



HAVASUPAI TRIBAL COUNCIL

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Submitted via web portal: <https://www.regulations.gov/document?D=CEQ-2019-0003-0001>

Re: The Havasupai Tribe's Comments on CEQ's Proposed "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act" [Docket No. CEQ-2019-0003]

Dear Mr. Boling and Ms. Seale:

I write on behalf of the Havasupai Tribe to raise significant concerns with the Council on Environmental Quality's ("CEQ's") proposal to amend the regulations implementing the National Environmental Policy Act ("NEPA") for all agencies, published at 85 Fed. Reg. 1,684 (January 10, 2020). The vast majority of CEQ's proposed changes would encourage certain types of development, including uranium mining, around the Havasupai Reservation and our Grand Canyon homelands that would endanger our crucial water sources and sacred places. However, the Tribe does support CEQ's proposals to include tribal governments in the list of possible "cooperating agencies" (without limiting tribal participation to when effects are "on a reservation") and to include tribes in the list of governments playing a role in NEPA at numerous other places in the regulations. 85 Fed. Reg. at 1,692, 1,707. We thus urge CEQ to withdraw its proposed rule changes entirely but to also begin a separate, narrower rulemaking focused exclusively on affording tribal governments the same opportunities that other governments have under CEQ's existing NEPA regulations. Importantly – and in contrast to the current rulemaking's very limited, fast-tracked, and wholly inadequate process of engaging tribes – this

separate rulemaking must feature meaningful government-to-government consultation with tribes, including with the Havasupai Tribe. If CEQ moves forward with its proposed rule despite widespread concerns, it should retain in the final rule its proposed changes to the treatment of tribes.

Since time immemorial, the Havasupai Tribe has resided on the banks of Havasu Creek at the bottom of the Grand Canyon, on the upper Coconino Plateau, and along the Colorado River. Much of this area has been formally acknowledged as the Tribe's aboriginal territory. *See, e.g., Havasupai Tribe v. United States*, 20 Ind. Cl. Comm. 210 (1968). The Tribe maintains deep ancestral ties to these lands and continues to actively utilize its plant, animal, medicinal, cultural, and religious resources. Moreover, the Tribe depends on water from the Redwall-Muav and Coconino Aquifers (the "R-Aquifer" and the "C-Aquifer") to provide our drinking water, irrigate our farms, and sustain our livestock, among other essential uses. These waters also form our world-renowned falls, which draw thousands of tourists each year and are the bedrock of our economy. Most importantly, this water plays a vital role in our traditions, religion, and culture. These waters are so essential to our way of life that we call ourselves *Havasuw 'Baa'ja*, the People of the Blue-Green Waters.

Based on our unique historic relationship with and knowledge of our aboriginal territory, its water, and its other natural resources, the Tribe regularly participates in NEPA processes to ensure that federal environmental decision making fully accounts for and protects Havasupai's interests. In our experience, NEPA has proven to be an important forum through which the Tribe can present its understanding of a proposed project's impacts on our rights and resources. NEPA also provides a consistent, well-known, science-based procedure through which the Tribe can work with federal agencies and project proponents to craft alternatives that would avoid or minimize impacts to our rights and resources, as well as to develop mitigation projects where impacts are unavoidable but can be agreed to by the Tribe. In short, the current NEPA regulations, while not always perfectly implemented, are an essential tool for the Tribe to assert and protect its sovereign interests. Instead of the sweeping overhaul that CEQ currently proposes, the agency should instead focus its efforts and resources on ensuring faithful adherence among federal agencies to the letter and spirit of NEPA and the existing regulations.

I. Procedural Concerns with This Rulemaking

Before commenting on the substance of the proposed rule, we must first emphasize that CEQ's public hearing and tribal consultation processes for this rulemaking have been overwhelmingly inadequate. First, given the magnitude of CEQ's proposed deviations from existing regulations and case law, a mere 60-day comment period does not allow tribes or the public at large sufficient time to review the substantial implications of CEQ's proposal and offer considered feedback. Second, and in the same vein, holding just two public hearings in Denver and Washington D.C. does not even begin to provide tribes or the public with meaningful opportunities to give comments on regulations that significantly affect Americans nationwide.

Finally, and of obvious particular importance to the Havasupai Tribe, CEQ has largely ignored its obligation to engage in government-to-government consultation with tribes on this rulemaking. Executive Order 13175 requires "regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications," 65 Fed. Reg. 67,249 (Nov. 9, 2000), and CEQ has officially recognized this obligation, *see, e.g.*, CEQ, *CEQ Guidance and Executive Orders Related to Native Americans*, available at <https://ceq.doe.gov/get-involved/tribes-and-nepa.html>. Yet here, although the proposed rule changes represent a radical policy shift with profound consequences for the Havasupai Tribe, we have not received any invitation to have a meaningful dialogue with CEQ about them. **The Havasupai Tribe formally requests government-to-government consultation on the proposed rule.**

II. Substantive Concerns with The Proposed Rule Changes

While CEQ's proposed changes to its NEPA regulations are concerning to the Havasupai Tribe in a number of respects, we focus below on how several of its most troubling provisions would harm our Tribe, namely the elimination of the concepts of "cumulative" and "indirect" effects. We also incorporate by reference the Center for Biological Diversity's comments.

