DRAFT RESPONSE LETTER

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Council on Environmental Quality
730 Jackson Place NW
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Attn: Docket No. CEQ-2018-0001

DRAFT Via Federal eRulemaking portal at https://www.regulations.gov.

July 17, 2018

Dear Mr. Boling and the Council on Environmental Quality,

The following are the comments of Rocky Smith and… on the Advanced Notice of Proposed Rulemaking (the ANPR) for an "Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act", docket identification (ID) number CEQ–2018–0001, published in the Federal Register of June 20, 2018 (83 Fed Reg 28591 et seq.).

All of the endorsers of this letter regularly participate in NEPA processes for projects, activities, plans, policies, and regulations advanced by federal agencies, especially USDA Forest Service and USDI Bureau of Land Management.

I. INTRODUCTION

The National Environmental Policy Act (NEPA) and its implementing regulations (hereafter, "the CEQ Regulations" or "the rule") at 40 CFR 1500 et seq. are a vitally important component in managing our country's federal estate and the resources thereon. At the outset, the current CEQ Regulations state it well: "The National Environmental Policy Act (NEPA) is our basic nation charter for protection of the environment". 40 CFR 1500.1(a).

It is critically important that, prior to approving projects or plans with more than a negligible impact on the environment, that the public and agency decisionmakers are fully informed on the possible impacts of the proposed action and have thoroughly looked at ways to minimize and mitigate the human impact on air, water, soil, wildlife habitat, climate change, and other aspects of the human environment. The current rule provides a process which, if diligently followed, ensures that impacts are disclosed and addressed prior to approval of any project.

We believe the CEQ Regulations generally work just fine, and no major changes to them should be contemplated. Personnel in agencies sometimes complain about the time and effort it takes to complete the NEPA process for any given project. We believe that a good, hard look at the impacts of every project is not only required by NEPA, but is also needed to ensure compliance

with other statutes as applicable, including but not limited to the Endangered Species Act, the Clean Air Act, and the Clean Water Act. A thorough look at the impacts and possible mitigation is also needed to help ensure the safety of the public with regard to air, water, and other possible hazards. In short, spending time addressing and mitigating possible impacts beforehand is much more efficient and effective then attempting to fix them after they have occurred. Stated another way, diligent application of NEPA, because it requires careful examination of possible impacts and ways to mitigate them, and also involves the public, results in better projects, activities, and plans. Fully informed decisionmaking is much likely to lead to better decisionmaking.

A quote from the current rule is most relevant here:

> Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork--even excellent paperwork--but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

Section 1500.1(c). We strongly agree with this. Making major changes in the rule, which appears to be contemplated by the ANPR, will only weaken the ability of NEPA to fulfill its purposes. See more below in section III.

We believe that problems in applying of NEPA and it implementing regulations stem primarily from agencies' failures to devote sufficient resources to this important work. Agencies are not given sufficient appropriation, or chose not to properly apply what they are given, to ensure personnel in each office have adequate training in application of NEPA. Also, some agency employees see NEPA as an impediment to implementing projects and activities, and as a process to complete as soon as possible and get out of the way, rather than as a chance to engage the public, improve projects before they receive final approval, minimize and/or avoid impacts, and to generate greater public acceptance of said projects. Changing the rule will not address these problems with NEPA implementation, and may exacerbate them.

Below, we respond to some of the specific questions ("Qs") in the ANPR and offer a few suggestions for minor improvements to the current rule.

II. NEPA PROCESS

The ANPR has three Qs in this issue area, two of which (Qs 1 and 3) involve interagency coordination. We believe that the current rule at 1501.6 encourages such coordination. It requires

that any agency that has jurisdiction by law to be a cooperating agency, and encourages any agency with "special expertise with respect to any environmental issue" that may be addressed to be a cooperating agency.

Q 2 asks if the rule should be revised to make better use of earlier studies and analyses, including those done by other federal agencies and non-federal entities. Again, the current rule is sufficient. Section 1506.2(b) states that agencies "shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements".

