Nez Perce

TRIBAL EXECUTIVE COMMITTEE
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March 27, 2025

Submitted electronically at: https://www.regulations.gov

Ms. Megan Healy, Principal Deputy Director for NEPA
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Nez Perce Tribe's Comments on the Proposal to Remove the Council on Environmental Quality's Regulations Implementing the National Environmental Policy Act From the Code of Federal Regulations, Docket No. CEQ-2025-0002

Dear Ms. Healy:

The Nez Perce Tribe ("Tribe") appreciates the opportunity to comment on the Council on Environmental Quality's ("CEQ") proposed Interim Final Rule ("Proposed Rule") to remove the existing implementing regulations for the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, as amended ("NEPA"), in response to Executive Order ("E.O.") 14154, *Unleashing American Energy*.[1]

The Nez Perce, the *Nimiipuu*, are a sovereign people who have sustained generations of life by cultivating a deep connection with their traditional land and resources that hold deep historical, cultural, and spiritual significance. The United States and the Tribe explicitly affirmed the Tribe's sovereignty by entering into a treaty in 1855, through which the Tribe reserved its right to fish, hunt, gather, pasture, and travel across the land encompassed by their aboriginal territories.[2] These Treaty-reserved rights and resources are foundational to our existence and not only define our sacred and enduring relationship to our aboriginal land and resources but also define us as *Nimiipuu*. Our Treaty partnership with the United States, and the United States' trust obligation to honor our Treaty partnership, is foundational to all of our intersections with the United States and will remain so heading forward.

The Nez Perce Tribe routinely interacts with the federal agencies as they implement NEPA regulations: for example, serving as a "cooperating agency" with the federal agencies; reviewing

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[1] CEQ Request for Comment ("RFC"), 90 Fed. Reg. 10,610 (Feb. 25, 2025).
[2] Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957; Treaty with the Nez Perces, June 9, 1863, 14 Stat. 647 ("[A]ll the provisions of [the treaty of June 11, 1855], which are not abrogated or specifically changed by any article herein contained, shall remain the same . . .").

and providing input on federal projects throughout the Tribe's 13-million-acre aboriginal territory and its Treaty-reserved fishing, hunting, gathering and pasturing areas; and ensuring, as necessary, that federal agency decisions comply with the law.

The Tribe strongly objects to CEQ's Proposed Rule, which eviscerates the framework that has been relied upon since CEQ first issued NEPA regulations in 1978, for three main reasons.

First, the Proposed Rule will create confusion, inconsistency, and inefficiency. The Tribe routinely engages on projects and planning processes undertaken by dozens of agencies including the Bureau of Indian Affairs, Bureau of Reclamation, U.S. Army Corp of Engineers, Federal Highways Administration, Department of Energy, U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Forest Service, Bureau of Land Management, Bonneville Power Administration, and others. By hastily undoing current CEQ regulations, the Proposed Rule will cause immediate confusion—about what, if any, regulations to apply; about the appropriate scope of review; about the validity of agency procedures as outlined in NEPA handbooks and other guidance; and about how a reviewing court will evaluate compliance with NEPA regulations.[3] Realistically, this confusion will last for years as agencies embark on lengthy rulemaking processes that may be further delayed by staffing cuts, congressional oversight, litigation, or other factors.

In the long term, multiple and potentially conflicting agency-specific regulations will complicate the Tribe's work with the various federal agencies. Other interested parties, regulated entities, and agencies will share this burden.

These foreseeable problems were precisely what CEQ's regulations sought to correct. As described in its 1978 rulemaking, CEQ's early promulgation of non-binding guidance to agencies resulted in:

> an evolution of inconsistent agency practices and interpretations of the law. The lack of a uniform, government-wide approach to implementing NEPA has impeded Federal coordination and made it more difficult for those outside government to understand and participate in the environmental review process. It has also caused unnecessary duplication, delay and paperwork.[4]

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[3] CEQ issued a memorandum to federal department and agency heads on February 19, 2025 encouraging agencies to "consider voluntarily relying on" existing NEPA regulations "in completing ongoing NEPA reviews or defending against challenges to reviews completed while those regulations were in effect." CEQ, Memo. re: Implementation of the National Environmental Policy Act, at 5 (Feb. 19, 2025). This non-binding memorandum—and its tacit recognition of the uncertainty to come—begs the question: why must CEQ rescind the existing NEPA regulations before agencies develop their own, let alone on such a remarkably fast schedule?

