September 29, 2023

Amy B. Coyle,
Deputy General Counsel
Council on Environmental
Quality 730 Jackson Place NW
Washington, DC 20503

Submitted via www.regulations.gov

RE: Docket # CEQ-2023-0003, National Environmental Policy Act Implementing Regulations Revisions Phase 2

Dear Ms. Coyle,

The National Association of Forest Service Retirees (NAFSR) appreciates the opportunity to provide comments and suggestions regarding the proposed changes outlined in the National Environmental Policy Act Implementing Regulations Revisions Phase 2.

Introduction

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

NAFSR members represent a full spectrum of resource professionals, line management, and research professionals working across the United States. Since the passage of the NEPA statute, and throughout their careers, members have actively implemented NEPA regulations for a variety of agency actions on 193 million acres of public lands administered by the FS. Members have participated in agency actions that required all levels of environmental reviews; environmental impact statements, environmental assessments and categorical exclusions. Members also have experience creating agency NEPA regulations and categorical exclusions. NAFSR members' experience include working with Cooperating and partnering agencies, Tribes, stakeholders and the public to meet the intent and requirements of the NEPA.

General Comments

The NEPA regulations, and interpretation of them by the courts, are critical to actions that carry out the Forest Service mission. Every project, from an outfitter guide permit, to a tree planting project to a landscape scale restoration project, is subject to NEPA. Changes in the regulations could impact the ability of the Agency to conduct projects to enhance forest carbon and adapt to climate change, including fuel reduction and prescribed fire treatments funded by Congress in the Bipartisan Infrastructure Law and the Inflation Reduction Act. The recent publication of the Wildland Fire Mitigation and Management Commission report also highlights the need for urgent action to adapt to wildfires. For agencies to respond to the climate emergency via projects such as fuel reduction, as well as the buildout of renewable energy, transmission lines and carbon capture projects, it is vital for CEQ to promulgate regulations that honor both the

statutory requirements and spirit of NEPA as well as the ability to successfully and efficiently implement requirements.

The CEQ regulations need to provide consistency, reliability, and simplicity so the Federal agencies, public, and courts understand requirements related to the statute, as well as the flexibility allowed for a wide variety of applications and efficiencies today and into the future. Some unnecessary NEPA burdens were imposed by the previous administration and some recently by Congress in the Fiscal Responsibility Act (FRA). Including the changes in this proposed regulation, the cumulative impact of all these new requirements may make it impossible for agencies to efficiently and effectively meet requirements to integrate environmental considerations in their planning and decision making. Additionally, political whip-saw changes to the CEQ regulations upset an orderly process for agencies to plan, decide on, and implement programs. The instability of the law and CEQ regulations means agency NEPA procedures, guidance, and training are constantly out of date.

In our view, CEQ should avoid requirements that thrust the vast network of agencies, NEPA contractors, legal professionals and judges into unexplored legal territory. This is not likely to help agencies increase the efficiency of project planning and implementation, nor to respond quickly and flexibly to climate emergencies as they arise.

The stability of the pre-2023 statute and the pre-2020 CEQ regulations provided a reliable and steady baseline for agencies to operate within. While case law and agency practices raised questions, burdens, and remedies, CEQ guidance and agency innovation have helped agencies navigate these challenges in the past.

The Council should have three priorities to remedy this unstable situation: (1) Stabilize the regulations by removing the unnecessary burdens within CEQ's purview, (2) Minimize the 2023 statutory burdens, and (3) Resist adding burden to the current unstable situation. To focus on these priorities, we support revising this proposed rule and sending the revision out for another round of public comment.

Stabilize CEQ Regulations:

We support CEQ's proposal to remove the unnecessary 2020 administrative burden requiring the cost of preparing draft and final EISs to be included on the cover of final EISs (1502.11 Cover (g)).

