20 August 2018 Comments on Council on Environmental Quality (CEQ) Docket CEQ–2018–0001

Thank you for the opportunity to offer these comments on the June 20, 2018, advance notice of proposed rulemaking (ANPR) published in the *Federal Register* Vol. 83, No. 119 in the form of 20 questions. Archaeology Southwest is a Tucson-based membership organization dedicated to the preservation, enjoyment, and investigation of the heritage places of the American Southwest. Our views are presented as General Comments regarding the National Environmental Policy Act (NEPA) regulations (40 CFR 1500) followed by responses to some of the 20 questions. The specific regulation updates we recommend are **rendered in bold**.

General Comments. The Archaeology Southwest mission—to work with tribes, private partners, and federal, local, and state governments to explore and protect the places of the past—together with our ethical obligations as cultural resource researchers and stewards, directs our attention to two core NEPA issues.

1. The NEPA statute and the current regulations affirm interests on the part of the American people and our Federal Government in cultural resources—historic places, traditions, and objects that are valued today—as essential and often irreplaceable elements of the human environment. Federal agency practice too often neglects legal mandates to consider sociocultural resources and impacts on par and in conjunction with biophysical aspects of the environment. The two are indivisible and require similar levels of consideration in the NEPA process.
2. The interests and preferences of federally recognized tribal governments and American Indians, Alaska Natives, and Native Hawaiian organizations (we use the cover term of "tribes") are not given the same consideration as state and local governments in the current regulations. The ANPR is an opportunity to rectify this longstanding injustice.

Aside from these two issues, the regulations require only minor updates. Indeed, after careful review, it is our assessment that the ANPR is biased in favoring (1) efficiency over effectiveness and (2) prescriptive reductions in the scope, complexity, and length of NEPA analyses and of resulting NEPA documents. This is the basis for our recommendation that the ANPR should be retracted and CEQ leadership redirected to improving implementation of the current regulations. Efficiency seems a noble aim at first glance, but the *outcome-focus* of the ANPR is contrary to the intrinsic *procedural-focus* of the NEPA statute. Section 102 of NEPA states, in part *(**emphases added**)*, "that, to the ***fullest extent possible***: … all agencies of the Federal Government shall --

(A) utilize a ***systematic, interdisciplinary approach*** which will insure the integrated use of the ***natural and social sciences*** … in planning and in decisionmaking…;

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(B) identify and ***develop methods and procedures*** … which will insure that presently unquantified environmental amenities and values may be given appropriate consideration…; (C) include in every recommendation … a ***detailed statement*** by the responsible official."

This passage, and NEPA's Section 101 (quoted below), demonstrate Congress' clear cognizance of the complex, context-sensitive, and scale-dependent essence of NEPA mandates to

- fulfill "the responsibilities of each generation as trustee of the environment,"
- attain "the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences,"
- achieve "a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities."

Mindful of this partial list of NEPA's broad and altruistic aims and of the reality that Federal Government agency personnel are the essential workhorses in the NEPA process, we urge CEQ to prioritize the provision of training, technical, and outreach assistance to federal officials on NEPA's frontlines. More or different regulations cannot substitute for the practical guidance agency personnel require to optimize efficiency and effectiveness in NEPA implementation. The federal agency staff we work with on a daily basis seldom claim the need for more or different regulations to discharge their essential NEPA duties; however, they frequently note the need for more budgetary support and better and more consistent, updated, and context-sensitive technical assistance and training.

In pursuit of NEPA regulation updates, practice enhancements, or both, CEQ is urged to embrace the following eight principles in encouraging and requiring federal agencies to:

1. Tailor the scope and scale of environmental impact assessments to be proportional to the context, nature, and intensity of the proposed action.
2. Use Internet and communications technologies to enable and encourage excellence in the NEPA process, especially in (a) scientific data management, analysis, and presentation, and (b) full and transparent disclosure of all proposed federal agency actions and decision making.
3. Facilitate abundant and high-quality public input at each consequential stage in the NEPA process, especially the identification of environmental values, the development of alternatives, and the assessment of effects.
4. Provide transparent and proportional responses to public input during the NEPA process.
5. Give consistent and prioritized attention to scientific evidence and reasoning as the essential and irreplaceable foundation for the NEPA process in general and for deciding when, where, and how much environmental change to allow.
6. On par with attention to biophysical resources, give clear and consistent consideration to sociocultural elements of the human environment and to the foreseeable effects of proposed actions on these elements.