CEQ's proposed rules require agencies to disclose only "reasonably foreseeable effects that occur at the same time and place" and that "have a reasonably close causal relationship to the proposed action or alternatives." Proposed § 1508.1(g), 85 Fed. Reg. at 1728-29. The proposal explicitly eliminates the existing requirement to consider cumulative impacts. Proposed § 1508.1(g)(2), 85 Fed. Reg. at 1729. It also deletes the term "indirect" from the definition of effects and instead makes consideration of indirect impacts optional. Proposed § 1508.1(g), 85 Fed. Reg. at 1728-29 ("Effects . . . *may* include reasonably foreseeable effects that are later in time or farther removed in distance."). These attempts to limit the scope of agencies' NEPA analysis could have disastrous consequences on the Havasupai Tribe's ability to protect our water, natural resources, and ultimately, our people, culture, and economy.

One of the most pernicious dangers facing the Havasupai Tribe today is uranium mining around our Reservation and Grand Canyon homelands. Uranium mining threatens to contaminate the groundwater that we depend upon for our livelihood, cultural identity, and continued existence. Such contamination would be absolutely devastating to all life on our Reservation. It would force the Tribe into an impossible dilemma: stay on our homelands in the Canyon and become sick, or leave our home and abandon our traditional way of life. But leaving our home has never been an option – we will never do that. Instead, contamination would be a death sentence for our people. Groundwater contamination would also lead to the collapse of the Tribe's tourism economy, which relies on our famous waterfalls and supplies 75% of all jobs at Havasupai. Additionally, uranium mining threatens to ruin our sacred places on the Coconino Plateau, including Red Butte, which the Kaibab National Forest formally recognized as a Traditional Cultural Property for our Tribe in 2010.

The Tribe was one of the staunchest supporters of then-Interior Secretary Ken Salazar's 2012 twenty-year moratorium against new mining claims on approximately 1 million acres of public lands around the Grand Canyon. However, the temporary ban – and its critical protection of Havasupai's natural and cultural resources – may not have happened if NEPA did not require examination of cumulative and indirect impacts.

The Bureau of Land Management ("BLM") developed an EIS to analyze the environmental impacts of, and alternatives to, the moratorium. *See* BLM, Northern Arizona Mineral Withdrawal Final Environmental Impact Statement (Oct. 2011), *available at* <https://tinyurl.com/uuembb8>. Under the EIS's no-action alternative of allowing new uranium mining to proceed, BLM found that uranium mining "could result in approximately 728 uranium exploration projects, 30 uranium mines, 317,505 ore haul trips, and 22.4 miles of new roads and power lines, with approximately 1,321 acres of disturbed landscape over 20 years." *Id.* at 4-173. BLM also found that "during the 20-year time frame, it is expected that there could be approximately six mines in production under approved plans of operation at any one time in the entire withdrawal area." *Id.* at 4-174.

BLM moreover found that uranium mining could result in potentially "major" impacts to R-Aquifer water quality at some South Rim springs. *Id.* at 4-67, 4-79 to 4-83, 4-96. This finding is extremely alarming for the Havasupai Tribe because approximately 95.4% of the discharge from the R-Aquifer occurs within Havasu Canyon, forming Havasu Creek, which flows into Supai Village and provides our community with water. Then-Interior Secretary Salazar decided to impose the temporary ban against new uranium mining claims, in large part, "to protect the Grand Canyon Watershed from adverse effects of locatable mineral exploration and development." BLM, Northern Arizona Mineral Withdrawal (Jan. 2012) at 2, *available at* <https://tinyurl.com/snss8lm>; *see also id.* at 9-10 ("the likelihood of a serious impact [to groundwater from uranium mining] may be low, but should such an event occur, significant").

But under CEQ's proposed NEPA rule changes, which do not require agencies to evaluate indirect or cumulative effects, BLM may have not analyzed these potential impacts to groundwater outside of the lands specifically subject to the moratorium because the agency characterized these effects as "indirect." *See* BLM, Northern Arizona Mineral Withdrawal Final Environmental Impact Statement (Oct. 2011) at 4-71. In particular, BLM described the possibly catastrophic environmental and economic impacts to Havasu and Havasupai Springs on the Havasupai Reservation as "indirect" and "cumulative." *See id.* at ES-16, 1-27, 4-77, 4-223. BLM also evaluated the impacts to multiple tribes' cultural and sacred places through the lens of cumulative effects. *See id.* at 4-223. The Havasupai Tribe's fight against uranium mining on our Grand Canyon homelands is far from over, and the proposed regulations, if finalized, would take away vital tools for the Tribe to ensure that federal decision makers fully take into account and protect our sovereign interests when considering future uranium mines.

In addition to uranium mining, CEQ's rule changes would gravely undermine the Havasupai Tribe's ability to inform agencies about the damaging effects of other types of proposed development. We offer two examples as key illustrations.