The current rule encourages "tiering", under which, e. g., NEPA documentation for individual projects can be tiered to a broader programmatic EIS by referencing the broader statement as needed in the project NEPA document. See section 1502.20.

As for earlier studies, they can be used if they are still up to date. Note that CEQ long ago issued guidance, which we believe is still appropriate, on when old EISs might need to be supplemented:

> As a rule of thumb, if the proposal has not been implemented, or if the EIS concerns an ongoing program, EISs that re more than 5 years old should be carefully reexamined to determine if the criteria in section 1502.9 compel preparation of an EIS supplement.

From Questions and Answers About the NEPA Regulations, 46 Fed Reg 18026 et seq., March 23, 1981.

The current rule requires supplementation if:

> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 CFR 1502.9(c).

Agencies should make use of any existing information relevant to the project or plan that is the subject of a forthcoming NEPA document. However, the respective lead agency has the responsibility to ensure that any information used is factual, up to date, and relevant for the proposal(s) under consideration.

We recommend adding to the current rule the guidance from CEQ cited above: that EISs (and EAs) five or more years old are presumed stale and in need of supplementation or at least some update unless demonstrated otherwise after careful consideration that includes an opportunity for the public to comment.

III. SCOPE OF NEPA REVIEW

Q 4 asks if direction concerning page limits and format should be revised. We believe strongly that there should be no hard page limits. By imposing any such limits, the CEQ or individual agencies may thwart the analysis of impacts. Interactions in the environment are complex, and the analysis of possible impacts will be at least as complex. There is no way around the fact that to fully analyze potential impacts and possible mitigation, some EISs (and even a few environmental assessments (EAs)) will be quite lengthy.

To keep EISs at a reasonable length, the current rule has numerous requirements, including, but not limited to: concentrating on significant issues, writing EISs in plain language, summarizing each EIS, tiering (see section II above), and incorporating by reference. See section 1500.4. Also, section 1502.2(b) states:

> Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues.

These requirements are sufficient to keep EISs at reasonable length while still allowing a full disclosure and analysis of the impacts.

Q 5 asks if the rule should "be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decisionmakers and the public…". As noted above, environmental interactions and projects' effects on the environment are very complex. Any of the possible effects of a project can be significant. Agencies, using their expertise, can determine what impacts are likely to be insignificant. It would be inappropriate to try to determine this using a "one size fits all" process in the rule.

Note that the exiting rule has the following requirement:

> Emphasiz[e] the portions of the environmental impact statement that are useful to decisionmakers and the public…and reducing emphasis on background material…

Section 1500.4(f).

No change is needed in the rule on this issue.

Q 6 asks if requirements for public involvement should be revised "to be more inclusive and efficient, and if so, how?" Currently, agencies are required to:

> Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

Section 1503.1(a)(4).

Public involvement is a vital part of NEPA application. As stated above, projects, especially controversial ones, often improve when agencies receive and incorporate public comment.[1] Therefore, the rule should strongly encourage agencies to solicit and respond to public comment.

We recommend adding a new paragraph (f) to section 1505.1, concerning the content of agencies' NEPA procedures, as follows:

> (f) Requirements for affirmative solicitation of public comment by inviting all potentially interested parties to comment and making all relevant documents easily available to all interested parties at appropriate times during the NEPA process. These documents shall include all material cited, quoted, or incorporated by reference in the relevant NEPA document.

Given modern digital technology and the internet, documents can easily be placed on agencies' web pages, or, in the case of a controversial project with many large documents (like maps), on an FTP server.[2] There is little expense and only slight personnel time needed to post relevant documents.

Q 9 asks if the rule should contain more direction for certain types of documents, including environmental assessments. It is important to note that EAs, written for projects thought to not have an overall significant effect on the human environment, often document actions that have considerable impacts, even if they don't quite meet the definition of significance at section 1508.27. Thus the rule should have provisions that require a reasonable disclosure and analysis of impacts in an EA, and also to require efforts to minimize or avoid impacts.