7. Recognize that adverse impact avoidance is always better than mitigation and that economic growth and jobs creation do not and cannot, in and of themselves, constitute mitigation for environmental impacts. In fact, the economic benefits arising from many federal actions, as important as these may be, are typically bases for further environmental impacts, not means for adverse impact mitigation.
8. Direct earnest and creative agency and public attention to the identification and assessment of environmental values at risk, possible impacts to those values, and actionable alternatives that avoid and mitigate the most serious environmental impacts.

When applied in accord with Congress' intent, NEPA is a potent planning tool, not a "bureaucratic burden." Every effort should be made by CEQ—administratively, through training, outreach and publications, technical assistance, and if necessary via updates to NEPA regulations—to build a Federal Government "culture of commitment" to enacting Congress' clearly stated intentions in adopting NEPA. The ANPR is a signal opportunity for all interested parties to work together to harness the awesome power of NEPA to plan and implement Federal Government actions that will serve the current generation of Americans without depriving future generations of healthy, diverse, and productive lands, waters, air, and cultural resources.

Question 1. *Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?*

No. There is no need to revise the current regulations, which contain ample guidance in this regard. Updates to the regulations to force multiagency environmental reviews to meet arbitrary standards for timeliness and "efficiency" are sure to discourage and thwart input and assistance from tribes, organizations like Archaeology Southwest, and members of the public. Short response times for comments on agency actions translate into fewer and less meaningful external reviews, greater workloads for tribes and other affected parties, and more litigation. Please consider in this regard the regulations implementing the National Historic Preservation Act (NHPA; see especially 36 CFR 800.8), which offer reliable guidance for coordinating NEPA and NHPA processes (see also the joint CEQ-Advisory Council on Historic Preservation [2013] *Handbook For Integrating NEPA and Section 106*, https://ceq.doe.gov/publications/nepa-handbooks.html). Similar technical and NEPA practitioner guidance for interagency collaboration to achieve collaboration with other laws and regulations would be more useful than regulatory updates in optimizing efficiencies. One issue that could benefit from an update is the **inclusion of tribal laws and organizations in all regulation references to state and local laws and regulations. Coordination and consultation with tribes should be specified in any such updates.**

NHPA merits further consideration in this regard because of (1) the generally smooth co-administration of this statute and NEPA in prevailing practice, (2) the central importance of cultural resources to tribal interests and well-being, and (3) the roles states, tribes, and their

tribal historic preservation officers (THPOs—there are nearly 200 such offices nationwide) play in assuring efficient and effective delivery of Federal Government services and amenities to America's communities. Early and stepwise consultation and coordination with tribes and THPOs through NEPA and NHPA processes addressing proposed Federal Government actions on- and off-reservation lands is a critical factor in assuring synchrony, timeliness, and efficiency, as well as in assuring that Federal Government decision makers have the benefit of the knowledge and wisdom of the people most familiar with the lands and resources proposed for alteration by agency actions. Several generations of astute federal officials with management responsibilities affecting Indian Country have learned the many benefits that derive from listening closely to tribal officials. There will never be a better opportunity than now for CEQ demonstrations of leadership in government-to-government relations with tribes, in fiduciary duty for the welfare of tribes and individual American Indians, and in the creation (via training, publications, etc.) of recommended practices in this crucial and significant domain of NEPA implementation.