Consistent with our 2020 comments, we support CEQ's proposal to remove the requirement to request comment on the summary of alternatives, information, and analyses submitted for scoping and associated documentation requirements for draft and final EISs. This was a burden to process written comments from scoping that could add three to six months to the NEPA process. While CEQ has always required agencies to make the results of scoping public, there has been no requirement that scoping comments must be submitted in writing. CEQ clarified that in scoping guidance. It would be good to do so in the regulations as well. However, the new 2023 statutory requirement for public comment: "Each notice of intent to prepare an environmental impact statement under section 102 shall include a request for public comment on alternatives or impacts and on relevant information, studies, or analyses with respect to the

proposed agency action" (Section 107 (c)) is something beyond the Council's control. What is within your purview is the 2020 EIS requirement for a "Summary of scoping information" at 1502.17. We opposed this summary in 2020 and oppose it now for the same reason. This is an added burden and requires more pages in an EIS while 2023 statutory requirements limit EISs to 150 pages. The results of scoping have always needed to be publicly available, but not in an EIS or an appendix.

In 2020 we supported an approach to limit pages and timing to encourage brevity and clarity in EISs and EAs, but we did not support including regulatory limits in the rule. We felt leaving these presumptive requirements in regulations could potentially result in future judicial reviews to question if an agency decision was arbitrary in determining the adequacy of a 20-page EA vs 75-page EA, especially where the CEQ has always expected EAs to be "concise," "brief", and 10-15 pages. While we stated in 2020 that presumptive time and page limits for completing environmental documents are better placed in policy than under the rule of law in regulation, we realize the 2023 statutory changes now require them.

While changing EIS and EA timing requirements are outside of the Council's purview, CEQ should change existing **1502.5 (Timing)** by deleting "An agency should commence preparation of an environmental impact statement as close as practicable to the time the agency is developing or receives a proposal…" as well as 1502.5 (a) requiring preparing EISs at the "feasibility analysis (e.g., go/nogo) stage…" The "go/no-go" feasibility analysis stage is generally considered an early stage in project management. This stage is considered as "pre-proposal" and should therefore be identified as "pre-NEPA." This stage can, should, and does take considerable time. Including it in the now-mandatory NEPA timeframes dooms agencies to failure, as they cannot be expected to complete the pre-proposal work and the rest of the planning and decision making within the mandated one and two years. This is critical for all infrastructure, landscape restoration, land management planning, and regulatory proposals. While environmental considerations are important at this stage, the NEPA process should not begin at this early stage. CEQ should clarify that the NEPA process should not include the feasibility analysis stage.

CEQ should delete the long-standing statement in **1501.5 (Environmental assessments)** "(b) An agency may prepare an environmental assessment on any action to assist agency planning and decision making." CEQ originally intended EAs to be a paper-work reduction mechanism to provide a concise way to show why an EIS is not necessary. Some agencies have used EAs to analyze decisions much like an EIS, and have thus added more to those documents to support decisions. Although the new statutory 75-page limit seems generous compared to CEQ's original expectation of 10-15 pages, unless CEQ limits EAs to the primary function of supporting a finding of no significant impact or determination to prepare an EIS, it will be difficult for agencies to keep EAs brief.

Make allowances in **1501.2 (Apply NEPA early in the process)** to realistically integrate NEPA into agency planning and decision making. Congress added the long-standing CEQ definition of proposal to the statute in 2023: "The term 'proposal' means a proposed action at a stage when an agency has a goal, is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and can meaningfully evaluate its effects." This should be the

starting point for the timing requirements for EISs and EAs. The CEQ regulations could encourage pre-NEPA "environmental considerations" early in agency planning and decision making prior to issuing a notice of intent to file an EIS.

