March 9, 2020

Mr. Edward A. Boling
Associate Director for the National Environmental Policy Act
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Docket CEQ-2019-0003

Dear Mr. Boling,

The Coalition for American Heritage appreciates the opportunity to comment on the Council on Environmental Quality's Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act. The Coalition for American Heritage ("Coalition") is an advocacy coalition that protects and advances our nation's commitment to heritage preservation. Supported by the American Cultural Resources Association, the Society for Historical Archaeology, the American Anthropological Association, and the Society for American Archaeology, the Coalition collectively represents 350,000 cultural resource management professionals, academic archaeologists and anthropologists, and subject matter experts with an interest in NEPA implementation. Many of our members serve as consultants to project applicants and facilitate compliance with NEPA. Additionally, many of our members serve federal government agencies by helping ensure compliance with NEPA regulations.

The Coalition favors timely and efficient environmental review. This proposed rule, however, will not result in the predictability and efficiencies that CEQ seeks. We are concerned that these proposed regulations are confusing and introduce undefined terms and concepts that will lead to more litigation, project delays, and increased project costs—the opposite of what the rule is intended to accomplish.

We Support the Increased Recognition of Tribes

We support CEQ's effort to acknowledge and improve the role of tribes in the NEPA process. The inclusion of "tribal" with "state and local" throughout the regulations, as well as the elimination of provisions that limit tribal interest to reservations, is a positive change.

We Support More Detailed Discussion on Environmental Assessments in the Updated Regulation

We support CEQ's additional guidance on Environmental Assessments (EAs). The proposed changes provide much more information on preparing an EA. The current regulations focus more

on the preparation of Environmental Impact Statements, which make up less than one percent of NEPA reviews. Providing more detailed guidance on preparing an EA will result in agencies more effectively processing projects where it is unclear if a project will have a significant impact on the environment.

The Proposed Rule Allows Agencies to Arbitrarily Limit the Applicability of NEPA

The draft rule proposes to create a new "threshold applicability analysis" with a new definition for "major federal action" meant to limit the number of projects undergoing NEPA review. Not only are these new concepts inadequately defined, but CEQ has failed to provide guidance within the regulations for which projects would or would not meet this threshold. We oppose the adoption of a percentage of federal funding test for every project because doing so would be arbitrary. Introducing ambiguity into established regulations risks the predictability on which project proponents, agencies, and the public have come to rely.

In addition, allowing agencies to decide at their discretion and without any public process that certain projects are not subject to NEPA review cloaks what should be a transparent decision-making process in secrecy and undermines public trust and confidence in fair and consistent application of the law. Under the proposed regulations, an agency could unilaterally decide—without an advance rulemaking—that a certain project does not have to be subject to NEPA and no further analysis is required. This change, however, is unnecessary. As it stands now, ninety-five percent of the actions that are subject to NEPA are resolved through categorical exclusions (CEs). In developing CEs, agencies must go through rulemaking procedures, in which the public often has the chance to comment. Once a CE is adopted, however, any project falling under that CE goes through a minimal NEPA review process. Allowing agencies to decide, at their discretion and without any public process, that certain projects are not subject to NEPA confers a unilateral decision-making authority on agencies that eliminates the opportunity for public input to help better anticipate unintended consequences of agency decisions.

Both Republican and Democratic administrations have undertaken numerous studies that have thoroughly examined NEPA and rejected claims that NEPA delays projects. The Congressional Research Service[1] has repeatedly concluded that NEPA is not a major cause of project delay. When delay occurs, it is more often caused by factors entirely outside of the NEPA process, such as lack of funding. For example, according to a December 2016 report of the U.S. Department of Treasury[2], lack of funding is "by far the most common challenge to completing" major transportation infrastructure projects. Reducing the number of projects subject to NEPA review will neither improve the projects themselves nor reduce project delays.

[1] Luther, Linda *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, Congressional Research Service (2012), available at https://environment.transportation.org/pdf/proj_delivery_stream/crs_report_envrev.pdf.

