminishing over time. Many environmental impacts that are with us today – in air, water, or on or beneath the earth's surface, result from a failure to consider the cumulative effects of a multitude of lesser environmental impacts. This result is true no matter the contaminant or the media. Human experience with the negative consequences of their failure to address cumulative environmental impacts is well-illustrated in the fields of stormwater management, air quality, local and global water quality, noise, toxic substances, wastewater, ocean pollution and other areas. Neglecting cumulative impacts means that only the most egregious of impacts may be found objectionable, and that over time, background levels of all manner of environmental contaminants will be allowed to grow.

Additionally, under the proposed rule, a determination of whether an impact is significant may no longer be based on cumulative effects. Thus, the bar for a finding of significance will be raised, with diminished NEPA review. This reduction in the scope of NEPA applicability and the resulting elimination of impact analysis will generally be to the detriment of individuals, communities, and the environment inhabited and used by Tribes for their livelihood, subsistence, culture, and ways of life.

Finally, concerning cumulative impacts, as McElfish (2020) has noted and the NTWC fully concurs:

> *The operational history of NEPA over 50 years has been working out how to evaluate cumulative impacts, not whether to evaluate them. For example, see: Considering Cumulative Effects Under the National Environmental Policy Act (CEQ, 1997:*

https://ceq.doe.gov/publications/cumulative_effects.html). Therein it is reported that "the passage of time has only increased the conviction that cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment. The purpose of cumulative effects analysis, therefore, is to ensure that federal decisions consider the full range of consequences of actions."

The proposed rule also will eliminate consideration of indirect effects, such as changes in the growth rate of development, changes in population density, industrial or other activity, land use types and distribution, and the corresponding effects on air quality, water quality and environmental conditions. Similar to the results of the elimination of consideration for cumulative impacts discussed above, this proposed change will result in an elevation of the bar for a finding of significance, with diminished NEPA review, a reduction in the scope of NEPA applicability. As in the case of cumulative impacts, the resulting elimination of impact analysis will yield results that will be, in general, to the detriment of individuals, communities, and the environment inhabited and used by Tribes for their livelihood, subsistence, culture and ways of life. This result is especially problematic for Tribes with smaller land holdings because the indirect effects from activities on adjoining and surrounding lands is much more profound, due to the relatively small boundary length and relatively short distances between individuals and the nearby environmental hazards.

The NTWC asserts that consideration must be given to indirect effects. Agencies cannot ignore reasonably foreseeable impacts just because they might occur at a later date, at a more distant location, or as a result of indirect effects. The CEQ also seeks to eliminate consideration of any impacts that it deems do not have a "sufficiently close causal connection to the proposed action." 85 Fed. Reg. at 1708. The proposed rule language does not discuss what criteria should be considered in making this decision, but it is objectionable for the same reasons as discussed above.

The NTWC urges the CEQ to continue to require that direct, indirect, and cumulative impacts all be considered.

5) The NTWC observes that as of February – March, 2020, the CEQ has only one member, and that would be its Chairman. U.S. Code Title 42 Section 4342 (Establishment; membership; Chairman; appointments) mandates that:

> *The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate.*

Thus, the CEQ is not functioning as intended by the laws of the United States, yet it has issued the proposed rule regardless. The membership of the CEQ should be expanded to the legally mandated level, so that the CEQ may be better equipped to responsibly protect the environment and human health of Tribal individuals and communities, in addition to traditional subsistence and cultural practices.

6) Pursuant to the proposed rule (Sections 1508.1(d), 1500.4(a), 1500.5(a) 1501.4(a) and 1507.3(d)(2)(ii)), the development and adoption of Categorical Exclusions may no longer take into consideration cumulative effects. Here again, the proposed rule would over time result, for reasons stated above, in a net degradation of environmental quality for Tribes.

7) It is the position of the NTWC that NEPA applies to all agencies of the federal government and that a lead agency, as a representative of the federal government, should be required to consider alternatives both under its purview and under the purview of other federal agencies. It is simply not practicable that NEPA be conducted under the simultaneous purview of all agencies, and thus the lead agency must necessarily consider alternatives under the purview of other agencies.

8) The NEPA regulations ultimately finalized should retain the existing language concerning conflict(s)-of-interest on the part of EIS preparers.

9) Review of Environmental Effects - Within the proposed section 1502.24, it is stated that agencies shall "make use of reliable existing data and resources and are not required to undertake new scientific and technical research to inform their analyses." 85 Fed. Reg. at 1721. While it is consistent with past practice that agencies do not need to create new science or methods in order to comply with NEPA, the proposed wording could be interpreted as permitting denial of additional field work or investigation of environments or settings that are not adequately described by "existing data and resources," and that result would be unacceptable. Indeed, it is often the case that existing and available data to support decision making are incomplete, even though methodologies for acquiring such data are both available and proven.