Federal decisions on major actions can take many years. This is the nature of often-times complex and controversial government proposals. The maximum statutory timeframes undermine the objective of integrating NEPA into agency planning and decision making at the earliest reasonable time. Given the 2023 statutory timing requirements for EISs (2 years) and EAs (1 year), agencies will need to be more strategic about when they officially initiate the NEPA process. For EISs, the end is defined as completing the EIS so it will be important for agencies to manage the start date (Notice of Intent) for the NEPA process to coincide two years prior to the expected Notice of Availability of the final EIS. A Record of Decision apparently can come any time after that. Since EAs are to be completed within one year of a "notice of intent" (undefined in the statute) to prepare the EA, CEQ should encourage agencies to manage how they officially make such notice to coincide with the required one-year timeframe to complete an EA. Apparently findings of no significant impact and decisions can come any time after the EA is completed.

To assist agencies in meeting the statutory timing requirements for an EIS, CEQ should remove their long-standing requirements at **1506.10** (Timing of agency action) of not issuing a record of decision before 90 days (after notice of availability of draft EIS), 30 days (after notice of availability of final EIS), and 45 days for (comments on draft EIS) and give agencies more flexibility for public engagement and commenting during the EIS statutory timeframe. This flexibility is especially important to the Forest Service given other mandatory timeframes such as those for land management planning, National Forest Management Act requirements, and objection and appeal requirements outside of NEPA.

Provide expectations under **1501.11 (Programmatic environmental documents and tiering)** for considering programmatic documents if the agency finds it will be more efficient to do so. CEQ invented the programmatic EIS (later providing guidance for EAs) as a paperwork reducing measure when programmatic EISs would serve long-term needs. Congress recently effectively removed any utility to programmatic documents by requiring programmatic reviews every five years while limiting the NEPA process to one year for EAs and two years for EISs. The cost of preparing a programmatic EA or EIS compared to the benefits has always been debatable; however, there is no incentive for an agency to prepare a programmatic NEPA document if they are required to complete it within one or two years and then review it every five years. Programmatic documents have typically taken longer to prepare, but the long-term benefits were considered worth the investment. With the new time limits on EAs and EISs there will be few programmatic NEPA reviews prepared. CEQ regulations should emphasize careful consideration of these trade-offs. CEQ regulations could also provide permissive language to exempt programmatic decisions from having to publish NEPA documents when NEPA's statutory requirements for a detailed statement (EIS) can be met through other means such as land management planning and agency regulatory action documentation that have robust public notice and engagement requirements of their own.

Stability also involves not making changes that are likely to be litigated. Litigation extends the time until agencies understand and can act on requirements. Two potential outliers compared to what we might call "Classic NEPA based on the 1978 Regulations" are both related to the idea of NEPA as an action-forcing statute, and are likely to be litigated. The first is an effort to walk away from acknowledging NEPA's history as a procedural statute; the second is requiring mitigation. It's not clear what problems these changes would be responding to; they are likely to be litigated or clarified by Congress; and they do not add modernization or efficiency. If there are not enough substantive environmental statutes on the books, we think the answer is to encourage Congress to pass more, not to add more requirements to the NEPA process.

Resist Adding New Requirements and Definitions to the Current Unstable Situation

CEQ should not replace the terms **"**significant issues" and "non-significant issues**"** (confusing terms for sure, but synonymous with significant and non-significant effects) throughout the regulations to the new terms: "important issues" and "unimportant issues." Issues are not required by statute or EIS and EA content requirements. The "scope" of these documents is defined as the scope of the actions, alternatives, and effects. CEQ's long-standing 1978 regulations on scoping clearly show "significant issues" synonymous with "significant effects": "As part of the scoping process the lead agency shall: …(2) Determine the scope (§1508.25) and the significant issues to be analyzed in depth in the environmental impact statement. (3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere…" (40 CFR 1501.7 emphasis added). As proposed, the new terms will cause confusion and add a great deal of burden to the process and documentation. Some agencies have long struggled with the term "issue." Some agencies do not use the term at all and are baffled by it. Other statutes use the term with different undefined intent. Simplify the regulations by replacing "issues" with "effects."

