March 10, 2020

Chairman Mary Neumayr
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503


Dear Chairman Neumayr,

These comments are submitted on behalf of the National Trust for Historic Preservation in the United States in response to the Council on Environmental Quality’s (CEQ’s) proposed revisions to the regulations implementing the National Environmental Policy Act (NEPA). 40 C.F.R. Part 1500-1508. As explained more fully below, the National Trust is deeply concerned about the potential impact of the regulatory changes on America’s historic resources and we respectfully urge that CEQ withdraw the proposed revisions.¹

The National Trust is a private nonprofit organization chartered by Congress in 1949 to “facilitate public participation” in the preservation of our nation’s heritage, and to further the historic preservation policy of the United States. See 54 U.S.C. § 312102(a). With more than one million members and supporters around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. The National Trust has participated as an advocate in the NEPA public comment process for hundreds of federal actions over the past 50 years, to support the preservation of historic and cultural resources, and the Trust has participated in NEPA litigation, both as amicus curiae and as a party, in scores of cases to enforce federal agency compliance with NEPA. In addition, the National Trust submitted comments to CEQ on August 20, 2018 in response to the agency’s Advance Notice of Proposed Rulemaking, Docket No. CEQ-2018-001.

The proposed regulations would arbitrarily limit the consideration of alternatives and impacts, leading to poor and uninformed decisions that could harm or destroy historic resources.

Since the fundamental purpose of NEPA is to foster informed governmental decision-making, the proposed limitations on the consideration of impacts and alternatives would

¹ In addition to the comments that follow, the National Trust also joined other organizations in a letter responding to the proposed revisions. Comments are available at https://protectnepa.org/wp-content/uploads/2020/03/Final-Draft-Comment-Letter3_9_20.pdf.
arbitrarily thwart that essential function, and would limit information about the proposed impacts on our valued historic resources, contrary to the intent of Congress.

- **Limited consideration of alternatives.**

The requirement that agencies take a “hard look” at the impacts of alternatives has long been acknowledged as the heart of NEPA. The proposal to remove language about alternatives from § 1502.14 of the regulations would fundamentally damage NEPA in a way that is contrary to the statute, with its strong emphasis on alternatives. Additionally, the proposed limitation of alternatives to those that are deemed “technically and economically feasible” may sound reasonable, but when combined with the proposal to give non-federal applicants much greater control over the preparation of NEPA review documents, the likely result is that the determination of what alternatives are “technically and economically feasible” would be largely controlled by applicants with a vested interest in the outcome. This would diminish the identification of alternatives that are less harmful to historic places. We already see this as a problem in NEPA reviews, and more stringent objectivity is needed. This shift away from a standard of reasonable alternatives to a standard of feasible alternatives from the point of view of the project proponent would have the opposite effect.

- **Indirect and cumulative impacts.**

We strongly disagree with the proposal to limit the consideration of impacts to those that have “a reasonably close causal relationship to the proposed action,” with no analysis of impacts that may be “remote in time, geographically remote, or the product of a lengthy causal chain,” regardless of how reasonably foreseeable those impacts may be. Additional development induced by a new real estate complex, or a new highway, provides a good example of how impacts may be remote in time, but are certainly reasonably foreseeable, and may have profound impacts on historic resources, including nearby historic districts. These types of impacts can be both positive and negative on older and historic communities and their significant historic resources, depending on the circumstances, and should be considered under NEPA. Federal projects may have profound traffic, noise, or dust impacts on historic districts, and those impacts may diminish the livability and viability of these historic communities. For example, there was a proposal in 1994 to build a highway project to accommodate a new Disney theme park near Manassas Battlefield. The Federal Highway Administration determined that, even though the agency’s role was simply to approve the construction or modification of interchanges, the scope of the EIS needed to include impacts on “air quality, noise, surface and groundwater resources, soils and geology, wetlands, vegetation and wildlife, farmlands, visual, community impacts, historic sites and structures and archaeological resources, parks, wildlife refuges and recreational areas, construction impacts, secondary impacts of the proposed transportation project and cumulative impacts,” as these were all reasonably foreseeable consequences of the proposed

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action, and the project was set to be constructed in an area replete with historic resources. The proposed elimination of the requirement to consider cumulative impacts would also remove the obligation to consider climate change impacts, even when those impacts can be readily predicted and quantified. The effects of climate change are already threatening communities and cultural resources around the country, and these threats are increasing. Climate change-induced impacts, such as coastal erosion, catastrophic wildfires, increased flooding, and rising sea levels, are damaging historic places nationwide. For example, historic Main Street communities, which serve as major economic engines, are facing all these threats, harming small businesses and local economies. Iconic places within the National Park system – from Mesa Verde to the Statue of Liberty – are also facing climate-induced threats. As the statute that establishes the nation’s environmental policy, review under NEPA is the appropriate place for federal agencies to consider whether their actions will unduly contribute to the causes of climate change, and whether their decisions will make adapting to the effects of climate change more difficult or costly.

Projects with limited federal involvement should not be exempt from NEPA.