[4] CEQ, National Environmental Policy Act—Regulations, 43 Fed. Reg. 55,978, 55, 978 (Nov. 29, 1978).

CEQ promulgated its regulations "to provide all Federal agencies with efficient, uniform procedures for translating the law into practical action."[5] That has been their effect and remains good cause to keep the regulations in place.

Second, the Tribe disagrees with CEQ's stated bases for rescinding its regulations. The Tribe understands that CEQ is following instructions in E.O. 14154 to "propose rescinding [its] NEPA regulations."[6] The support for that directive seems to come from recent lower court decisions on CEQ's rulemaking authority, cited in the RFC.[7]

But CEQ's authority to issue its NEPA regulations is well-settled: Congress created the CEQ to, among other things, "develop and recommend to the President national policies to foster and promote the improvement of environmental quality."[8] In 1977, President Carter, by executive order and "in furtherance of the purpose and policy of" NEPA, directed CEQ to "[i]ssue regulations to Federal agencies for the implementation of [NEPA's] procedural provisions" after consultation with agencies and public hearings.[9]

Following CEQ's development of its NEPA regulations, the U.S. Supreme Court sanctioned "the detailed and comprehensive process, ordered by the President, of transforming advisory guidelines into mandatory regulations applicable to all federal agencies."[10] The Supreme Court has subsequently affirmed CEQ's "authority to issue regulations interpreting" NEPA,[11] and afforded the regulations "substantial deference."[12]

None of the lower court cases cited in the RFC upend the settled question of CEQ's rulemaking authority. The first case to decide CEQ's rulemaking authority, *Marin Audubon Society v. Federal Aviation Administration*,[13] has been clarified by the D.C. Circuit on denial of rehearing *en banc*: the panel opinion ruled unanimously on separate grounds,[14] rendering the two-judge ruling on CEQ authority dicta. The second case, *Iowa v. Council on Environmental Quality*,[15] a district court order, is not precedential. The remaining cases do not decide the question of CEQ's authority or the validity of its NEPA rules and accordingly do not support E.O. 14154's directive or the Proposed Rule.

Third, the process by which CEQ seeks to issue the Proposed Rule violates the APA. CEQ has given the public only 30 days to comment—a timeframe that, given the magnitude of the Proposed

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[5] *Id.*
[6] Exec. Order 14154, Unleashing American Energy, 90 Fed. Reg. 8,353, 8,355 (Jan. 29, 2025)
[7] *See* 90 Fed. Reg. at 10,613–14.
[8] 42 U.S.C. § 4344(4).
[9] Exec. Order 11991, Relating to Protection and Enhancement of Environmental Quality, 42 Fed. Reg. 26,967, 26,967 (May 24, 1977).
[10] *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).
[11] *Dep't of Transp. v Public Citizen*, 541 U.S. 752, 757 (2004).
[12] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989).
[13] 121 F.4th 902 (D.C. Cir. 2024)
[14] *Marin Audubon Soc'y v. Fed. Aviation Admin.*, No. 23-1067, 2025 WL 374897, at *1 (D.C. Cir. Jan. 31, 2025)
[15] No. 1:24-CV-00089, 2025 WL 598928 (D.N.D. Feb. 3, 2025).

Rule, fails to provide the Tribe and others the "opportunity to participate in the rule making through submission of written data, views, or arguments" provided by the APA.[16] And by giving itself just eleven business days to review comments before implementing the Proposed Rule, CEQ is clearly foregoing its duty under the APA to "consider[] . . . the relevant matters presented[.]"[17] Further, CEQ has not consulted with the Nez Perce Tribe to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.

For these reasons, the Tribe respectfully requests CEQ to withdraw its "Proposed Rule."

Thank you for your consideration of the Tribe's comments. If you have any questions or concerns, please contact Winter Hayes, Legal Policy Analyst, at winterh@nezperce.org or 208.621.4821.

Sincerely,

Shannon F. Wheeler
Chairman

[16] 5 U.S.C. § 553(c).
[17] *Id.*