Climate change and environmental justice are worthy environmental problems deserving congressional and executive action, but including them in regulations to implement NEPA's procedural requirements sets broad expectations that have no stability in established law or regulation. In the case of climate change, many NEPA documents at the Forest Service and the Bureau of Land Management have already been rejected by the courts for not adequately addressing climate change. It would seem that the agencies are already addressing climate change, and perhaps CEQ could examine the case law and determine whether fine-tuning the climate change requirements in this NEPA regulation would improve legal defensibility.

CEQ has provided straight-forward environmental justice guidance on Executive Order 12898; however, more recent executive orders have been less clear and there have been no clear requirements, guidance, or recommendations for implementing them. The definition of environmental justice currently in the proposed regulation is not clear. There are "communities with environmental justice concerns" and "vulnerable communities" mentioned in the

regulation, which are also unclear terms. As proposed, environmental justice expectations in CEQ's regulations will add unnecessary burden to agencies meeting NEPA process requirements as they try to understand how much analysis is required and as case law is developed.

CEQ proposes adding a requirement (**1501.5 (e)**) for inviting public comment if an agency publishes a draft environmental assessment. This requirement serves as a disincentive for transparency. Some agencies may choose to publish early drafts for public disclosure, discussion, and perhaps comments. This can and has been a beneficial practice, but requiring a comment period adding process and documentation time will discourage the practice. We oppose including 1501.5(e) as proposed.

CEQ proposes to identify the environmentally preferable alternative in the EIS (**1502.14 Alternatives including the proposed action**) "In this section agencies shall: … **(f)** Identify the environmentally preferable alternative or alternatives…" CEQ's long-standing direction has been to identify the environmentally preferable alternative in the Record of Decision (ROD). It should remain in the ROD because this is a discretionary finding vs. fact. Also, if there are cooperating agencies with multiple decisions each agency may identify different alternatives as being environmentally preferrable. The environmentally preferable alternative is a finding based on facts in the EIS. CEQ's 40 most asked questions addressed this in 1981, stating that responsible officials are encouraged to identify the environmentally preferable alternative in the EIS and must identify it in the ROD. If CEQ wants to change this, the environmentally preferable alternative should only be identified in the EIS without rationale, saving the rationale for the choice for the ROD similar to how a preferred alternative/s is identified in the draft EIS if one exists and must be identified in the final EIS, but without rationale.

Summary

Outside of the few noted changes, we do not support the proposed regulations. In NAFSR's view, from the practitioner perspective, the cumulative impacts of these proposed changes, the FRA changes, and some changes from the 2020 regulations that remain, will make it difficult or impossible for agencies to carry out their missions as funded and required by Congress. In the case of the Forest Service, that includes projects to enhance forest carbon and adapt to climate change, including the fuel reduction and prescribed fire treatments in the Bipartisan Infrastructure Law and the Inflation Reduction Act. The recent publication of the Wildland Fire Mitigation and Management Commission also highlights the need for urgent action. While we are deeply committed to the spirit and intent of the NEPA statute for consideration of environmental effects and public involvement, we also believe that stability in regulations is essential for agencies to respond to the climate crisis with the flexibility and urgency needed.

In NAFSR's view, from the agency practitioner perspective, the stability of the pre-2023 statute and the pre-2020 CEQ regulations provided a reliable and steady baseline for agencies to operate within; however, some of the burdens we opposed in 2020 remain. We recognize some of these are due to recent statutory changes outside of the Council's purview. We look to CEQ to steady the regulations to allow agencies discretion to carry out their responsibilities and encourage CEQ to consider these and produce a revised proposal.

The Council should have three priorities to remedy this unstable situation: (1) Stabilize the regulations by removing the unnecessary burdens within CEQ's purview, (2) Minimize the 2023 statutory burdens, and (3) Resist adding burden to the current unstable situation. Due to the importance of NEPA regulations in advancing climate mitigation and adaptation projects, we support revising this proposed rule and sending the revision out for another round of public comment before finalizing the rule.