Question 2. *Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?*

Yes. First, the CEQ regulations at 40 CFR 1500–1508 should be updated to **include references to tribes on par with states and local governments.** Second, in specific reference to cultural resources, there is an opportunity for CEQ leadership in administration and regulation, especially at 1506.2–1506.7, to **promote more effective use of regional and interregional databases containing environmental information, including cultural resource data**. The last two decades have witnessed vast expansions in the geographical scope, quality, and usefulness of databases containing spatially explicit information regarding the location and significance of archaeological resources and other cultural resource places. Archaeology Southwest is the steward for interstate databases of thousands of cultural resource localities across Utah, New Mexico, and Arizona. Within this region, Archaeology Southwest has identified *Priority Preservation Lands* in a proactive effort to designate landscapes having exceptional values that require special consideration in NEPA and NHPA processes. Applications of databases and prior studies should be integral to NEPA processes, and CEQ leadership is encouraged to first promulgate and publish recommended practices, then propose regulation updates when and if any such updates emerge from consultations with affected tribes and the stewards of regional databases.

No further consideration should be given to allowing the Federal Government to allow state or local governments to make decisions regarding federal actions. The Public Trust Doctrine and other principles guiding Federal Government duties oblige continued federal responsibility for all commitments of lands and resources managed on behalf of the American people and tribes. The current regulations, especially 1502.21, provide ample mandates for federal officials to "incorporate material into an environmental impact statement by reference when the effect

will be to cut down on bulk impeding agency and public review of the action." No clear means for improving current provisions exist. We oppose reducing current federal requirements or substituting state or local environmental review standards that are not at least equivalent to federal standards. We oppose any exemption for a lead federal agency from independently evaluating and taking responsibility for an environmental document being used for NEPA compliance. That sort of pass-the-buck governance is excluded by NEPA Section 101.

Question 3. *Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?*
No. Regulatory change in this area is unlikely to optimize interagency coordination in pursuit of NEPA's aims; such change would be more likely to frustrate and complicate the NEPA process. What is called for in this regard and in other domains of NEPA practice is optimized CEQ leadership in supporting agency personnel responsible for NEPA implementation, via training, online guidance, and other means for identifying and promoting recommended practices for optimizing both efficiency and effectiveness in the NEPA process.

Question 6. *Should the provisions in CEQ's NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?*
Transparency and public involvement are central aims in the NEPA statute. Parts 1506.6–1506.10 in the current regulations and agency policies enable public participation in Federal Government decisions that affect their environment, health, and well-being. The most promising opportunity for an update in this regard is in clarifying the importance of seeking and considering input from tribes and other local communities that have been denied meaningful access to the NEPA process and have been disproportionately affected by many generations of Federal Government policies and actions impacting their health, safety, economies, and cultures. Tribes must be consulted early and often in the NEPA process, and their views given in-depth and priority consideration, for actions affecting both tribal trust lands (that is, reservations) and ancestral lands used and occupied by today's tribes' forebears. Where we work, it is not uncommon for upwards of 90 percent of the cultural resources significantly impacted by federal actions, including actions well removed from reservations, to have direct and powerful connections to one or more federally recognized tribe. Accordingly, the **CEQ regulations, notably Parts 1503.1 and 1506.6, should be revised to require consultation with and enable involvement by all tribes interested in or affected by proposed actions.**

It may also be useful to **implement a minimum standard comment period, perhaps 30 days, for all environmental assessments.** This question further raises an opportunity to make better use of communications technologies to ensure all Americans, including those without ready Internet access, may review NEPA documents and offer input. We note that technology mobilization does not require regulatory updates, only Federal Government leadership in just and creative governance and innovation. This is, in effect, our response to Question 15.

Questions 7 & 8. Definitions of key NEPA terms.

