SOCIETY FOR AMERICAN ARCHAEOLOGY

March 5, 2020

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

RE: Proposed update to the regulations implementing the National Environmental Policy Act [Docket CEQ-2019-0003-0001]

The Society for American Archaeology (SAA) submits the following comments on the Council on Environmental Quality's (CEQ) proposed changes [Docket No. CEQ-2019-0003-0001] to the implementing regulations for the National Environmental Policy Act (NEPA) at 40 CFR 1500-1505 and 1507-1508. SAA believes that some changes to NEPA regulations may be needed in order to provide increased timeliness to project reviews. The bulk of what the CEQ has called for, however, is the result of a misguided reform effort whose ultimate outcome would be heavily biased in favor of development interests and would both undermine protections for our irreplaceable cultural and environmental resources and fail to produce the efficiencies it seeks. SAA calls upon CEQ to withdraw these proposed regulations and enter into extensive consultations with all stakeholders in order to devise a more balanced and effective set of proposed changes.

The Society for American Archaeology is an international organization dedicated to the research, interpretation, and protection of the archaeological heritage of the Americas. With more than 7,000 members, the Society represents professional, student, and avocational archaeologists working in a variety of settings, including government agencies, colleges and universities, museums, and the private sector.

It is our opinion that the overall effort to revise the NEPA review process as proposed is badly flawed for the following reasons:

1. The entire reform process was designed to produce a regulation heavily weighted in favor of project proponents and applicants.

CEQ published the proposed regulatory changes on January 10, 2020, in accordance with the directives established under Executive Order 13807 (issued August 15, 2017), which set forth a path for "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure." Among the steps already taken under EO 13807 were the creation of a "One Federal Decision" standard on project reviews through a single, unified NEPA document and the formation of an interagency working group to evaluate the environmental review processes to "identify impediments to efficient and effective environmental review and authorizations for infrastructure projects." The proposed regulatory changes before us today constitute the end result of this process, which was tainted from the beginning by the administration's desire to greatly limit both the scope and duration of the review requirements, thus reducing the amount of avoidance, minimization, mitigation, and remediation work needed to ensure sound environmental and cultural resources stewardship. For example, the requirement

of an economic analysis [§1501.2(b)(2)] to justify NOT carrying out types of NEPA work will likely incentivize the constraining of evaluation and mitigation activities.

2. The proposal would create new and problematic policies to reduce NEPA compliance.
Under the proposed changes, agencies would be authorized to arbitrarily decide that non-federal actions that meet an undefined "minimal" level of federal involvement would be exempt from NEPA requirements under a new Threshold Applicability Analysis [§1501.1]. Agencies would also be allowed to designate some federal projects as "non-major" [§1507.3] based on an arbitrary percentage level; there would be a significant expansion in the number of Categorical Exclusions [§1506.7]. Further changes such as the replacement of "exorbitant" with "unreasonable" would act to limit the universe of potential alternatives, reduce study or permit areas, and allow federal agencies and permit applicants to ignore resources that most certainly will be adversely affected. The proposed changes will increase ambiguity in the process and reduce its ability to identify environmental and cultural resource baselines, evaluate significance and effects, and work to avoid and minimize adverse effects.

3. The proposal's language changes would limit the applicability of NEPA reviews.
The document contains a number of troubling changes in language that cannot be supported. §1508.1(g) would redefine "effect" to mean impacts of an action that are "reasonably foreseeable" and that "may include" impacts that occur later or farther from (in distance) the area of proposed effect. This would essentially gut the existing law and regulation's coverage of indirect and cumulative effects of projects, especially in regard to historic properties where context, setting, and viewscapes are important considerations. In another example, CEQ wants to link "reasonableness" of a program alternative to include consideration of "technical feasibility," "consistency," "practicality," and "affordability." Under these terms, it would be easy for both agencies and proponents to arbitrarily limit NEPA reviews and the identification of potential alternatives. The most troubling aspect of these changes is that agencies and project proponents would be able to make these determinations without an opportunity for public comment.

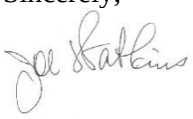
4. The proposal would unwisely limit public involvement in the process.
The language contained in §1500.3(b)(3) would prevent comments NOT submitted during the formal EA and EIS comment periods from being considered later in the process. It is understandable and reasonable for agencies and project proponents to want comments to be submitted in a timely manner to avoid having to go back and rework designs and the review process itself simply to accommodate stakeholders who were late in submitting comments. Nevertheless, one of the fundamental goals of NEPA is to incorporate, to the maximum extent practicable, the viewpoints of the public on development projects that use public funds and/or lands. This is to ensure that the mistakes of pre-NEPA project and facilities construction are not repeated. Further, some flexibility in the ability of interested parties to provide comments is necessary when new issues and information arise over the course of a NEPA process. This is a common occurrence. Language must be added to the proposed rule that would require project managers to take into account—even after the expiration of the formal comment period—new and substantive issues raised by the public.

5. The proposal does not acknowledge that the scale and complexity of projects varies greatly.
The changes put forward by CEQ make no distinction between minor proposals with no or minimal effects and large projects with major impacts on the landscape. CEQ seeks more clarity and efficiency from the NEPA process, and small-scale actions with minimal environmental risk would clearly benefit from such a framework. Yet the draft changes before us would produce exactly the opposite effect—larger, more complex, and better-funded proposals would be incentivized to reduce their NEPA compliance responsibilities, while small project proponents would be placed under the same regulatory burdens as their bigger colleagues.

6. Cultural resources would suffer adverse impacts from the proposed changes.
It is difficult to underestimate how heritage resources would be adversely affected by these proposed changes. While NEPA and the National Historic Preservation Act are distinct laws, with their own implementing regulations, there is a synergy between the two statutes that is both mutually beneficial and reinforcing. The current NEPA regulations integrate NEPA and National Historic Preservation Act (NHPA) compliance and enforcement, ensuring that NEPA documents disclose information about cultural resources and that these resources are considered during a project planning process so that efforts can be made to avoid and minimize impacts to historic properties. NHPA Section 106 activities benefit because NEPA documents reach a broad audience, expanding the audience for disclosing information to the public about the presence of resources and potential impacts. Section 106 reviews, if done early and properly, will inform the development and evaluation of NEPA program alternatives and the creation of strategies to avoid and minimize impacts. The proposed changes, by reducing the amount of NEPA work to be done, would inappropriately reduce the scope of analysis for federal actions and eliminate or reduce requirements for consulting with federally recognized tribes and coordinating with other stakeholders. Overall opportunities for the public to comment on proposed federal programs, projects, permits, and activities would be greatly diminished. From SAA's perspective, CEQ's proposed changes are contrary to the long-standing practice of ensuring that our nation's cultural heritage is protected for future generations. Under the CEQ proposal, cultural resources would no longer receive the consideration and protection they do today. Once cultural resources and historic properties are destroyed or degraded, they are lost forever; they are NOT renewable resources. If we do less to identify and protect heritage assets, it will inevitably lead to a significant loss of our nation's cultural heritage.

As an organization of heritage professionals, we include in our ranks 4,976 Americans who spend their days helping support infrastructure development while also preserving our cultural heritage. Because of this, SAA strongly recommends the withdrawal of the proposed changes to the NEPA regulations. Please do not hesitate to contact me if you have any questions at joe.watkins.saa@gmail.com. Representatives from SAA are available to meet with you at any time and provide additional information regarding these concerns and to discuss ideas for improving the proposed regulation. Thank you for your consideration.

Sincerely,



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