www.NTAATribalAir.org
928.523.0526 office
928.523.1266 fax

National Tribal Air Association
P.O. Box 15004
Flagstaff, AZ 86011-5004

March 10, 2020

Council on Environmental Quality (CEQ)
730 Jackson Place NW
Washington, DC 20503
Attn: Docket No. CEQ-2019-0003

Re: Notice of Proposed Rulemaking: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA)

The National Tribal Air Association (NTAA) is a member-based organization with 149 principle member tribes. The organization's mission is to advance air quality management policies and programs, consistent with the needs, interests, and unique legal status of Indian Tribes. As such, the NTAA uses its resources to support the efforts of all federally recognized Tribes in protecting and improving the air quality within their respective jurisdictions. Although the organization always seeks to represent consensus perspectives on any given issue, it is important to note that the views expressed by the NTAA may not be agreed upon by all Tribes. Further, it is important to understand interactions with the organization do not substitute for government-to-government consultation, which can only be achieved through direct communication between the federal government and Indian Tribes.

On June 26, 2019, the CEQ published the Draft NEPA Guidance on Consideration of Greenhouse Gas Emissions. The NTAA submitted comments on the Draft Guidance stating our support for retaining analysis of greenhouse gas (GHG) emissions in NEPA documents, particularly with regard to Indian Country, due to the dependence of many Tribes on subsistence lifestyles and the cultural significance of many species of flora and fauna. The letter provided detailed judicial support for this viewpoint. The NTAA also criticized the Draft Guidance for not requiring federal agencies to disclose the monetized social costs of GHG impacts in the NEPA process, thereby failing to give a full picture of the potential economic impacts of climate change. The Draft Guidance also failed to give federal agencies the adequate tools to calculate both direct and indirect emissions from projects and did not require consideration of alternatives or potential mitigation measures to reduce GHG emissions.

On January 10, 2020, the CEQ published the proposed rulemaking titled "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act." 85 Fed. Reg. 1684. The NTAA has a number of concerns regarding this proposal. While we agree that certain portions of the NEPA regulations could be updated, we urge the CEQ to give more consideration to whether it is beneficial to place efficiency and timely action before thoroughness and full inclusion of all affected parties.

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 air quality and climate impacts. Although NEPA does not require any particular decision, 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 proposal seeks to weaken federal environmental review obligations. The proposal 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 often view their relationship with the environment, and tend to manage their interactions with the environment, in a holistic manner. The proposal would reduce the information available to Tribes regarding a proposed project's environmental impacts, including air quality and climate impacts, as well as impacts to other natural resources that are bound up with air quality. Tribes rely on that information to understand environmental interactions and to protect their communities. The NTAA objects to this proposal and the CEQ should withdraw it.

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. 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 as they would violate NEPA's statutory requirements. *See, e.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390, 409-10 (1976) (citing 42 U.S.C. § 4332(2)(C)). Indeed, several guidance documents exist on how best to address cumulative effects. *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 industrial properties or impacts from existing and future neighboring facilities, especially for fossil fuel development and mining projects. Many pollutants have cumulative effects in humans or animals, and existing body burdens are also an important consideration. The NTAA further 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. In this section, 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 proposal does not discuss what criteria should be considered in making this type of decision. The NTAA urges the CEQ to continue to require that direct, indirect, and cumulative impacts all be considered.

Another troubling issue regarding Part 1508 is the statement that, "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 NTAA fears that this language (in particular the addition of "have a reasonably close causal relationship to the proposed action," which has no basis in law) would be used to eliminate foreseeable impacts of climate change, as some entities would attempt to argue the causality of GHG emissions on climate change and on the emissions of any facility in particular. This language could also be construed as relieving federal agencies of addressing the long-term impacts of 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 proposal goes beyond that holding: agencies generally have the power to act on a project based on information about downstream effects. Again, the NTAA 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 with regard to the impacts of GHG emissions, the CEQ proposes to allow different levels of review in Section 1501.3. These 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. *See* 85 Fed. Reg. at 1714. The NTAA 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.

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 NTAA's stance that technical and economic feasibility are secondary to environmental impact and all reasonable alternatives should be considered.

The CEQ proposes changes to Section 1501.10 of the NEPA regulations to establish a presumptive time limit for the publication of a final Environmental Analysis (EA) to one year and Environmental Impact Statement (EIS) to two years. 85 Fed. Reg. at 1699. The NTAA categorically opposes time limits of this type, as many projects can be so large or complex that it would be impossible for the work to be completed in this length of time, especially if several federal agencies (as well as state and/or Tribal agencies) are involved. A thorough environmental analysis leads to better agency decision-making and allows many different viewpoints to be considered, and this could very conceivably take more than one or two years. Setting arbitrary time limits short-circuits the process and would lead to worse environmental analyses and decision-making.

