

Docket ID – CEQ-2018-0001

Implementation of Procedural Provisions of National Environmental Policy Act

Comments submitted by **National Association of Forest Service Retirees (NAFSR) and The Public Lands Foundation (PLF)**

The National Association of Forest Service Retirees (NAFSR) is a national nonprofit membership organization that represents thousands of Forest Service retirees who are dedicated to: sustaining the heritage of caring for the National Forests and Grasslands, partnering with the Forest Service, and helping understand and adapt to today's and tomorrow's challenges.

The Public Lands Foundation (PLF) is a national nonprofit membership organization that advocates and works for the retention of America's Public Lands in public hands, professionally and sustainably managed for responsible use and enjoyment by American citizens. The PLF endorses and embraces the multiple use mission of the Bureau of Land Management (BLM). Members are predominately retired employees of the BLM from across the United States.

Advanced Rulemaking, Council on Environmental Quality (CEQ) request for public comment on potential revisions to update and clarify CEQ National Environmental Policy Act (NEPA) regulations and procedures.

Thank you for the opportunity to comment on the potential revisions to the CEQ NEPA regulations. NAFSR and PLF membership together spans the entire spectrum of natural resource and research professionals. Many of our federal retirees spent their professional careers working at all levels of the USDA Forest Service (USDA FS) and DOI Bureau of Land Management (DOI BLM), at the national and community levels, to implement NEPA since its passage in 1969. Our members literally have thousands of years of collective on the ground and applied experience in implementing the laws, regulations, and policy that effect NEPA. Today several of our members remain involved with the working of NEPA by serving as private consultants to advise Federal Agencies on NEPA regulations and requirements.

The following are the CEQ questions and NAFSR's and PLF's responses recommending changes and reforms to current CEQ NEPA regulations and procedures.

NEPA Process

- 1. Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?**

➤ *CEQ should look at development of an integrated decision-making model.*

Amend CEQ's - Environmental Analysis & Review Procedures - Decision Making Procedures so that they are integrated with the regulatory system that harmonize the various planning levels and decision points (NFMA, ESA, NEPA, etc.). Decision making is complicated by the extensive environmental analysis and public involvement procedures developed under NFMA, NEPA, ESA, CWC and FACA. All these factors in combination can prevent or seriously delay work

from getting done to protect species, improve water quality, restore watersheds, or treat fuels next to communities at risk from wildfire.

For example, the differences between agency's administrative review processes can become a pinch point for processes and coordination. Agencies up front through agreement should be allowed to adopt a single agency's process for conducting their coordinated reviews as cooperating agencies.

A further example of where time and cost could be reduced or eliminated is the overlapping process reviews and effects decisions that are made by both the land management agencies and the regulator agencies for site-specific projects. The site-specific project reviews could be delegated to a single agency such as the action agencies (the USDA Forest Service and DOI Bureau of Land Management) if the project conforms and is tiered to a broader landscape Decision with a FONSI.

For decisions made at the broader landscape level, Forests and Grasslands, Resource Units, or regional planning, might be jointly delegated to a suite of agencies with natural resource management. CEQ should detail the elements of an interagency review process to coordinate the procedural requirements of conservation and environmental programs, thus creating a system within which would also allow regulatory agencies to do their reviews concurrently with action agency NEPA analysis and reviews.

- *CEQ regulations should better define a lead agency versus a cooperating agency and their respective responsibilities.*

2. Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?

- *Adopt into regulations a Determination of NEPA Adequacy to allow prior NEPA to be used for similar projects with similar effects/impacts.*

Amend the regulations to expand upon how past analyses could be used to support a current environmental review. For example, CEQ should look at the DOI BLM implementing regulations which cover this subject as a good template.

As an example, past NEPA could be used to substantiate that there would be no significant effects and therefore a FONSI could be prepared. There is currently an inordinate amount of time spent on doing repetitive NEPA analyses showing that there would be no significant effects on similar actions that have already had a finding of non-significance. Regulations need to be expanded to include the use of analysis from other NEPA reviews to support a FONSI. Reference to, or tiering to, these prior reviews should be adequate and a viable part of reaching a FONSI.

- *Amend the CEQ regulations and NEPA procedures for addressing "new information" and "changed circumstances",*

A simpler process is needed for adjusting approved NEPA decisions in response to new information. CEQ needs to define the extent to which NEPA requires federal agencies to consider post-decisional information.

