March 10, 2020

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


Dear Mr. Boling,

Thank you for the opportunity to submit comments on the Council on Environmental Quality’s (CEQ’s) update to the regulations implementing the procedural provisions of the National Environmental Policy Act (NEPA). Preservation Action is a 501(c)4 nonprofit organization created in 1974 to serve as the national grassroots lobby for historic preservation. Representing more than 3,000 members and supporters across the country, Preservation Action seeks to make historic preservation a national priority by advocating to all branches of the federal government for sound preservation policy and programs through a grassroots constituency empowered with information and training and through direct contact with elected representatives.

Overall, Preservation Action is supportive of the goal to make the NEPA Process simpler and more efficient. We believe the nation benefits when important projects can proceed without delays. But we also believe that the nation benefits when these projects are informed and shaped by public input, and aimed towards the goal of finding alternatives that are not only fiscally responsible, but that avoid adversely impacting natural and cultural resources. To that end, we are supportive of language in the proposed regulations that increase the recognition of Tribes. In our view, any effort to acknowledge and improve the role of Tribes in the NEPA process is a positive step. By cutting the limitation of interests solely to “reservations,” they are recognizing that tribal interests extend well into federal and private ancestral lands. This recognition and involvement could enable better protection for cultural resources.

Beyond this, however, we have a number of concerns with the revised language:

**New Definition of “Effects”** – “Direct” and “Indirect” effect definitions have been eliminated, instead consolidating elements of both into a singular “effects” or “impacts” definition:

(g) Effects or impacts means effects of the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. Effects include reasonably foreseeable effects that occur at the same time and place and may include reasonably foreseeable effects that are later in time or farther removed in distance.
The basic definition of “indirect effects,” which are those that “…are later in time or farther removed in distance, but are still reasonably foreseeable,” survives in the consolidated definition though what has been stricken are key clarifying examples that note “Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” These removed examples are somewhat different from the remaining examples of “effects” which leave out land use, population density or growth rate – each of which are factors which might impact historic properties.

Although the definition retains the concept of effects being those that “…are later in time or farther removed in distance, but are still reasonably foreseeable,” the definition goes on to say those effects are not to be considered significant “… if they are remote in time, geographically remote, or the product of a lengthy causal chain.” This, of course, is important – because if they are not “significant,” they could fall into a “categorical exclusion” from NEPA or would be exempted from the need to prepare an Environmental Impact Statement. The idea of limiting consideration of effects because they are “remote,” or because they are just one of many is concerning and may have impacts on historic properties.

Elimination of Cumulative Impact or Effects – The definition of “cumulative impact” has been removed entirely and the revised language explicitly states that, “Analysis of cumulative effects is not required.” The now deleted definition stated:

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

If an agency does not have to consider how their actions contribute to a collective series of cumulative actions by other agencies, then there would be no coordination on potentially catastrophic impacts to historic properties because each agency would consider only their individual action. Each action might be individually minor, but collectively they could have major impacts jeopardizing the resource’s integrity and eligibility on the National Register of Historic Places.

Limits on Alternatives Analysis – The analysis of alternatives when exploring ways to minimize the effects of projects upon natural and cultural resources is key to effective decision-making. In our view, considering a wide range of alternatives is more efficient and cost-effective than proceeding with an ill-informed project that leads to unnecessary damage, unexpected effects, or disastrous consequences. Some projects, and indeed some environmental or cultural resources are complex and may cover a large land area – so an appropriate number of alternatives to consider may need to be similarly broad. The narrative accompanying the revisions seeks comment upon whether there should be a maximum number of alternatives considered. In our view, the number of alternatives considered should not be an arbitrary number – rather the number of alternatives considered should be enough to adequately consider potential impacts, public input and available resources.

Major Federal Action Definition Narrowed – Major Federal Actions have been redefined to be “…actions subject to Federal control and responsibility with effects that may be significant.” (Note the definition of effects above that has pre-determined certain effects as not significant.) Projects with “minimal federal
funding or minimal Federal involvement where the Agency cannot control the outcome” would not be considered a Major Federal Action and thus would not be subject to NEPA. If an agency had to issue a permit for a single element of a much larger project that did not require other federal permits or funding, there would potentially be no NEPA analysis necessary. This could take away a layer of consideration of impacts on historic properties and lead to disputes over causation and effects. In our view, this is not an efficiency.

**Broader Use of Categorical Exclusions (CEs)** – Although CEs are already widely used, they were only referred to by definition in the existing NEPA regulations. The revision includes a section on CEs that notes them as an efficiency but requires agencies to consider whether “extraordinary circumstances” could still lead to significant effects. As long as those “mitigating circumstances or other conditions are sufficient to avoid” those significant effects, however, the agency could still categorically exclude them. This kind of internal evaluation, mitigation and exclusion lacks transparency, is concerning and may result in harm to historic properties.

