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Subject:

## **NPRM Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act**

*Docket No. CEQ-2019-0003*

Thank you for the opportunity to offer these comments on the notice of proposed rulemaking (NPRM) published on January 10, 2020, in the *Federal Register* and identified as Docket No. CEQ-2019-003. Archaeology Southwest is a Tucson-based membership organization dedicated to the preservation, enjoyment, and investigation of the heritage places of the American Southwest. Our submission is provided via (A) general comments, (B) a single qualified endorsement regarding the NPRM, (C) a list of 12 things that were not included in the NPRM and should be featured in the adopted regulations, (D) objections to six specific provisions in the NPRM, and (E) concluding comments. These comments distill to our finding that the NPRM is not consistent with the NEPA statute and is otherwise misguided, and to our recommendation that the NPRM should be withdrawn or suspended, revised, and re-submitted for public review and comment.

### **A. GENERAL COMMENTS**

The statutory intent of the National Environmental Policy Act, as declared in 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 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 issues regarding NEPA.

1. The NEPA statute and the current regulations affirm and provide a straightforward rationale for continuing national commitments to the preservation and use of *cultural resources*—that is, historic places, traditions, and objects that are positively valued today—as essential and often irreplaceable elements of the human environment that NEPA exists to protect. Federal agency practice too often neglects NEPA’s mandates to consider sociocultural resources, and federal project and program impacts to those resources, in conjunction with biophysical aspects of the environment. The two are indivisible and require parallel levels of consideration in current and future 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.

## **B. ONE WELCOME CHANGE EMBEDDED IN THE NPRM, AND HOW TO OPERATIONALIZE IT**

The NPRM has taken the opportunity to begin rectifying this longstanding and unjust discrepancy by referencing tribes on par with states and local governments. Even as the NPRM recognizes tribes’ roles and responsibilities in the NEPA process, however, the NPRM fails to make good on the intention stated in the 2018 advance notice of proposed rulemaking to expand “recognition of the sovereign rights, interests, and expertise of tribes.” In particular, the NPRM fails to reference tribal sovereignty, federal government trust responsibility, and federal agency mandates to consult with tribes.

This apparent oversight requires redress. True, complete, and appropriate tribal participation in the NEPA process will naturally require NPRM revisions and fine-tuning. This work must be done in consultation with tribes to address and comport with principles in federal Indian law, including but not limited to (1) federal trusteeship for tribes, individual American Indians, and tribal trust lands; (2) government-to-government relations and mandates for consultation and coordination; 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.

Consider a shortcut to achieving this obvious mandate. The adopted regulations, CEQ implementation guidance, and revisions to agencies’ proposed procedures for NEPA practice should explicitly include or incorporate by reference two existing federal government policies. First, the adopted regulations should reaffirm Executive Order 13175 to ensure consultation and coordination with affected tribal governments and agencies, as necessary and appropriate for a proposed action. The adopted regulations should, additionally, reaffirm the joint CEQ-Advisory Council on Historic Preservation (ACHP) guidance

on integrating the NEPA and Section 106 compliance processes, a policy that clarifies federal agency and project proponent obligations to facilitate tribal participation at the earliest possible stage and on a continuing basis. The adopted regulations should also require the elimination from federal agencies' proposed procedures of all provisions that limit tribal interests to Indian lands. We note that the NPRM references at least three other executive orders; we fail to find any bona fide reason it should not incorporate E. O. 13175 by reference. The necessary recognition by CEQ of its obligations under E. O. 13175 will require CEQ to suspend the NPRM process or extend the comment period for at least 60 days to enable tribal consultations, and this should be done promptly.

### C. ERRORS OF OMISSION: 12 OPPORTUNITIES MISSED IN THE NPRM

The NPRM fails to exploit opportunities to operationalize and codify recommended NEPA practice. In particular, the NPRM errs in omitting and mobilizing the following 12 principles as bases for streamlining federal agencies' statutory and commonsense requirements to:

