Background:

On July 15, 2020, the CEQ promulgated its Final Rule modifying the comprehensive CEQ regulations implementing NEPA.

Overview:
The following is intended to serve only as an abbreviated summary of some, but not all, of the core elements and changes found in CEQ’s Final NEPA Rule. Using NAFSR & PLF previously submitted comments these elements/changes were identified as important to improving future successes and efficiencies of conducting NEPA within the Land Management Agencies. These primary core elements/changes have been grouped under one of the following 3 headings; Administrative Process Requirements, Changed and Amended NEPA: Definitions, Procedures and Analysis Requirements and NEPA Public Involvement and Coordination with State, Tribes.

Summary:
1. CEQ’s Final Rule Administrative NEPA Process Requirements:
   • The CEQ directs Agencies to request additional comments & new information in the NOI on potential alternatives and impacts, and help in identifying any relevant information, studies, or analyses on potential impacts affecting the quality of the human environment. Revised regulations also state that comments must be specific (as possible) and must be submitted during the established comment period. Failure to do so may limit the opponents’ ability to challenge later. The Final Rule also promotes the use of modern technologies for information sharing and public outreach. NAFSR & PLF submitted comments supported use of modern technologies and spoke to the agencies’ need to hear & address specific comments & concerns when the agency can still remedy them during the Environmental Impact Statement (EIS) process. However, see statement below as the Final Rule directs new information to be collected in the NOI.

   • Requires draft EIS (DEIS) and final EIS (FEIS), to include a summary of all alternatives, information, and analyses received in response to NOI request, submitted by State, Tribal, and local governments and other public commenters for consideration. NAFSR & PLF submitted comments asked CEQ to not include this requirement in the Final Rule. The organizations asked CEQ to further clarify and define this process requirement if included in the Final Rule to reduce future confusion. Final Rule language only clarified that the agencies can group comments for response and does not require agencies to respond to each comment.
• Related to the new requirement that agencies summary NOI responses in DEIS & FEIS, requires agency decision maker to certify in a statement for Record of Decision (ROD) that the agency considered all of the alternatives, information, and analyses, and objections submitted by State, Tribal, and local governments and other public commenters. The CEQ has clarified in the Final Rule that certification was to be included in the ROD. This clarification addresses NAFSR & PLF submitted comments regarding timing of certification but does not address what may be required.

• Final Rule language modified the draft Rule’s p ervious requirement that agencies establish a “new 30-day mandatory comment period” on all final EISs to now say agencies may request. The modified language from “shall to may” addresses NAFSR & PLF submitted comments that the previous language in effect would result in extending and mandating agencies to add an additional 30 days for comments.

• Final Rule establishes presumptive time and page limits on environmental documents: e.g., two years and 150 pages of main text for an Environmental Impact Statement (EIS) and one year and 75 pages of main text for an Environmental Assessment (EA). The Final Rule language clarified that these limits “shall” be met unless approved by a Senior Agency Official. NAFSR & PLF submitted comments, while supportive of shorter timelines and greater efficiencies asked that this section be moved out of the Final Rule and issued under a Government Wide Policy. NAFSR & PLF additionally had suggested that the “Senior Agency Official” be revised to allow for SES level designation. CEQ Final Rule declined to allow Officials below the Assistant Secretary level to be designated as a Senior Agency Official.

• Requires that the DEIS & FEIS cover page include the Environmental Cost of preparing the NEPA documents. NAFSR & PLF submitted comments asked that this requirement be removed as current agencies budgetary systems were not designed to track an individual project. The CEQ included the cost requirement in the Final Rule. In addition, it added the requirement to include cooperating and participating agency, applicant and contractors’ costs, stating, “if practicable and noted where not practicable, to include costs incurred by cooperating and participating agencies.”

• Allows applicants/contractors to assume a greater role in preparing EISs with appropriate disclosure of financial or other interests and with supervision and independent evaluation by the agency.

2. Changes and Amended NEPA: Definitions, Procedures and Analysis Requirements:
• Codified use of “Mitigated FONSI”. Language under the Final Rule codifies the long-standing administrative practice into the new regulations. NAFSR & PLF comments supported inclusion of this language. Suggested DOI language to clarify the use of a Finding of No Additional Significant Impact was not included in the Final Rule.
Adoption, Tiering and Finding of No Significant Impact (FONSI), incorporation by reference. The Final Rule advocates the use of tiering, incorporation by reference, and adoption of existing analyses, to focus new NEPA analysis only on issues that previously have not been addressed. The concept of tiering has always existed with NEPA. The Final Rule expands the definition of “tiering” to expand the scope of documents that can be relied upon to include not just other EIS reports, but also EAs and other data. NAFSR & PLF submitted comments supported the added language and expanded use of documents.

NEPA Functional Equivalency, language in Final Rule allows documents required by other statutes to serve as a NEPA equivalent. NAFSR & PLF supported this concept and inclusion of language in the Final Rule.

NEPA Thresholds for determining if NEPA applies and the appropriate level of environmental review. CEQ re-wrote the entire Thresholds section between draft and final. The final wording under NEPA Thresholds now allows agencies the discretion to determine whether compliance with another statue (e.g. Clean water Act) could satisfy the requirements of NEPA. NAFSR & PLF submitted comments supported the concept of NEPA equivalence and provided suggested language to use on Thresholds. NAFSR & PLF suggested Thresholds language was not included in the Final Rule. The Thresholds revision between draft and Final Rule is important as it may lead to a wide variety of interpretation on when NEPA does or does not apply to federal actions.