We strongly disagree with the proposal to limit or avoid NEPA review altogether when the federal agency role in a non-federal project is relatively small (often referred to as “small federal handle” projects). These situations often arise when a privately proposed project requires a federal permit. One frequent example is the need for permits from the Army Corps of Engineers when a project would impact wetlands or waters of the United States. The proposed revisions assume that, when a federal permit is required for only a small part of a larger project, the impacts of the federal decision on the environment will necessarily be small as well. That is simply not the case. There is no correlation between the magnitude of the federal involvement and the magnitude of the adverse impacts of the project. As the U.S. Court of Appeals for the Fourth Circuit has warned,

“While at first blush the project here may appear to be trivial, the smallest of endeavors can have enormous consequences if undertaken improvidently. We caution the district court not to yield to the temptation of necessarily equating the size of the government’s action with its potential for injury.”

Pye v. United States, 269 F.3d 459, 469 (4th Cir. 2001). The Pye case involved a proposal by Charleston County in South Carolina, to build a road across a small wetland area to access a large parcel for potential uses that included a landfill, or a construction borrow pit. The County’s actions would have impacted an African American cemetery and the remains of the family plantation of Robert Young Hayne, who served as Senator and Governor for South Carolina and Mayor of Charleston in the 1830s. While the wetland crossing itself was minor, the adverse impacts of the County’s activities on the surrounding environmental and cultural resources would have been significant. Similarly, an Army Corps decision to permit the installation of new concrete pilings under a dock in Charleston, South Carolina, for the purpose of building a new cruise passenger terminal, would cause impacts far beyond

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4 59 Fed. Reg. No. 133 (July 13, 1994). Ultimately, as a result of public opposition, the project was not pursued. See Disney Drops Plan for History Theme Park in Virginia, N.Y. Times (Sept. 29, 1994).
simply the construction-related impacts to water quality.\textsuperscript{5} The project would ultimately increase cruise tourism in the area, exacerbating traffic and air quality issues faced by the local historic district, while concentrating economic benefits with the cruise industry rather than local businesses.

\textbf{We object to the proposal to change the definition of “significant” and to delete intensity factors.}

Whether a proposed federal action has “significant” impacts is often a key question in the context of NEPA compliance. Despite this, CEQ’s proposed revisions would remove direction and explanatory language that agencies use to determine whether impacts will be significant. These proposed changes would lead to uncertainty, delays, and ultimately litigation. Federal agencies and applicants alike are familiar with applying the decades-old factors for evaluating significance and how to use them to evaluate proposed federal actions. The proposed regulatory revisions would omit, with no explanation, the majority of the factors in the definition of “significantly.” 40 C.F.R. § 1508.27(b). These changes will bring uncertainty to the NEPA process, in direct opposition to CEQ’s stated goal in this proposed rulemaking of enabling “more efficient, effective, and timely” reviews.

In particular, we strongly oppose the proposed deletion of the factor for considering actions “that may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.” We also strongly oppose the proposed deletion of the factor to consider impacts to unique geographic areas, including “proximity to historic or cultural resources” and “park lands.” Similarly concerning is the proposed deletion of the consideration of effects that “are likely to be highly controversial,” or the consideration of whether an “action may establish a precedent for future actions with significant effects ....” Deleting these factors may lead agencies to assume that impacts to historic and cultural resources are no longer to be evaluated for significance, an outcome that would be clearly unlawful and contrary to congressional intent. 42 U.S.C. § 4331(b). These factors are useful to agencies, applicants, and the public. They should be retained.

\textbf{Placing mandatory time limits and page number limits on the preparation of NEPA documents is arbitrary, and likely to undermine the goals of NEPA and the consideration of historic resources.}

CEQ’s existing NEPA regulations provide useful guidance to agencies to limit the page numbers for most Environmental Impact Statements (EISs) to 150 pages, and to limit the page numbers for unusually complex proposals to 300 pages. Amending the regulations to make these page limits mandatory is arbitrary, unnecessary, and may interfere with the ability of agencies to adequately meet their legal obligations under NEPA in some instances, including the consideration of historic resources. Similarly, the existing regulations include guidance that is more than adequate for agencies in setting schedules for completion of NEPA review and allows flexibility in timelines when it is warranted. The proposed regulations prescribe compulsory time limits, regardless of the complexity of the project.

This approach is too inflexible and unworkable in practice and will lead to a failure to consider impacts to historic resources.

Effective public involvement in complex projects takes time, as does a meaningful analysis of impacts and alternatives for large and complex projects. One of the most important functions of NEPA is to allow sufficient time and opportunity for information to be disclosed. This disclosure process may lead project applicants and public officials to fine-tune projects to reduce or avoid impacts, or even to change their minds about the viability of a project entirely, if its negative impacts outweigh its benefits for the community. Rushing the process with arbitrary, rigid deadlines is likely to convert NEPA into a check-the-box exercise, rather than encouraging a process that provides data and public input to support better, more informed government decision-making in support of the public interest, as the law requires.

