



March 10, 2020

Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503
Attn: Docket No. CEQ-2019-0003

Re: CEQ Proposed Rule: National Environmental Policy Act; Docket No. CEQ-2019-0003

The American Cultural Resources Association (ACRA) appreciates the opportunity to comment on the revisions the Council of Environmental Quality (CEQ) is proposing to its regulations implementing the National Environmental Policy Act ("NEPA") (40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1507, and 1508).

ACRA is the national trade association supporting and promoting the cultural resource management (CRM) industry. Our member firms undertake much of the legally mandated CRM studies and investigations in the United States. Many of our members serve as consultants to project applicants and federal agencies subject to NEPA review and advise their clients on how to achieve a responsible balance between development needs and preservation values. The proposed CEQ regulations are of interest to ACRA because part of the "human environment" that must be considered under the current regulations includes cultural resources. 40 C.F.R. §§ 1508.8 (CEQ definition of "effects") and 1508.14 (CEQ definition of "human environment").

ACRA is pleased to see that the proposed regulations strengthen tribal participation in the NEPA process. The addition of "Tribal" to the phrase "State and local" at specified points in the document is an acknowledgement of the government-to-government relationship between tribal governments and federal agencies. Such acknowledgement of that relationship is lacking in the regulations as they currently stand and engaging tribal entities early in the NEPA process is critical to ensuring that valuable environmental and cultural resources are evaluated.

Implementing significant changes to NEPA regulations will put undue financial burden on small businesses. This is directly contrary to CEQ's findings in the rulemaking analyses regarding the Regulatory Flexibility Act and Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking (Section III Part B). CRM firms employ more than 10,000 people across the country, and 97% of these firms qualify as small businesses under federal size standards. Many of these firms are involved in projects in both the public and private sectors that include NEPA compliance activities. Should they go into effect, implementation of the revised regulations will place an undue financial burden on these firms in the form of extra expenses for retraining employees, amending compliance procedures, and more. The extra costs incurred by these firms would limit growth of the industry as firms may have to delay or permanently hold on taking on new projects and hiring new employees.

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ACRA supports CEQ's aim to improve efficiency in the NEPA process and is committed to working with agencies to streamline and improve all permitting processes. However, efficiency should not preclude adequate consideration of how actions could affect environmental and cultural resources or diminish the role of the public in commenting on important projects. ACRA is concerned with several proposed changes:

1. **The draft regulations are too discretionary.** The revisions leave major decisions up to the discretion of the agency and encourage agencies to do the bare minimum level of analysis. This is particularly evident in the language used throughout the proposed regulations. For example, rather than "the agency shall", which constitutes a non-discretionary mandate, the conditional phrase "the agency may" is used throughout the document. ACRA and its members fear that agencies would deemphasize the use of the NEPA process, alternatives considered, and effects considered. Agencies could attempt to avoid NEPA compliance altogether by claiming that they are providing "minimal" funding for or have "minimal" involvement in a private development proposal. Agencies could also claim that complying with NEPA would be inconsistent with Congress's intent under another statute or that an entirely different process that satisfies other goals could serve as a substitute for environmental analysis and public review. Such decisions could be made in conjunction with the project proponent and outside of public and tribal rights to know and review. Minimizing the importance of NEPA could adversely affect cultural and environmental resources within the area affected by a proposed action, many of which are not known until the NEPA process has been engaged.
2. **The role of the project proponent is greatly expanded.** The draft regulations would eliminate the restriction on who may prepare an Environmental Impact Statement (EIS) so that project proponents would be able to write their own environmental reviews. The removal of the requirement that proponents certify that they do not have a conflict of interest would affect the public's right to know of the disclosure of conflicts of interests or financial stakes. Removing these necessary constraints could potentially result in agencies delegating too much authority to project proponents, who could subsequently downplay environmental impacts.
3. **The draft regulations lack definitions for "Significance" (or "Significantly" in the original regulations).** Section §1508.27 (Significantly) of the original regulations has been removed. That section provides necessary guidance on how to determine significance concerning both context and intensity. Significance is at the heart of NEPA and is integral to the environmental review process as it factors into determining project effects and whether an Environmental Assessment (EA) or EIS will be prepared. "Significant effects" and "significant impacts" are used throughout the draft, but without a section that concisely defines what constitutes significance, it will be left to the agencies to determine whether projects fall under those terms. Agencies will likely label far fewer actions as "Significant" and the ability of the public to review such actions will be severely diminished as a result.
4. **Shortened timeframes for preparation and limitation on the number of pages for EAs and EISs is unrealistic.** The draft regulations prioritize speed of approvals over public and tribal review and comment/consultation. However, every EA and EIS is different, containing distinct alternatives and unique issues. Further, the shortened timelines and limited

document length could pose substantial barriers to public and tribal involvement and their right to comment. Although the proposed regulations allow managers to extend the time and number of pages in the preparation of these reports, placing arbitrary limits from the outset could create further delays in project implementation if during the NEPA process the agency discovers more time is needed or the document will not meet the required page numbers.

5. **The proposed regulations no longer recognize indirect effects, cumulative effects, and connected actions.** The result is that each federal action will now be treated as if it exists in a vacuum, and only effects that are immediately and directly associated with and resulting from that action will be evaluated. The proposed regulations will result in the consideration of a minimal number of effects rather than a full range. Effects vary in extent and duration in each project, some of which may extend beyond the foreseeable future. Many actions have effects that extend beyond those that are immediately identifiable, and effects from similar actions within the same area are cumulative. An example of cumulative effects with respect to cultural resources concerns dam construction and fluctuating reservoir levels that promote shoreline erosion of resources at pool levels. Such effects are evident today on the reservoirs on the Missouri River.

ACRA is concerned that if these changes are implemented, the public will lose its right to review and comment on the potential for adverse effects from projects. Public review is central to the NEPA process. ACRA is especially concerned that the proposed regulations will not give adequate consideration to project impacts to cultural resources. These non-renewable resources are our nation's heritage, and ACRA believes that any changes to the NEPA regulations can balance development, preservation, and environmental values as Congress intended. ACRA opposes the proposed changes and urges CEQ not to adopt them.

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

Best regards,

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