[2] AECOM, *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance*, at 2 (2016), available at. https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf

The Proposed Rule Unnecessarily Limits Public Involvement

We oppose limitations on the ability of the public to comment on the potential impacts of a project and provide information critical to agencies' decision-making. Public involvement in projects is not detrimental for developers or agencies—in fact, proper involvement with interested parties improves the success of a project. A 2012 Congressional Research Service report concluded that the NEPA process strengthens projects and reduces project time and costs, because the process identifies and avoids problems that might arise in later stages of project development.[3] In addition, a 2014 Government Accountability Office (GAO) report on NEPA costs and benefits found that senior officials across several federal agencies agree that NEPA review "financially and environmentally improved" projects[4] by encouraging greater consideration of alternative project designs and making better design decisions.

Yet this proposed rule would limit the ability of the public to comment in several ways. First, the proposed rule would only allow public comment on the "completeness" of the review. This limitation is too narrow and would deny the public the opportunity to comment on the purpose and need of a project. Congress explicitly intended for the federal government to work alongside the public in carrying out reviews under NEPA. The text of the statute states that "it is the continuing policy of the Federal Government" to carry out the tenets of NEPA "in cooperation with State and local governments, *and other concerned public and private organizations* . . .".[5] NEPA cannot be adequately fulfilled without proper public input, and to limit such input would be inconsistent with a stated directive of NEPA.

Arbitrary deadlines for EAs and EISs will also lead to reduced opportunities for public comment. The proposed regulation limits the time to scope, analyze, and process EAs to one year and EISs to two years. Often, meaningful consultation with stakeholders and tribes takes time, and arbitrary time limits risk agencies skipping steps in the process, resulting in inadequate and incomplete NEPA analyses that in turn will lead to poor project decision making, and subsequent litigation as a result of incomplete and inadequate analyses. The way to ensure that NEPA analyses are done quickly and effectively is to encourage better early planning with NEPA stakeholders and the public, not by imposing arbitrary timelines.

Limiting the public's ability to challenge agency decisions is also contrary to the intent of NEPA. The proposed rule would require objections to proposed alternatives to be made within thirty days of the notice of availability of the EIS or be waived. In addition, the new rule would ban groups who did not publicly comment on the rule from pursuing litigation in court and encourages the use of bonds in court cases, where those seeking to bring a claim would have to put up money to get access to the court system. Such provisions would increase already significant barriers for the public to bring suit against agencies for arbitrary and capricious actions. We oppose the thirty-day deadline for bringing objections and any use of bonds to access justice in the courts.

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[3] Luther at 36.
[4] U.S. Government Accountability Office, *National Environmental Policy Act: Little Information Exists on NEPA Analyses,* GAO-14-370 (2014), available at https://www.gao.gov/products/GAO-14-370.
[5] 42 U.S.C. § 4331 (emphasis added).

These proposed changes run counter to the fundamental goal in NEPA of giving the public a voice in federal decision making. We oppose all of these limitations on public involvement, which will lead to worse project outcomes.

The Proposed Rule Arbitrarily Limits Alternatives Analyses and Impacts Considered

The draft regulations propose to limit both the number of alternatives to be analyzed and the strength of those analyses, which will lead to poor decisions based on incomplete information. CEQ requested comment on whether the rules should establish a maximum number of considered alternatives. We oppose establishing a maximum number of alternatives to consider and limiting the alternatives analysis to three options. Any limit CEQ places on considered alternatives would be arbitrary and would unnecessarily restrict what should be a robust review that takes into consideration stakeholder concerns. Placing such a restriction would limit the agencies in their consideration of alternatives that could avoid or minimize effects to natural, cultural, and community resources.

NEPA's requirement to consider alternatives has led to better choices about project delivery and fewer impacts to the human environment. Success stories include the protection of the Colorado River (the source of drinking water for millions of Americans) from uranium tailings through the NEPA process on the Moab Uranium Mill site, and the NEPA review at Joshua Tree National Park, which identified an alternate route for a military training flight pattern that was better for military training, park visitor experience, and natural and cultural resources.