10) The CEQ proposes to amend Section 1501.2(b)(2) to clarify that agencies should consider economic and technical analyses along with environmental effects. 85 Fed. Reg. at 1695. The NTWC agrees that economic factors can be considered but should not be limited to analyses of the profit to be gained by corporations. Economic analyses should also consider the economic value provided by ecosystems, or ecosystem services, and the economic benefit that can be realized by "no action" or the losses that would occur due to implementation of one or more project alternatives. The "no action" analysis would examine the impacts of choosing not to move ahead with a project, and would look at the economic, social, and environmental benefits that the ecosystem provides. This analysis establishes a baseline value for ecosystems services. Alternative actions could include a variety of different project scenarios. This allows for the possibility that project alternatives may be scoped with the explicit objective of increasing the value of ecosystem services, for example, in settings where ecosystems have been disrupted and the corresponding ecosystem services diminished, e.g., due to prior land or water use practices.

    As an example of demonstrating the economic benefits of "no action," the Fond du Lac Band of Lake Superior Chippewa recently commissioned an analysis of the ecosystem goods and services provided by the St. Louis River watershed, which makes up one of the

borders of the Fond du Lac Reservation.[2] Fond du Lac also produced a Health Impact Assessment on the social benefits of wild rice,[3] which is a traditional food source that is threatened by water quality issues, along with an economic analysis of the benefits of wild rice to Minnesota Tribes.[4]

11) The NTWC sees several additional troubling issues concerning the proposed language for Part 1508. The proposal states, "it is CEQ's intent to focus agencies on analysis of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action." 85 Fed. Reg. at 1708. The CEQ also proposes "that effects should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy causal chain." *Id.* The addition of "have a reasonably close causal relationship to the proposed action," has no basis in law and could be used to eliminate analysis of foreseeable impacts of climate change. For example, some entities may argue there is not a close enough causality between climate change and the emissions of any facility in particular. This language could also be construed as relieving federal agencies of addressing the long-term impacts of greenhouse gas emissions (GHGs) along with bio-persistent pollutants. The proposal claims the CEQ "proposes to codify a key holding of *Public Citizen* (541 U.S. at 767-68) relating to the definition of effects to make clear that effects do not include effects that the agency has no authority to prevent or that would happen even without the agency action, because they would not have a sufficiently close causal connection to the proposed action." 85 Fed. Reg. at 1708. But the proposed language goes beyond that holding, which involved presidential action the agency had no control over. On the other hand, agencies generally have the power to act on a project based on information about downstream effects. Again, the NTWC fears this language could be used to ignore the impacts of GHG emissions on climate change, as the impact is global in nature and cannot be blamed on any single facility or action.

    Also within Part 1508, the CEQ proposes to change the definition of reasonable alternatives that agencies must consider. 85 Fed. Reg. at 1710. While the CEQ quotes a Supreme Court case that says, "alternatives must be bounded by some notion of feasibility," the CEQ proposes to go beyond that decision and require consideration merely of a reasonable range of technically and economically feasible alternatives. *Id.* (*quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 551 (1978)). This change will improperly narrow the alternatives required to be considered by the statute and limit the environmental analysis performed. Moreover, no further information is given as to the definition of these terms or how agencies will decide on this range of technically and economically feasible alternatives (project proponents often make claims that the exact proposed project is the only economically feasible project, yet still move forward and make significant profits after different alternatives are selected). It is the NTWC's stance that all reasonable alternatives should be considered.

12) In section 1501.3, the CEQ proposes directions for agencies to follow when determining what level of NEPA review is required. 85 Fed. Reg. at 1695, 1714. These directions

[2] http://fdlrez.com/RM/downloads/Earth%20Economics%20St%20Louis%20River%20Project%20Report.pdf.
[3] http://www.fdlrez.com/RM/downloads/WQSHIA.pdf.
[4] http://www.fdlrez.com/RM/downloads/WQSWildRiceBenefits.pdf.

should be studied carefully along with the criteria for when and how they will be applied. The CEQ should clarify or remove proposed section 1501.3(b)(1), which provides for permissive limitations on environmental effects that agencies may consider to determine whether the effects are significant. 85 Fed. Reg. at 1714. The NTWC agrees that both short- and long-term effects are relevant. *See id.* But significant environmental effects of a project can be local, regional, national, or global. It is unclear what the CEQ means with its example regarding a "site-specific action" usually depending "upon the effects in the locale rather than in the Nation as a whole." *Id.* This example should be removed or clarified; all environmental effects of a project must be considered when evaluating whether the effects are significant.

Conclusion

The NTWC opposes the finalization of the proposed rule for the reasons outlined above.

The proposed revisions need to be analyzed in terms of their potential environmental, financial, legal, organizational, cultural, and institutional impacts, both intended and unintended, on Tribes, many of which are already under-resourced when it comes to engaging, enforcing and adhering to a complex set of federal and state environmental actions, regulations and rules.

Furthermore, the abilities of Tribes to adjust to major changes to federal rules, illustrated in this instance by the proposed NEPA revisions, and to the entire chain of court rulings and interpretations that will inevitably flow down over the years and even decades as a result of the implementation of the proposed changes, needs to be considered.

We thank the CEQ for an opportunity to comment on the Proposed NEPA Regulations revisions. If you have any questions or require clarification from the NTWC, please do not hesitate to contact me.

Sincerely,

Ken Norton, Chairman
National Tribal Water Council

Cc: Karen Gude, EPA Office of Water