We understand that within 12 months of the publishing of these rules, if finalized, every Federal Agency will have to alter their NEPA procedures to comply with the new regulations. In those new procedures, Agencies will need to update their existing procedures for CEs. After years of iterative development of agency CEs, we are concerned what a wholesale encouragement of their use and a rewrite of their associated procedures will look like when attempted all at once – particularly since they will be permitted to use CEs that have been adopted by other agencies. Although the proposed regulations call for public “review,” they do not seem to allow for public “comment,” and there is no provision to allow for objections.

**Arbitrary Time Limits and Page Length** – We are concerned about arbitrary time and page limits. Proposed are page limits of 75 pages (including appendices) for EAs, 150 pages for a routine EIS, and 300 pages for an EIS covering a matter of “unusual scope or complexity.” While senior agency officials would have the authority to grant exceptions to both the time and page limits, we are concerned that an arbitrary focus on time and page limits on top of the other proposed changes could result in a lack of consideration of alternatives, limit public input, or result in hurried analysis. Efficient milestones focused on quality, not quantity or speed should be the goal.

**30-Day Comment Deadline and Specificity Requirements** – In order to seek efficiencies in the public comment process, the revised regulations propose to establish an “exhaustion” clause. An agency would be required to seek “…comment on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment,” when publishing a notice of intent to prepare an EIS. Those comments must then be summarized in the final EIS. However, “Any objections to the submitted alternatives, information, and analyses section (§ 1502.17) shall be submitted within 30 days of the notice of availability of the final environmental impact statement.” Comments or objections must be as “specific as possible,” and those not received before the deadline will be considered “unexhausted and forfeited.” (We believe that “unexhausted” is a typographical error, as elsewhere in the document the same phrase uses the term “exhausted,” which seems more consistent with the intent.) Comments also appear to be limited to “…the completeness of the submitted alternatives, information, and analyses section.”

Several changes are proposed to further articulate the “specificity of comments” when commenting upon a draft EIS:
(a) To promote informed decision making, comments on an environmental impact statement or on a proposed action shall be as specific as possible, and may address either the adequacy of the statement or the merits of the alternatives discussed or both, and shall provide as much detail as necessary to meaningfully participate and fully inform the agency of the commenter’s position. Comments should explain why the issue raised is significant to the consideration of potential environmental impacts and alternatives to the proposed action, as well as economic and employment impacts, and other impacts affecting the quality of the human environment. Comments should reference the corresponding section or page number of the draft environmental impact statement, propose specific changes to those parts of the statement, where possible, and include or describe the data sources and methodologies supporting the proposed changes.

Even if the length of an EIS is substantially reduced, as proposed, the actions and subsequent analysis can be extremely complex to interpret. In some cases, therefore, a 30-day deadline seems arbitrary and capricious – particularly in light of the “specificity” required. This may present a serious challenge to the public and could severely limit their participation. These limitations, as such, could result in impacts to historic properties simply because the barrier to comment and limit upon the “completeness” would prevent adequate or meaningful input.

Judicial Review only after Record of Decision, and Bond Requirements for Stays: Under the existing rules, Judicial Review of an agency’s compliance with NEPA could not be filed before an agency filed their final EIS. The proposed rule change moves that window after an agency files their Record of Decision (ROD). While the proposed rules allow that an agency “...may structure their procedures to provide for efficient mechanisms for seeking, granting and imposing conditions on such stays,” they further allow that they “...may include the imposition of an appropriate bond requirement or other security requirement as a condition for a stay.” Waiting until an agency has issued their ROD for judicial review may allow an agency to proceed further in the NEPA process faster, however, by putting it at the conclusion of the process, there would seem to be an increased chance of poor decision-making and legal challenges. Additionally, requiring bonds for stays places a substantial burden upon concerned citizens. Together, both of these proposed changes could jeopardize historic properties.

“Nexus” Required for Mitigation— The revised language proposes to clarify the definition of “mitigation” to require that it must “... have a nexus to the effects of a proposed action.” Compensatory mitigation, at times, has been applied to resources unrelated to the proposed action – if there is consensus to do so. Harm to a historic property, for example, may not be best mitigated by focusing on the “nexus to the effects” of the proposed action. It is unclear to what extent compensatory investments in survey, documentation, GIS or in the preservation of other historic properties would still be permitted. Mitigation, to be of value to the American public, should be a mutually agreed upon and useful – not artificially limited.

While it is a worthy goal to try to make the NEPA process more efficient, we find that the majority of the proposed changes, save for an acknowledgment of tribal responsibilities, are designed with only the interests of the Federal Agencies and Project Sponsors in mind. In our view, significant delays result from conflicts over projects generated by inadequate input, a resistance to explore alternatives, late consultation, and a lack of transparency. The primary way the proposed regulations seem to address these issues is by artificially limiting comment, thought and input – not by encouraging better information faster. With this in mind, we suggest CEQ take another look at the proposed revisions, and come up with ways to foster better collaboration and quality outcomes.
Thank you for the opportunity to comment.

Respectfully,

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Chairwoman
Preservation Action

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