1. **Facilitate abundant and high-quality public input at each consequential stage in the NEPA process**, especially the identification of environmental values (including historical and cultural values), the development of alternatives, and the assessment of effects.
2. **Tailor the scope and scale of environmental impact assessments to be proportional** to the context, nature, and intensity of the proposed action.
3. **Provide transparent responses to public input** during the NEPA process in a manner that is proportional to the type and level of environmental impacts.
4. **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.
5. **On par with attention to biophysical resources, give clear and consistent consideration to sociocultural elements** of the human environment, to cultural resources more specifically, and to the foreseeable effects of proposed actions on these elements.
6. **Recognize that adverse impact avoidance is almost always better than impact mitigation** and remediation, 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.
7. **Focus agency and public attention on 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**.
8. **Use Internet, communications, and remote sensing and mapping technologies to enable and encourage excellence in addressing the foregoing**, especially in (a) scientific data management, analysis, and presentation, (b) full and transparent disclosure of all proposed federal agency actions and decision making, and (c) solicitation, compilation, and analysis of public comments and other input.

9. **Reconcile the disconnection between the truths that current regulations and the NPRM focus primarily on environmental impact statements (EISs), but federal agency staff time and daily NEPA efforts center on environmental assessments (EAs).** Opportunities exist to make the NEPA process more effective and more efficient by: (a) providing detailed guidance regarding EA contents and procedures for completion (again, the recommended practices embedded in departmental and agency policies are apt starting points); and (b) extending the “Limitations on actions” safeguards for EISs at 1506.1 to EAs and categorical exclusions. In particular, agencies must not allow or permit environmental impacts not otherwise permitted on the basis of a NEPA analysis 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 ....”
10. **Ensure 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). The NPRM should have addressed—and the adopted regulations should provide—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 FONSIIs, which are not addressed by current regulations on agency decision making or the NPRM. The adopted CEQ regulations should modify Part 1505 to: (a) provide requirements for decision documents related to actions covered by FONSIIs similar to those currently provided at in Part 1505.2 for Records of Decisions; (b) require agencies to assure that mitigation and monitoring commitments appear in legally binding documents; and (c) 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.
11. **Provide clear and consistent definitions for key terms not otherwise defined in the NEPA statute or regulations.** These include definitions for “consultation” (especially “tribal consultation”), “cultural resources,” and “extraordinary circumstances” (in the context of section 1507.3 in the current regulations and limitations on the use of categorical exclusions, as defined at 1501.4 in the NPRM). The Department of Interior NEPA regulations (43 CFR 46) and subordinate policies (especially Departmental Manual 516) provide solid starting points for defining the extraordinary circumstances that disable categorical exclusions. **Any inclusion of a definition for extraordinary circumstances should restore to the adopted regulations definitions for “significantly” and should cross-reference factors contributing to the intensity of environmental impacts** (formerly in section 1507.27[b] and proposed for removal by the NPRM). Because too many federal agencies impose through their actions a definition of consultation as *notification*, instead of as an opportunity to learn from people especially familiar with the values of the lands and resources slated for alteration by proposed actions, the **consultation definition should be developed in consultation with tribes.** Discussion regarding the definition 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*).

- 12. Provide clear and consistent incentives for improving NEPA compliance practice.** As a complement to addressing the 11 specific errors of omission listed above, and to further NEPA's general statutory aims, many opportunities exist for CEQ and federal agency leadership to develop 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. The adopted regulations, official NEPA guidance, and federally sponsored training should incorporate and build upon the best available recommended practice guidance, the principles listed in numbers 1–8, above, the “Polluter Pays” principle, the Public Trust Doctrine, etc.

#### D. OBJECTIONS TO SPECIFIC NPRM PROVISIONS

The NPRM enables and promotes a series of undue and ill-advised provisions. These harmful provisions, all of which are contrary to the spirit or letter of the NEPA statute (or both), should be excluded from the regulations adopted in the final rule.