Final Rule language does add some limited clarification as to the definition of “Major Federal Action” by excluding activities with minimal Federal funding or involvement such as small business and farm loan guarantees. NAFSR & PLF submitted comments asked and supported the need for additional clarification of what constitutes a “Major Federal Action”.

“Cumulative Effects” definition was specifically repealed and is no longer incorporated by reference in the definition of “effects”. NAFSR & PLF had recommended keeping the Cumulative Effects definition.

Final Rule removes “indirect effects” from the definition of effects/impacts. Final Rule defines effects analysis requirements as agencies directed to consider changes to the human environment (ecological, social, historic, cultural, social, health and economic) that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. Effects may have both beneficial and determinate effects. The new regulations state that “effects” do not “include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.” This definition of Effects/Impacts incorporates wording similar to NAFSR & PLF submitted comments.

Defining “Significantly”. NAFSR & PLF submitted comments asked the CEQ to include a definition for Significance and to clarify “criteria for “significantly”. The CEQ declined to include a definition of “Significantly” in 1508.1. However, the Final Rule does add clarifying lan-
guage, similar to language provided by NAFSR & PLF that significance varies with the setting of the proposed action and degree of the effects of the action. The CEQ has included language under “Determine the appropriate level of NEPA review”, that the determination of the “significance” of an action be analyzed by the potentially affected environment and degree of the effects of the action. (short- & long-term effects, both beneficial & adverse effects, effects that violate Federal, State, Tribal, or local law protecting environment).

- Final Rule directs agencies to analyze a reasonable range and number of technically and economically feasible alternatives. Clarifies that mitigation must have a nexus to effects of the proposed action or alternatives. **NAFSR & PLF submitted comments were supportive of the Final Rules concept and language for “reasonable alternatives”. However, the Final Rule does not include a definition of a reasonable range of alternatives.**

- Final Rule language enhances the use of EAs and Categorical Exclusions: by allowing agencies to establish procedures to use other agencies’ categorical exclusions (CEs) and to adopt EAs and CE determinations, where appropriate. **NAFSR & PLF comments were supportive of this concept.** The new regulations eliminate the words “individually or cumulatively” and state that, to be deemed an action for which a categorical exclusion is appropriate, the action must be one that “normally” does not have a significant effect on the human environment.

- Final Rule language allows for adoption of mitigated CE s. **NAFSR & PLF submitted comments supported this concept.**

3. Public Involvement and Coordination with State, Tribes and Localities:

- One Federal Decision requires joint schedules, a single EIS, and a single record of decision (ROD), where appropriate, for EISs involving multiple Federal agencies. Allows for use of other Federal environmental analysis and documents and use of State, Tribal and local environmental studies, analyst and decisions. **NAFSR & PLF comments supported this language.**

- Strengthens the role of the lead agency and requires senior agency officials to oversee NEPA compliance, including timely resolution of disputes to avoid delays. **NAFSR & PLF submitted comments supported the language clarifying the definition and role of the lead agency.**

- Clarifying language and definition of Cooperating Agency provision limiting comments to its jurisdiction by law or special expertise and meeting timeframes for hard completion dates for the agencies. **PFL & NAFSR comments supported this language.**

- Reduces duplication by facilitating use of documents prepared by State, Tribal, and local agencies to comply with NEPA. **NAFSR & PLF submitted comments supported.**

- Enhances ability of Native Americans to participate in the NEPA process and ensures appropriate consultation with affected Tribal governments and agencies. **NAFRS & PLF submitted comments were in support.**
• Eliminates provisions in the prior regulations that limit Tribal interest to reservations.

What Happens Next?
• The new CEQ NEPA regulations are not effective for at least 60 days (September 14, 2020), and agencies will have the option to apply these rules or the prior rules to projects already in process. The actual effective date for the Final Rule is contingent on the Congressional report submittal date.

• This is a “major rule” under the Congressional Review Act, meaning CEQ must submit a comprehensive report on the rule to Congress and the rules do not become effective until 60 days after the submission. In November, if there is a change in administration, the statute allows for rules promulgated within the prior 6 months to be reviewed and overturned by the incoming administration. The rule-only says that CEQ “will submit” a report, so it is unclear how soon the rules may become effective. The new CEQ NEPA regulations provide that all existing CEs may continue to be used and give agencies until one year from the effective date (approximately September 14, 2021) to revise their regulations.

• It is expected that opponents will challenge the rule in court before they become effective and until the legality of the new regulations has been adjudicated the risk of preparing NEPA documents will need to consider the associated risks of relying on the new regulations where they depart materially from the 1978 regulations.

Next Steps for Forest Service’s NEPA Reforms:
It is unclear if the Forest Service proposed NEPA Rule may be delayed to ensure it is consistent with CEQ’s NEPA regulations. If this happens, the result most likely will be that the FS Rule could be delayed until the coming year. NAFSR remains supportive of the Forest Service reforms and will continue to advocate that they move forward.