- *Amend CEQ regulation to limit the analysis of unavailable and incomplete information.*

Under existing CEQ regulations (40 CFR 1502.22), the thresholds and requirements for accomplishing these analyses can be cumbersome and costly. Greater flexibility should be built into the regulations on this requirement.

- *The CEQ regulations should be amended to define the extent to which NEPA and other environmental laws require federal agencies to consider post-decisional information.*

CEQ needs to limit the on-going duty for federal agencies to continually evaluate post-decisional information. Several options exist: 1) to adopt a “a deal is a deal” approach that allows federal decisions to proceed despite new information inconsistent with original predictions, 2) to develop less burdensome procedures for supplementation, 3) to allow projects of limited duration to be completed, or 4) provide standards and guidance for new information that (rather than halting ongoing projects pending reevaluation) allow for consideration of the likely effect on the environment of not incorporating the new information into ongoing or authorized projects and commit to considering it for new projects in early stages of planning.

3. Should CEQ’s NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?

- *CEQ should look at development of an integrated decision-making model.*
(Addressed in Question 1#)

4. Should the provisions in CEQ’s NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?

- *The more useful addition would be to emphasize the intent of the environmental assessment (EA).*

Emphasize early in the regulations that an EA is brief, concise document to determine whether to prepare a FONSI or EIS.

5. Should CEQ’s NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decision makers and the public, and if so, how?

- *CEQ regulations clarity is needed to state that “significant issues” are the same as “significant effects/impacts”.*

CEQ NEPA already calls for agencies to focus on significant issues that are relevant and useful to decision makers. However, CEQ should get rid of the term “issues”. This term has caused quite a bit of confusion, discussion, and unnecessary work in NEPA. Instead of focusing on issues, use the term “environmental effects” or “environmental impacts”.

- *Thru definition CEQ should clarify the decoupling of the act of doing NEPA procedures and requirements from the Federal Decision processes.*

Clearly, NEPA was meant to serve as a public review process that informed the decision-making processes of Federal Agencies. The act of doing NEPA was never intended to be a decision-making process, in of itself, but rather that the intent of NEPA is a review process that help to inform the decision.

6. Should the provisions in CEQ’s NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?

- *The current regulations offer quite a bit of discretion for public involvement.*

The only time frames imposed are for the 45-day comment period for draft environmental impact statements and a comment period for some environmental assessments and findings of no significant impact. While public comments are a form of involvement, agencies should continue to be allowed to exercise discretion in how and when they involve the public.

- *Response to comments – show responsiveness to comments, but not tit-for-tat response (set expectations in definition)*
- *CEQ should re-evaluate the time requirements or need for a 45-day public response period.*

In today's environment of advanced computer technology and web networks, federal agencies can do immediate and transparent posting of public comments.

- *CEQ should re-evaluate the time requirements or need for agencies to wait a period of time (i.e. 15 days, 30 days, etc.) before executing a ROD and/or Decision.*

Given today's requirements and agency practice to fully engage the public up front and throughout the NEPA process, these time requirements may not be necessary. These requirement(s) were put in place, over 40 yrs ago, and need a hard look and updating based on today's agencies practices and the use of the world wide web.

7. Should definitions of any key NEPA terms in CEQ’s NEPA regulations, such as those listed below, be revised, and if so, how?

- a. Major Federal Action;**
- b. Effects;**
- c. Cumulative Impact;**

- d. **Significantly;**
- e. **Scope; and**
- f. **Other NEPA terms.**

- ***CEQ Regulations 40 §1508.18 Major federal action.*** CEQ's NEPA Regulations currently apply to all ground disturbing activities as a "major Federal action", unless specifically categorically excluded. However, the intent of the 1969 law was to have it apply to "major significant" actions. *"Major federal action" includes actions with effects that may be major, and which are potentially subject to federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§1508.27).*

Based on the 1969 Act, CEQ should issue guidance as to what constitutes a "major federal action" helping to establish the appropriate NEPA requirements for: uses and scope, range of issues, range of alternatives, depth of analyses, and the type of NEPA document required. Further clarification or guidance related to the term "major federal action" could result in not subjecting minor actions to the same level of analysis as those actions for which NEPA was intended.

Minor actions (decisions) federal agencies make that truly have no opportunity for "significant" environmental effects such as "administratively permitting" an activity that could occur under general use of an area should not be subject to detailed environmental review. An example of this is the issuance of an outfitter and guide permit for conducting guided hikes, horseback riding, or guided hunts. These activities could occur in the absence of the "permittee" and would not be subject to environmental review under NEPA.