- 1. The NPRM misrepresents and undermines environmental protection as a substantive purpose of NEPA.** The revisions build on the shaky foundations of the half-truth that NEPA is a procedural statute. At 1500.1, the NPRM suggests that the sole (and soulless!) function of NEPA is satisfied if federal agencies have “considered relevant environmental information and the public has been informed regarding the decision making process.” While some court decisions have focused on NEPA's procedural provisions, NEPA's more substantive purpose is to implement national environmental protection policies. As the current CEQ regulations state, “NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action.” The NPRM proposes to eliminate the statutory goal of excellent action, attempting to release federal decision makers from common-sense obligations to make decisions that give weight to the integrity and protection of the human environment.
- 2. The NPRM needlessly and arbitrarily restricts NEPA's applicability.** (a) The NPRM would adopt for all federal agencies the doctrine of functional equivalence, the theory that if another law addresses environmental protections then the agency does not need to comply with NEPA. The proposal would enable agencies to use any other statute or Executive Order in lieu of NEPA, a provision not contemplated in and plainly contrary to the NEPA statute. (b) The NPRM would restrict interpretation of “major federal action” and exclude many federal actions from NEPA review altogether. Agencies would be instructed to determine whether a proposed action is a “major” federal action to decide if NEPA applies to the proposed action. 1501.1(1) and 1508.1(q) state that a “but for” causal relationship is not sufficient to bring a proposed action under NEPA. 1501.8(a)(2). (c) At 1501.1(a)(4), the NPRM allows agencies to disregard NEPA if it “would be inconsistent with Congressional intent due to the requirements of another statute.” This is frivolous: NEPA already makes it clear that agencies do not have to comply with NEPA if another statute requires an expedient action that precludes environmental assessment. The proposed addition appears designed to encourage arbitrary and capricious determinations regarding NEPA applicability. (d) The NPRM introduces “threshold applicability analysis” at 1501.1 as a means for determining whether to apply NEPA. This tool appears to have been crafted to exclude projects requiring cultural resources review, particularly projects with “minimal government funding or involvement.” Because these quoted terms are not defined in the NPRM, their introduction invites agency perfidy and abuse of discretion.



3. **The NPRM reduces and limits the scope of NEPA analyses.** At 1501.8(a)(2), the NPRM states that, “analysis of cumulative effects is not required.” This would mean that environmental impacts that accrue as a result of multiple relatively minor actions would no longer be assessed, documented, disclosed, or analyzed in the course of the NEPA process. Requirements for federal agencies to assess impacts that, when added to other past, present, and reasonably foreseeable actions (no matter who undertakes such actions), cause significant effects, have been central to NEPA’s impetus and implementation. All prior NEPA regulations have emphasized the necessity of cumulative effect documentation and analysis. Indeed, the notions of “looking before leaping” and attention to cumulative effects are among the law’s essential guiding principles and mandates. The same NPRM section (1501.8(a)(2)) proposes to eliminate federal agency requirements to assess and analyze effects from federal actions “that the agency has no ability to prevent or that would occur regardless of the proposed action.” The NPRM further proposes, via changes to sections 1501, 1508, and elsewhere, to exclude consideration, documentation, and analysis of indirect effects on the environment from proposed federal actions. These secondary and longer-term effects often exceed and “swamp” direct and primary effects (oil drilling and fracking are timely examples). Removal from the regulations and other attempts to exclude attention to indirect and cumulative effects appears to be a short-sighted, and possibly insidious effort to limit otherwise reasonable assessment of the effects of proposed actions on the environment, especially including effects on cultural resources. Proposed NPRM changes to the definitions of “Scope,” at 1508.1 (cc), and elimination of the definition of “significance” would radically reduce both the number of projects subject to NEPA review and the spatial extent of those projects that are reviewed. These proposed changes, in particular, are inconsistent with both the letter and the spirit of the NEPA statute and cannot be implemented through regulatory revision. The NEPA statute does not subcategorize “effect,” and the current regulations include the separate references based on deep experiential recognition that the rigorous, evidence-driven project planning the NEPA statute envisions will sometimes reveal the unforeseen, even unforeseeable impacts of federal actions. The proposed re-definition of “effect” restricts analysis and planning to direct effects, a patently shortsighted and seemingly reckless approach to planning highly complex and consequential actions.
4. **The NPRM revisions narrow requirements to analyze reasonable alternatives.** The NPRM proposes, at 1502.14, to eliminate requirements for federal agencies to analyze reasonable alternatives outside of an agency’s jurisdiction. At 1501.8(z), the NPRM authorizes agencies to give weight to the goals of the proponents of federal actions instead of NEPA’s goals of environmental protection and good decision making. Adoption of this provision of the NPRM would undermine obligations for a federal agency official to decline a proponent application or require the proponent to pursue a substantially less impactful alternative.
5. **The NPRM eliminates the conflict of interest disclosure requirement for contractors preparing EISs, thereby opening the door for proponents of federal actions to prepare EISs.** The changes proposed in the NPRM at sections 1506.5.(c) and 1507.2 would dispense with existing, reasonable, and necessary safeguards against intentional or unintentional bias, thereby eliminating legal and commonsense obligations for objective, science-driven analyses as the bases for describing proposed actions and attendant impacts, analyzing those impacts, and informing federal agency decision makers and the public. **These proposed changes encourage and facilitate conflicts of interest, effectively asking the American people to trust that project proponents share public interests in environmental protection as high priorities.** The fallacy of this logic is what gave rise to NEPA and other environmental protection statutes in the first place. Time has not reversed this fallacy.