We also oppose CEQ's redefining effects to remove distinctions between direct and indirect effects; using ambiguous and confusing effects terminology such as "reasonably foreseeable" and "have a reasonably close causal relationship to the proposed action or alternatives"; and removing consideration of cumulative effects completely. The proposed rule seeks to redefine the effects that are considered under a NEPA analysis and significantly reducing what would typically be considered under an indirect effects analysis. CEQ proposes to use the tort law definition of "proximate cause" as the standard for determining whether effects should be considered. We oppose using the tort law definition of "proximate cause" in the regulations because the definition of "proximate cause" in tort law is notoriously inconsistent throughout jurisdictions, with some courts using but-for causation interchangeably with proximate. In fact, the American Law Institute finds the term so confusing that it has proposed replacing the term "proximate cause" with "scope of liability" in its latest restatement of torts.[6] Limiting the effects considered in the NEPA review process will result in agencies failing to consider significant impacts to communities, and will result in poor agency decisions based on incomplete information. This drastic reduction in the strength of alternatives analysis not only introduces confusion into the process, but will also ignore a wide array of community concerns.

[6] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM, § 29, comment d (Proposed Final Draft No. 1, 2005).

The Proposed Rule Eliminates a Key Definition

We oppose CEQ's striking of the word "significantly" from the definitions provision of the regulations. The change is a direct contradiction of Congress' intent in enacting NEPA. A major tenet of NEPA, per the original statute, is to assess major federal actions "significantly affecting the quality of the human environment."[7] The statute also specifically calls on the federal government to "preserve important historic, cultural, and natural aspect of our national heritage . . . ". Under the current rule, in determining the significance of a potential action, the agency considers a list of ten different factors, including, "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources . . . ". The proposed rule drastically cuts back these considerations, now requiring only three factors. The proposed regulations eliminate the reference to unique resources, including cultural ones, and eliminates the term entirely from the definitions section. Eliminating consideration of unique resources puts those resources at risk and goes against the explicit directive of the original statute.

This change not only puts categories of resources at risk, but also introduces unnecessary ambiguity. CEQ has provided no guidance or examples for how this major change will be implemented in practice. There is no example on whether, for example, these three factors may encompass the previous list, or if the newly proposed list explicitly excludes consideration of such factors. This ambiguity creates needless confusion.

The Rulemaking Process is Flawed

Finally, we are concerned that the public comment period for this rule has been too short, and we reiterate our request for an extension of comments. We are also concerned that CEQ is not conducting meaningful government-to-government consultation with tribes on this proposed rule. Executive Order 13175 (E.O. 13175) requires that tribal consultation occur when an agency is considering regulatory changes that would affect tribal nations. The proposed NEPA regulations meet that threshold requirement. CEQ should conduct formal, good-faith consultation on potential effects of the proposed regulations on tribal nations and address how these regulations will be implemented. Tribal nations should be given the opportunity to provide input, on a government-to-government basis, to assist CEQ with this rulemaking. Two public hearings, February 11, 2020 in Denver, CO and February 25, 2020 in Washington, D.C., and one "tribal focused meeting" February 26, 2020 in Washington, D.C., do not constitute government-to-government consultation. Tribal consultations should occur in various regions throughout Indian Country, such that tribal concerns are broadly reflected and truly considered in good faith by CEQ in this rulemaking process. We urge CEQ to extend the comment period and to conduct additional meetings with the public and with tribes across the country.

As a general matter, these regulations are bound to result in extensive litigation, which in turn results in further project delays. NEPA now has fifty years' worth of case law interpreting the statute and its regulations. These proposed regulations toss that case law—and all of the existing CEQ guidance—away. The predictability that comes with fifty years' worth of guidance and case

[7] 42 USC § 4332

law will be gone, and the inevitable result will be to litigate all the changes. The proposed regulatory changes will not only impact communities and the natural and cultural resources they value, but the proposed changes will impact and impair industry. Industry groups, and developers, will now lose the predictability that was previously afforded projects, and the ability to rely on the public input process to surface and resolve concerns about a project early in the project development process. We thus strongly urge CEQ to reconsider these changes, and refrain from adopting the proposed regulations.

Thank you for the opportunity to comment on the proposed regulations. Please do not hesitate to contact us with any questions on these comments.

Best regards,

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