However, in some agencies it has been interpreted that the decision to issue a permit, is a possible major federal action, although the environmental effects are the same regardless of the permit or perhaps even less due to the administration of the action.

While some people argue that this is the type of action that can be handled under a categorical exclusion as prescribed by CEQ regulations, the process for establishing categorical exclusion is often burdensome and the result is often still an activity that is subject to unnecessary project level environmental review to determine whether extraordinary circumstances exist.

Clarifying what is not a major federal action would benefit multiple federal agencies, including CEQ, as this burden would be reduced and the intent of NEPA would still be met to provide harmony between "man" and the environment.

- For Major Federal Actions, CEQ has made it clear that major federal action does not have a meaning apart from "significantly". We would support an approach as well that would simply reform and clarify "significantly" by: Clarifying 1508.27 (b) (1) does not mean that agencies are required to disclose significant beneficial impacts and that the present statement merely means that agencies may have significant impacts even if the agency believes that on the balance the effect will be beneficial. Clarify (as the courts have) that

1508.27 (b) (4) is about scientific controversy over the effects vs. public controversy over a project and its effects.

- Amend CEQ regulations to re-define "*site-specific effects*" to include the use of programmatic analyses which establish standards and mitigation parameters at the broad landscape, ecosystem, or regional level to satisfy "*site-specific effects*". Individual projects, therefore, would not be required to re-address "*site-specific effects*" if it has fully adapted programmatic mitigations measures into its design and project decision.

Specifically, individual actions or decisions that Federal Agencies find to be consistent with these programmatic standards and mitigations measures would satisfy the hard look "*site-specific effects*" requirement of NEPA. This would eliminate the overlapping, costly and redundant project-by-project and programmatic NEPA procedures and requirements while providing a more meaningful scale in which to assess environmental effects.

- *CEQ to clarify that Condition-based management is an appropriate form of a proposal by federal land management agencies.*

CEQ should support the adoption of Condition-based management to decision making and implementation. Condition-based management is where a proposed action is implemented on a conditional basis, based upon clearly identified on-the-ground conditions. Condition-based management is responsive to today's ecosystem and stems from the recognition that the environment is dynamic, changing in response to changing natural and human caused events.

Condition-based management is derived from the principles of adaptive management but focuses more on adjusting the management actions to the ever-changing ecosystem to achieve an objective versus a more passive learning objective associated with adaptive management.

- *Clarify the definition of "Emergency" to include post fire activities that are needed and contribute to quicker recovery of the area.*

8. Should the provisions in CEQ's NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?

- **Notice of Intent;**
- **Categorical Exclusions Documentation;**
- **Environmental Assessments;**
- **Findings of No Significant Impact;**
- **Environmental Impact Statements;**
- **Records of Decision; and**
- **Supplements.**

- *Change the format requirement for the EIS and allow for a detailed statement that is more responsive to today's agency decision processes, especially dynamic processes involving collaboration.*

Some Federal Agencies NEPA regulations do allow for some of this now, but CEQ regulations could be more modern and move away from a linear decision structure from the 1960s.

- *Reorganize the regulations by document type, making it clear what provisions apply to each type of document.*

The purpose of an EIS is different from the purpose of an EA and each of those are different from the purpose of a CE. There are many instances where agencies apply EIS requirements to EAs. This undermines the efficiency of preparing EAs.

Regarding CEs, many agencies now have documentation requirements for at least some of their CEs. This is contrary to CEQ intent where CEs are categorically excluded from documentation in an EA or an EIS. CEQ regulations could clarify that agency procedures should not require documentation for CEs

- *EIS vs. EA*

Specifically, the Act only requires a rather rigorous planning process involving alternatives, environmental analysis and public involvement with everything documented in an EIS. Under the Act these requirements apply to "Major Federal Actions Significantly affecting the quality of the human environment".

For lesser decisions, the Act requires Federal Agencies to give "Appropriate Consideration to Environmental Values". Specifically, CEQ should establish a clear set of requirements and procedures for doing an EIS vs. EA. EAs are to inform the decision process of the significance/non-significance of actions affecting the quality of the human environment.

CEQ needs a clearer definition that an EIS is intended to be an in-depth look that helps to inform the Federal Agencies Decision Making Processes but is not the decision-making process. Whereas, the EA purpose is intended to only determine significance of the Federal Action.