6. **The NPRM constrains public participation in the NEPA process and legal challenges to questionable decisions.** The role of the public in the NEPA process under the current regulations is not just to “be informed,” but rather to be a participant. The provisions in the NPRM would eliminate options for public opposition to faulty NEPA analyses and unjust Federal decisions. The NPRM affirms, at Section 1500.3(d), that the proposed regulations create no “cause of action” and that there is no presumption of irreparable harm for a violation of the regulations. These changes attempt to undercut requests for injunctive relief to halt destructive action prior to full compliance with NEPA. The NPRM proposal at section 1500.3(d) to encourage agencies to impose bond or other financial requirements in the context of a NEPA challenge would decimate the rightful capacities for citizen groups, especially environmental justice communities, to pursue judicial remedies to faulty NEPA analyses or biased decisions. Among the initial rationales for NEPA enactment was to enlist and engage numerous and diverse viewpoints in planning publicly funded and permitted actions. Limiting access to legal remedies runs counter to principles of transparent governance in general and NEPA’s original intent in particular.

The six sets of revisions to the current NEPA regulations listed and discussed above will, if implemented, reduce and alter the consideration that planners, scientists, and managers presently give to cultural resources and other elements of the human environment impacted by federally funded or approved actions. The adoption of the apparently profit-driven proposals contained in the NPRM will themselves have unforeseen consequences: uncertainty, litigation, delays in federal actions, poor and incompletely federal agency decisions, and hidden costs are all easily foreseeable results of the NPRM.

## E. CONCLUDING COMMENTS

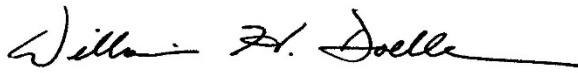
The proper legal and administrative roles of the CEQ and of the NEPA regulations is to enact Congress’s intent for NEPA to serve as a means for planning and implementing government actions without creating unnecessary or disproportionate adverse environmental impacts. NEPA and its current implementing regulations have proved to be extraordinary assets for planning government actions. They are widely emulated examples of the innovative, public-minded, balanced, and often legitimately contentious governance that defines the United States of America. History has proved that, when applied in accord with Congress’s intent, NEPA is a potent planning tool and means for balancing diverse interests in federal lands, not a “bureaucratic burden.”

Indeed, the only burden inherent in NEPA is the obligation now created via the NPRM, which obliges Americans who appreciate environmental protection and cultural resources to defend NEPA from interpretation and application contrary to congressional intent and statutory language. The NPRM recklessly disregards and fails to embrace and harness NEPA’s awesome power 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. CEQ and other agencies have neglected administrative opportunities—that is, training, outreach and publications, technical assistance, and modest updates to NEPA regulations—to fulfill their obligations and to foster and sustain a federal government “culture of commitment” to enacting Congress’s clearly stated intentions in adopting NEPA.

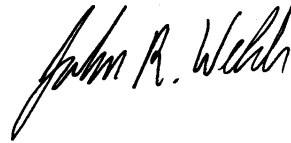
The apparent NPRM bias in favor of simplifying and transforming the NEPA process into a checklist for approving federal government actions, regardless of the scope, magnitude, and significance of their impacts on our air, water, land, cultural resources, and climate, is inappropriate and unlawful. All in-

formed persons now recognize that interactions among sociocultural and biophysical systems are highly complex and that taking a full and careful *look*, via the NEPA process or something like it, prior to the *leap* of a government decision often pays 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 that no update to the CEQ regulations can or should thwart or undermine either NEPA's statutory recognitions of this complexity or the attendant mandates for cautions and principled management of our public lands, waters, and cultural resources.

For these reasons, the NPRM should be withdrawn, and Congress's original intentions, along with scientific results, practical experience, and tribal consultations in NEPA implementation accumulated over the last five decades, should be restored to primacy in conjunction with efforts to incorporate conceptual, technical, and scientific advances into the NEPA process.



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