The CEQ regulations and case law already provide dozens of definitions that are unambiguous, free of the outcome-focused bias signaled in the ANPR, and useful in pursuit of NEPA's procedural requirements. Possible exceptions **include definitions for the terms "consultation" (perhaps especially "tribal consultation"), "cultural resources," and "extraordinary circumstances" (in the context of 1507.3 and limitations on the use of categorical exclusions, as defined at 1508.4).** Many federal agencies routinely approach consultation as "checklist" notification instead of as an opportunity to learn from the people most familiar with the values of the lands and resources slated for alteration by proposed actions. As a partial remedy, the **consultation definition should be developed in consultation with tribes** and might usefully reference a good-faith effort to accommodate tribal interests and concerns (see also E. O. 13175 and ACHP's 2017 report, *Improving Tribal Consultation in Infrastructure Projects*).

The Department of Interior NEPA regulations (43 CFR 46) and subordinate policies (especially Departmental Manual 516) provide decent starting points for defining the extraordinary circumstances that disable categorical exclusions. **Any update should also cross-reference factors contributing to the intensity of environmental impacts (1507.27[b]).**

Question 9. *Should the provisions in CEQ's NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?*

The current regulations focus primarily on environmental impact statements (EISs), but federal agency staff time and daily NEPA efforts center on environmental assessments (EAs). Opportunities exist for regulation **updates to create a NEPA process that is both more effective and efficient by:**

1. **Providing detailed guidance regarding EA contents and procedures for completion. Again, the recommended practices embedded in departmental and agency policies are apt starting points.**
2. **Extending the "Limitations on actions" safeguards for EISs at 1506.1 to EAs and categorical exclusions. Agencies must not allow or permit environmental impacts in the name of impact assessment or mitigation planning. Exploratory drilling, cultural resource site testing, and similar actions that would otherwise require NEPA environmental assessments must never be allowed as part of EIS studies. NEPA does not permit an agency to act first and comply later. To clarify this essential principle, Part 1506.1(a) should read something like, "(a) Until an agency completes the NEPA process [delete reference to Part 1505.2], no action concerning the proposal ...."**
3. **In a similar vein, the regulations should assure agency and project proponent recognition of civil and criminal remedies for what might be termed "anticipatory environmental degradation," meaning unauthorized actions taken to alter or destroy aspects of the environment in an attempt to limit regulatory requirements for impact assessment, avoidance, and mitigation prior to or during the NEPA process. The phrase**

"including actions under other applicable statutes" should be appended to "that the agency will take appropriate action" at 1506.1(b).

We have seen several examples of significant environmental impacts allowed by federal officials in the name of impact assessment. A place highly significant to Western Apaches was subjected to extensive scientific "sample excavations" that removed more than an acre of ground cover and probably disturbed human remains prior to any Record of Decision. Additional updates should be considered to assure that (1) the NEPA process is completed prior to substantial commitments of public lands or resources and (2) agency and proponent investments in EAs are to be commensurate with and proportional to the size, complexity, public controversy, and potential environmental impacts of specific proposed actions.

Question 10. *Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how?*

No. Good governance and common sense oblige federal officials—decision makers as well as rule makers—to grasp the truth that the NEPA process is scale-dependent. It is ***not*** consistent with the NEPA statute to require arbitrary limits on the time frames of NEPA analyses or the page lengths of NEPA documents. Instead, the regulations should make clear (1) that the NEPA process exists to improve the efficient and effective planning, impact assessment, and implementation of federal actions and (2) that doing so is contingent on early initiation and diligent attention to the NEPA process. If any update is proposed regarding the timing of agency actions, then please consider our response to Q. 9, above. **Part 1506.1 could be strengthened to further discourage project proponents from proceeding with land and resource alterations prior to the completion of the NEPA process.**

Question 11. *Should the provisions in CEQ's NEPA regulations relating to agency responsibility and the preparation of NEPA documents by contractors and project applicants be revised, and if so, how?*

Per our comments regarding Federal Government tribal trusteeship and government-to-government relations (see Question 1), as well as E. O. 13175, **Part 1506.5 could be updated—again in close consultation with tribes—to affirm tribes' sovereign discretion in electing direct communications and consultations with federal agency officials, rather than with project proponents or third-party contractors.**

Question 18. *Are there ways in which the role of tribal governments in the NEPA process should be clarified in CEQ's NEPA regulations, and if so, how?*