Additionally, adequate time is needed to ensure meaningful Tribal participation in the NEPA process by allowing Tribes to better understand and respond to a proposed project's impacts. Tribal participation in the process is very important and must be offered to Tribes at the outset of the process. The federal government has a history of not providing early notification to Tribes, which forces Tribes to play catch up in order to have their voices heard. We do not want time limits to constrain Tribal participation or limit work product quality. Further, most Tribes do not have the funds to hire full contingents of environmental or legal staff. Tribal staff are often stretched thin over several on-going projects or may need additional time to understand and participate in the analyses performed as part of an EA or EIS. Also, meaningful Tribal consultation takes time. Consultation cannot be accomplished with one meeting or conversation, especially on multifaceted topics.

Similarly, the CEQ proposes to change Section 1502.7 to include presumptive page limits for EISs of up to 150 pages or up to 300 pages for proposals of unusual scope and complexity, and 75 pages for EAs. 85 Fed. Reg. at 1697, 1700. The NTAA is opposed to these limits due to the complexity of many relevant projects.

According to the proposal, either of these proposed limits (time or length) could be increased with approval from a senior agency official, however it is unclear which, if any, parties can request an increase and what, if any, standards the official will base his or her decision on. This adds to the confusion of this already complex process, and likely will discourage Tribes from requesting an extension of time or increase in pages even when it is needed. Again, both of these proposed limitations would disadvantage Tribes, for participatory purposes as well as for including any relevant studies or information that Tribes may have. Thorough review cannot be unilaterally and arbitrarily constrained.

The CEQ proposes to revise Section 1503.3(a) to require comments to be very specific in nature and "provide sufficient detail for the agency to consider the comment in its decision-making process." 85 Fed. Reg. at 1703. Further, a newly proposed Section 1503.3(b) would "emphasize that comments on the submitted alternatives, information and analyses section should identify any additional alternatives, information or analyses not included in the draft EIS, and should be as specific as possible." *Id.* at 1704. While the NTAA agrees that specific information is helpful, we

also believe that these requirements will discourage or disqualify comments from individuals or Tribes who may not have the capacity or resources to respond in the way that the CEQ wishes. This does not make their comments any less valuable. Comments asking that Tribally significant areas be protected and respected can be valuable without being exhaustive in their presentation. The CEQ's proposed amendment to Section 1503.4(a) is related and seeks to require that agencies "consider substantive comments timely submitted." *Id.* There is no proposed definition of what might constitute "substantive comments." By proposing to eliminate the detailed requirements that agencies explain why comments do not warrant further agency response in 40 C.F.R. § 1503.4(a)(5), *see* 85 Fed. Reg. at 1722, this power could be abused by allowing agencies to refuse to consider comments that address issues that the agency does not wish to consider or does not recognize for the important issues they may raise.

Further to the topic of Tribal participation, the NTAA offers comments on proposed Section 1500.3(b) that addresses "exhaustion," meaning that issues that were not raised during public comment will be deemed "exhausted" and "forfeited." *See* 85 Fed. Reg. at 1693. This would be disadvantageous for Tribes, as Tribes are often not informed about proposals 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. Tribes also may need to rely on other parties to raise certain issues, and still should be able to raise claims based on those issues should the agency not address them lawfully.

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 NTAA agrees that economic factors can be considered but should not be limited to the profit to be gained by corporations. Rather, this type of analysis should include the economic value of the impacted ecosystems and the economic benefit that can be realized by "no action" or 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 an existing ecosystem provides. Alternative actions could include a variety of different project scenarios. 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.[1] Fond du Lac also produced a Health Impact Assessment on the social benefits of wild rice,[2] 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.[3]

The NTAA opposes the CEQ's proposed changes to who can prepare an EIS. Currently EISs must be prepared by the agency or a contractor selected by the agency or a cooperating agency and

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

contractors must execute a disclosure statement specifying they have no financial or other interest in the outcome of the project. 40 C.F.R. § 1506.5(c). The proposal would allow the project applicant to prepare the EIS (subject to the direction of the agency) and would remove the disclosure requirement for contractors (the latter without any discussion or explanation in the proposal). 85 Fed. Reg. at 1705, 1725. There is no legitimate reason for these changes and it will cause biased EISs that do not properly evaluate projects' environmental impacts.

The NTAA supports the CEQ's proposal to add "Tribes" to the phrase "State and local" throughout the rule and agrees that early coordination is desirable. *See* 85 Fed. Reg. 1692. This will help ensure that consultation and coordination with Tribes will take place, as appropriate, throughout the process and will support recognition of the sovereign nature of Tribes. Tribal participation leads to a more robust EA or EIS and helps Tribal voices and concerns be heard. Section 1501.8(a) should also allow Tribes, not just Federal agencies, to appeal any denial of participation by the Lead Agency. The NTAA also 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 and to the extent it is not, the CEQ should clarify.

Conclusion

The NTAA opposes the finalization of this proposal for the reasons outlined above. We urge the CEQ to uphold the 2016 guidance. The NTAA appreciates this opportunity to comment. If you have any questions or require clarification from the NTAA please do not hesitate to contact the NTAA's Project Director Andy Bessler at 928-523-0526 or Andy.Bessler@nau.edu.

On Behalf of the NTAA Executive Committee,

Wilfred J. Nabahe
Chairman
National Tribal Air Association