Case law has applied most of the requirements of EISs to EAs, especially with regard to providing environmental information for public comment (see Sierra Nevada v. Weingardt, 376

[1] This is consistent with NEPA's purpose, "to foster excellent action". See section 1500.1(c).
[2] This addresses Q 15.

F. Supp. 2d at 992, E.D. California, 2005); and consideration of alternatives (see Te-Moak Tribe v. Interior, 608 F.3d 592, 601-602 (9th Cir. 2010; and Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988), cert denied, 489 U.S. 1066 (1988)).

Q 10 asks if the rule's provisions for the timing of agency action need to be revised. We do not believe they do. The current rule prohibits a decision within 90 days of issuance of a draft EIS, or 30 days after publication of a final EIS, whichever is later.[3] Section 1506.10(b). This requirement is reasonable, in that it prevents an agency from rushing through preparation of an EIS and issuing a decision before impacts and public comments have been fully considered.

Q 13 asks about the appropriate range of alternatives. We believe that current direction requiring agencies to "rigorously explore and objectively evaluate all reasonable alternatives" (section 1502.14(a)) is very important to retain. This section also states that the EIS section describing alternatives, including the proposed action, is the "heart" of the EIS.

Note the purpose of NEPA:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; …

42 U. S. C. 4321.

Section 101 of NEPA further details the federal government's responsibility to, e. g., assure a safe, healthful, productive and aesthetically and culturally pleasing surroundings", and "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences". 42 U. S. C. 4331.

We do not see how the purpose of NEPA and the responsibilities of the federal government detailed therein could possibly be met without a rigorous examination of a broad range of alternatives. The CEQ must retain section 1502.14(a). Any substantial weakening of this section would cut the heart out of NEPA.

[3] There are some qualifications and exceptions to these timing requirements (see subsections (b) – (d) of 1506.10), but they likely are only infrequently invoked.

This section could be strengthened by requiring agencies to consider alternatives that would meet part of, as opposed to all of, a project's purpose and need.[4] Agencies are already required to consider "reasonable alternatives not within the jurisdiction of the lead agency". 1502.14(c).

IV. GENERAL

Q 16 asks if the rule should be revised to "promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents". This is addressed above in the introduction to section II. Again, the existing rule at 1503.1 requires agencies to obtain comments from other agencies with jurisdiction or relevant expertise. Agency NEPA documents are regularly used by the Fish and Wildlife Service and the National Marine Fisheries Service for Endangered Species Act decisions, and by the U. S. Army Corps of Engineers for section 404 permitting under the Clean Water Act.

The current rule encourages coordination with other agencies and reduction of duplication. Change is not needed.

Q 20 asks if the rule's provisions on mitigation should be changed. Currently, EIS records of decision are required to:

> State whether all practical means to avoid or minimize environmental harm from the alternative selected have been adopted and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

Section 1505.2(c). Furthermore, section 1505.3 requires agencies to "condition funding of actions on mitigation".

As discussed more fully in section III above, part of NEPA's purpose is "to prevent or eliminate damage to the environment and biosphere". Agencies approve actions every day that impact our environment. Requirements for mitigation force agencies to search for less damaging alternatives and/or to design projects and apply measures that reduce impacts. The current provisions on mitigation are needed and appropriate, and must be retained.

CONCLUSION

[4] Agencies too often write a purpose and need so that only the agency's proposed action will meet it.

The endorsers of this comment letter feel strongly that no major changes are needed in CEQ's rule for implementing NEPA. Major changes would likely weaken application of NEPA to the detriment of wildlife, water quality, and air quality, among other resources, as well as public safety and human enjoyment of the environment.

It is especially important to retain provisions requiring rigorous examination of all reasonable alternatives and those that require active solicitation of public comment.

Please inform us in a timely manner about future opportunities for comment on any proposal to revise the CEQ Regulations.

Sincerely,

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