Yet under the current CEQ procedural requirements there is little distinction made, resulting in several administrative and paperwork requirement(s) placed on Federal agencies without distinguishing the definition of the "major federal actions" or EIS versus EA intent. For EAs many of the same requirements for an EIS exist for environmental analysis and go well beyond what is needed to review the federal actions and to inform the decision-making processes of the Federal Agency as to "significance". This lack of clarity under CEQ procedures results in overlapping, costly and redundant project-by-project procedures and requirements.

- *In definition CEQ should clarify the decoupling of the act of doing NEPA procedures and requirements from the federal decision processes.*

Clearly the NEPA ACT meant for NEPA to be a reviewing process that informed the Decision-Making Processes of Federal Agencies. NEPA itself was not intended to be a decision-making process in and of itself, but rather that the intent of NEPA is a review process that informs the decision.

- *The idea of a “detailed statement” which is now known as an EIS should be redefined in today’s world.*

In 1978 we were still using typewriters and US Postal Service to send documents and comments. In today's rich technological environment, the detailed statements could be shortened with links to the evidence about significant effects and alternatives.

- *CEQ regulatory requirements are buried throughout the regulations, including in definitions.*

Requirements should be removed from definitions and placed in a more logical place within the regulations. For example, the content requirements for an environmental assessment are in the terminology section under environmental assessments.

- *Amend CEQ regulations to ensure that NEPA’s detailed statement requirement does not apply to actions that do not involve an irretrievable or irreversible commitment of resources.*

This would help to eliminate the overlapping, costly and redundant project-by project and programmatic NEPA procedures and requirements while providing a more meaningful scale in which to assess environmental effects.

- *Revise CEQ Regulations to allow Federal Agencies to use other Federal Agencies’ Categories for Categorical Exclusion (CEs) Activities. Federal Agencies thru agreement should be allowed to adopt for use other Agency CE Categories.*
- *Provide provisions for functional equivalents such as what EPA or DOI BLM has for NEPA. Agencies that do environmental planning shouldn’t do both processes.*
- *Use plain English and state what you mean vs. new definitions. Do we really need a new definition for “trivial”? These seem to be common words. Keep it simple.*

10. Should the provisions in CEQ’s NEPA regulations relating to the timing of agency action be revised, and if so, how?

- *40 CFR 1506.9 and 1506.10 should be revised to be more relevant today.*

Rather than have agencies file EISs with the Environmental Protection Agency for publication in the Federal Register, agencies could send notices directly to the Federal Register to slightly speed up the notice process. However, Federal Register notices will still cause delay problems during administration transitions, regardless of the agency submitting the notice. Delaying Federal Register notices are more of an administrative problem from Washington than a regulatory problem.

- *Recommend eliminating the 90-day period (40 CFR 1506.10 (b)(1)).*

It doesn't seem to have a relevant purpose and most agencies take more than 90 days. In some emergency situations the 90-day period and 30-day wait period between the final EIS and record of decision could be critical. CEQ should examine the need for these.

12. Should the provisions in CEQ's NEPA regulations relating to programmatic NEPA documents and tiering be revised, and if so, how?

- *CEQ should focus on improving the use and application of programmatic analyses.*

In December 2014, CEQ provided guidance on the effective use of programmatic environmental reviews under NEPA. This guidance should be expanded upon to further clarify how programmatic analysis can be used through tiering to support cumulative effects analysis on project level decisions.

This includes the use of programmatic analysis as part of consultation efforts associated with ESA. This gets back once again to the overall purpose of NEPA in effectively evaluating federal actions as part of the decision process, thus promoting future project level decisions under the realm of a programmatic analysis as consistent with the intent of NEPA.

- *Revised CEQ regulations should make it clear that site-specific effects do not have to be addressed in a strategic programmatic EIS.*

A land management plan is strategic in nature. Doing a site-specific effects review under these long-term plans results in doing hypothetical "reasonably foreseeable scenarios", which may or may not happen. In these cases, the CEQ regulations should define that the site-specific look would only occur at the project level review. Having a clearer definition of when a site-specific look is needed would allow federal agencies to invest their scarce resources, and the American tax dollars, in a more meaningful manner. Define the role of a strategic programmatic NEPA documents, as compared to project level activities.

- *CEQ regulations should allow for "site-specific effects" to be satisfied for individual projects tiered to a broad scale programmatic which looks at specific actions and their effects.*

These programmatic analyses should and can provide the "site-specific" long term cumulative effects analyses required under NEPA for post project decisions. A programmatic that has looked at specific actions, contains cumulative effects analysis, and standards and mitigation parameters at the broad landscape, ecosystem or regional level should satisfy "site-specific effects" for post individual projects. These future projects if fully designed to follow programmatic standards and guidelines and mitigations measures should not be required to re-address "site-specific effects".