Yes. Tribes need and deserve opportunities to participate in the NEPA process in ways not anticipated in the current CEQ regulations. **The regulations should be updated in close consultation with tribes and in accord with essential principles in federal Indian law and agency**

practice, including (1) federal trusteeship for tribes, individual American Indians, and tribal trust lands; (2) government-to-government relations; and (3) tribal sovereignty and self-determination, meaning the inherent right of tribal governments to assert their interests and the obligation of the federal government to take such assertions into consideration. These and related principles translate into mandates for CEQ to accord tribes at least the same status and privileges as state and local governments, to enable tribes to be cooperating agencies in the NEPA process, and to create means to learn about and accommodate tribes' interests in and preferences regarding federal actions beyond tribal trust lands, especially actions affecting tribes' homelands, sacred places, and cultural resources.

Question 19. *Are there additional ways CEQ's NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?*

Per previous comments, the proper legal role of the CEQ and NEPA regulations is to enact Congress' intent for NEPA to serve as a tool for planning and implementing government actions without creating adverse environmental impacts. NEPA is an extraordinary asset, a prime and widely emulated example of the innovative and public-minded governance that defines the United States of America. The only burden here is the obligation created via the ANPR to oblige Americans to defend NEPA from interpretation and application contrary to statute.

Question 20. *Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how?*

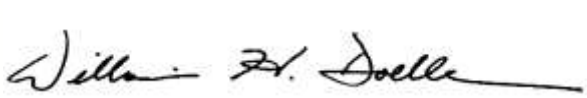
Yes. The ANPR is an opportunity to address a longstanding weakness in the current regulations: the lack of specific guidance for the monitoring and mitigation enforcement programs authorized at 1505.2–3. This weakness is poignantly problematic given the proliferation of EAs and FONSIs, which are not addressed by current regulations on agency decision making. **Updates to the CEQ regulations should modify Part 1505 to: (1) provide requirements for decision documents related to actions covered by FONSIs similar to those currently provided at in Part 1505.2 for Records of Decisions; (2) require agencies to assure that mitigation and monitoring commitments appear in legally binding documents; and (3) amend Parts 1505.3(c) and (d) to provide that reports on progress in carrying out relevant mitigation and monitoring are made systematically available to the public, with or without any request from the public.**

As a complement to these updates and any others proposed in furtherance of NEPA's statutory aims (see our eight principles, pages 2–3, above), opportunities exist for additional CEQ leadership in developing guidance and training to prioritize impact avoidance and, when this is not possible, to facilitate creative consideration of broad ranges of mitigation approaches, alternatives, and practices, including off-site and compensatory mitigation. NEPA guidance and training should incorporate and build upon the best available recommended practice guidance, the eight principles listed above, the "Polluter Pays" principle, the Public Trust Doctrine, etc.

Concluding comment. NEPA's statutory intent, per Section 101 ***(emphases added)***, includes directing "the Federal Government to use ***all practicable means***, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

1. fulfill the responsibilities of each generation as trustee of the environment…;
2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage…;
5. achieve a balance between population and resource use…; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

The apparent ANPR bias in favor of simplifying and transforming the NEPA process into a checklist for approving Federal Government actions is inappropriate, and the ANPR should be withdrawn. Congress' original intentions, along with scientific results and practical experience in NEPA implementation accumulated over the last five decades, recognize that interactions among sociocultural and biophysical systems are highly complex and that taking a full and careful *look*, via the NEPA process, prior to the *leap* of a federal decision pays handsome dividends in economic as well as ecological and administrative currencies. As a means for maintaining allegiance to NEPA's requirements for Federal Government agencies to balance public goods and environmental impacts, it may be useful to keep in mind Einstein's aphorism that "Things should be as simple as possible, but no simpler." No process or result of any update to the CEQ regulations should thwart or undermine NEPA's statutory recognitions of this complexity and the mandates for cautions and principled management of our public lands and resources.



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