First is the Town of Tusayan and Stilo Development Group's proposal to build significant commercial and residential developments in the Kaibab National Forest, only a few miles from an entrance to Grand Canyon National Park. The Tribe has opposed this project for years because it will pump groundwater from the already overextended R-Aquifer and thus further jeopardize flows into Havasu Creek on our Reservation. The Stilo-Tusayan proposal also threatens the Tribe's nearby sacred place, Red Butte, by substantially increasing the number of people living in and visiting the area for extended periods of time.

Second is any attempt by the Arizona Snowbowl Ski Resort to expand its use of reclaimed sewage water for artificial snowmaking on the San Francisco Peaks, another important sacred site for the Havasupai people. Not only does wastewater snow desecrate our sacred mountain, it also threatens to contaminate the Tribe's primary water resource, the R-Aquifer, whose source waters originate in the snowpack and rainfall on the San Francisco Peaks.

Neither project can move forward without NEPA review and Forest Service approval. Under CEQ's proposed regulation changes, Stilo-Tusayan and Snowbowl could press the Forest Service to not disclose any harmful impacts to Havasupai's water and cultural resources by arguing that they are "indirect" and do not have "a reasonably close causal relationship to the proposed action[s]" because they will occur later in time or be farther removed in distance. *See* Proposed § 1508.1(g), 85 Fed. Reg. at 1728-29.

Equally distressing is that CEQ's proposed rules would allow Stilo-Tusayan and Snowbowl, or a federal contractor who need not disclose its conflicts of interests or financial stakes in the projects, to prepare the environmental reviews themselves. *See* Proposed § 1506.5, 85 Fed. Reg. at 1,725; *compare id. with* 40 C.F.R. § 1506.5(c) (current CEQ NEPA regulation requiring reviewing contractors to disclose conflicts of interests). This change invites self-serving assumptions and analyses into the NEPA process, which is wholly at odds with NEPA's overarching goal of informed decision making. The reason that NEPA's regulations have long required agencies to maintain responsibility for reviews is because they are charged with making decisions in the public interest. Project proponents, who are self-evidently acting in their own interests rather than the public's, lack incentives to consider any alternatives to a proposal or to take a hard look at its environmental consequences.

Finally, CEQ's proposed regulations impose strict page limits and timelines for agencies to complete their NEPA reviews. *See* Proposed §§ 1501.5, 1502.7, 85 Fed. Reg. at 1,715, 1,719 (EAs limited to 75 pages and EISs limited to 150 pages); Proposed § 1501.10, 85 Fed. Reg. at 1,717 (EAs limited to one year and EISs limited to two years). These arbitrary restrictions encourage agencies to do the bare minimum level of analysis. Simply put, they are grossly inadequate for effectively studying the wide-ranging, long-term, and potentially irreversible impacts of highly controversial projects such as the Stilo-Tusayan development or the Snowbowl's expanded use of wastewater snow. These compressed timelines and document length will also pose substantial barriers to meaningful tribal consultation on projects such as these, which take time and thoughtful analysis to perform effectively.

III. Support for the Tribe-Specific Aspects of the Proposed Rule


The Havasupai Tribe strongly supports affording tribes the same opportunities to participate in the NEPA process that the current regulations provide to other governments, including state and local governments. To that end, the Tribe supports CEQ's proposal "to add 'Tribal' to the phrase 'State and local' throughout [CEQ's NEPA regulations]" 85 Fed. Reg. at 1,692. Likewise, the Tribe supports CEQ's proposal to "eliminate the provisions in the current regulations that limit Tribal interest to reservations," as well as to amend the definition of "cooperating agency" "to make clear that a State, Tribal, or local agency may be a cooperating agency when the lead agency agrees." *Id.* at 1,692, 1,707. These changes properly recognize tribes as regulatory authorities, as well as the fundamental fact that tribal governments have sovereign interests unique from the general public. More generally, Havasupai supports CEQ's stated intention to "support[] expansion of the recognition of the sovereign rights, interests, and expertise of Tribes in the NEPA process and CEQ regulations implementing NEPA," as well as its intention to "further support coordination with Tribal governments and agencies and analysis of a proposed action's potential effects on Tribal lands, resources, or areas of historic significance as an important part of Federal agency decision making." *Id.* at 1,711; *see also id.* at 1,692.

That said, because of the Tribe's numerous and significant concerns with the proposed rule as described above, Havasupai cannot support CEQ's proposed NEPA regulation changes. **The Havasupai Tribe thus urges CEQ to abandon the current rulemaking entirely. Instead, we request that CEQ begin a much narrower rulemaking focused solely on treating tribal governments in the same way that state and local governments are treated in the existing regulations.** If CEQ moves forward with its proposal despite widespread concerns identified in public comment, it should retain in the final rule its proposed changes to the treatment of tribes.

IV. Conclusion

Thank you for considering these comments from the Havasupai Tribe. Please contact me at htchair@havasupai-nsn.gov or (928) 433-8131 to schedule our requested tribal consultation as soon as possible.

Respectfully submitted,



Matthew Putesoy Sr., Vice Chairman
The Havasupai Tribe

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Cc: Congressman Tom O'Halleran
Senator Kyrsten Sinema
Senator Martha McSally
Congressman Raul Grijalva