Specifically, individual actions or decisions that Federal Agencies find to be consistent with these programmatic standards and mitigations measures would satisfy the hard look "site-specific effects" requirement of cumulative effects for NEPA. This would eliminate the overlapping,

costly and redundant project-by-project and programmatic NEPA procedures and requirements while providing a more meaningful scale in which to assess environmental effects.

13. Should the provisions in CEQ’s NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?

- *Amend CEQ regulations to provide guidance that reduces the scope of alternatives that must be formally evaluated.*

This is responsive to the collaborative model of decision-making that seeks to narrow the range of options considered through constructive discussion. Require at a minimum the no action and one alternative. Current regulations often tend to force and discourage such collaborative efforts. CEQ should either work to enhance collaborative processes in support of better NEPA analyses or remove barriers hindering such collaboration.

In 1997 CEQ published a report entitled “The National Environmental Policy Act: A Study of its Effectiveness After Twenty-five Years.” This report identified important ways to improve NEPA’s effectiveness and improve the environmental analysis and documentation process outlined in NEPA. *Collaboration, place-based decision-making, and adaptive management* were identified as key areas for improving the NEPA process.

A decade later those elements are fundamentally common practices for Federal Agencies such as the USDA FS and DOI BLM. These three elements have proven to be the key linkages for moving public trust forward and accomplishing important work on the ground for the communities they serve. However, CEQ has not updated its regulations or procedures to reflect its own findings and proven practices by federal agencies.

- *CEQ could further explain in the regulations that it is not a single document that is important.*

What is important is that agencies do consider options that have less impact on the human environment. Allowing for evidence of this effort beyond creating huge environmental impact statements would be helpful. With today’s electronic records, agencies should be able to maintain various draft alternative iterations to show that they have done this inquiry. Environmental impact statements are integrated into agency decision making.

Decision making requires choosing among alternatives. Thus, alternatives are not unique to NEPA. A decision process that includes NEPA compliance is not actually as linear as CEQ’s impact statement content requirements imply. However, because we have this construct of what a “detailed statement” should look like based on our 1970s experience, we are stuck in a rut in how agencies can comply with NEPA. NEPA’s intent is for agencies to develop and study alternatives that reduce impacts on the human environment.

- **14. Are any provisions of the CEQ’s NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced.**
- *CEQ should look for ways to modernize vs. undermine the NEPA’s objectives. Ways to modernize:*
 - “Mail” - Delete the word “mail” and replace it with distribute. In 1978 we had the US Postal Service. Today there are many ways to access and exchange information with other agencies and the public.
 - “Environmental Impact Statement” - Define what constitutes a “detailed statement” by the responsible official as called for under NEPA. The present regulations are responsive to early court rulings about the intent of the “detailed statement” that we now know as an environmental impact statement (EIS). The CEQ regulations should expand the idea of a detailed statement as being an ongoing documentation record available electronically vs. specific draft and final documents. The detailed statement should be closer to what is presently called the “summary” with clear references to information available electronically.
 - Recommended Format for an EIS (40 CFR 1502.10) – This is presently a “recommended” format, but the regulations state that it “should” be followed unless there is a compelling reason to do otherwise. The regulations should be changed to only what NEPA requires for the “detailed statement”. This would not preclude additional information, but with today’s electronic files and internet access, quite a bit of information could be available there. For example, is it necessary to require an index with today’s ability to search documents? Our intent here is to go beyond what is currently allowed as “incorporation by reference” where a great deal of the detail is expected to be available elsewhere.
- *CEQ specifically should provide guidance that outlines how federal agencies can document the collaborative process of refining a proposal and conforming to the CEQ regulations requiring the rigorous and objective evaluation of reasonable alternatives.*
- *CEQ update required timeframes and process steps to reflect use of technology advancements since passage of the Act. For example, postal mailings vs. computer email/websites.*

19. Are there additional ways CEQ’s NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?

- *It may be useful for agencies to identify the unnecessary burdens and delays caused by the regulations before identifying changes to the regulations.*

One area to explore is where agencies have processes required by other laws or regulations that can be used as a functional equivalent for NEPA. For example, the Forest Service has an in-depth forest planning process that also requires an environmental impact statement. CEQ should consider that agencies identify planning and decision processes that are the functional equivalent of NEPA and therefore do not require additional NEPA documents. There should be a functional equivalent category that would cross walk with CEQ NEPA.

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August 17, 2018