Over NEPA’s fifty years of implementation, there have been multiple examples that illustrate how NEPA can lead to better decision-making, including the reconsideration of proposed projects when the benefits did not justify the negative effects. There are also many examples where NEPA reviews ultimately resulted in a decision not to proceed with a project following extensive review and analysis. Some of these NEPA review processes took substantial time to complete, time that would not be available under the proposed rules. Long review periods generally occur when a project is highly controversial, or it has the potential for substantial negative impacts, allowing decisionmakers to fully study these complex situations and evaluate potential impacts. This time is essential to meeting the purpose of NEPA—cultivating better informed government decision-making, including the identification of potential impacts to historic resources and the consideration of alternatives. Two recent examples where NEPA review ultimately resulted in the cancellation of controversial projects with major negative impacts follow:

- **I-10 Mobile River Bridge and Bayway Widening, Alabama.**

  In October 2003, the FHWA issued a Notice of Intent to prepare an EIS for the construction of a massive new bridge in Mobile, Alabama. The project would have had adverse visual, noise, and vibration impacts on two or three downtown historic districts, as well as the National Historic Landmark City Hall. The project was hugely controversial and would have been costly to build. Tolls would have been required to finance its construction. The need for tolls was not addressed in the initial Draft EIS, so a Draft Supplemental EIS was required. Once the $6 tolls were disclosed, however, public opposition to the project became overwhelming.\(^6\) Alabama’s Republican Governor recently declared the project “dead” on August 28, 2019, even though the FHWA had approved the project.\(^7\)

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\(^6\) In addition, there were significant environmental justice concerns about the impacts of the project on nearby Africatown, which is a historic community founded by West Africans that were part of one of the last known illegal shipments of enslaved people to the United States in 1860. See [https://www.al.com/news/2019/05/should-tolls-support-africatown-environmental-justice-looms-large-in-i-10-bridge-talks.html](https://www.al.com/news/2019/05/should-tolls-support-africatown-environmental-justice-looms-large-in-i-10-bridge-talks.html).

This is an example of NEPA serving exactly the function that Congress intended—to disclose information that enables public officials to make better decisions by weighing public costs and benefits. Although the process took nearly 16 years from the initial Notice of Intent to the final decision, the objective disclosure of information about impacts led to a more informed decision with input from the public. That public input should not be suppressed. The rigid time limits in the proposed regulations would significantly hinder the ability of state and local governments to make informed decisions that can avoid harms to historic resources.

- **State route 710: Pasadena, South Pasadena, and Los Angeles, CA.**

The second example is one that played out over several decades, with the direct involvement of CEQ. The SR 710 freeway extension project in Southern California would have bulldozed almost 1,000 homes and 6,000 trees, cutting through or alongside six historic districts, in order to connect two points on a map of the LA freeway grid. The estimated cost to complete the project back in the 1990s was $1.6 billion, and studies showed that traffic in the corridor would move less than one mile an hour faster than if the project was not built.

The first Draft EIS for the project was issued in March 1975, followed by a Supplemental DEIS in September 1976, and a Final EIS in June 1977. This rapid completion of the environmental review then ground to a halt, because the hastily prepared documents were rejected as inadequate by the FHWA two months later. The NEPA review restarted in September 1982, with the preparation of two more Supplemental DEISs, and the Final EIS was released in 1992 (17 years after the first Draft EIS). Throughout all of these reviews, a Low Build Alternative that would have significantly fewer negative impacts on the environmental and cultural resources, as well as local communities, was not adequately considered.

Concerns about the project resulted in the unusual step of the ACHP requesting a pre-decisional referral to CEQ pursuant to 40 C.F.R. Part 1504. The CEQ comments, issued in 1993, recommended additional development and analysis of a Low-Build alternative. The Department of the Interior and the Environmental Protection Agency had also issued comments opposing the project. Despite the guidance from CEQ, and opposition from other federal agencies, the FHWA again finalized its decision to move forward with the project and issued a Record of Decision in 1998. The ROD was then enjoined by a federal district court the following year, in part because of FHWA’s failure to adequately consider the Low Build alternative. After extensive litigation and further environmental review, the Low Build alternative was eventually adopted by the FHWA in 2019. While it took many years of review, NEPA ultimately fulfilled its purpose in this case. The disclosure of the true costs and impacts led the public and the government agencies to decide to significantly revise the project, rather than pursue it as originally proposed. However, to reach this outcome, the review took time and careful analysis that was not constrained by arbitrary deadlines.

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We strongly oppose the proposed new barriers to public participation and enforcement of NEPA compliance.

Because of the National Trust’s congressional charter to “facilitate public participation” in historic preservation, 54 U.S.C. § 312102(a), we have especially strong objections to the proposed regulatory revisions that would hinder and weaken public involvement and the role of the public voice in the NEPA process. These changes will diminish the capacity of the public to participate in the identification of potential impacts on historic places in their communities.

The National Trust strongly opposes adding language that would allow federal agencies to dismiss public comments for lack of specificity and technical expertise. Community preservation organizations that promote the protection of cultural resources are often volunteer operated and may not be trained in the technical language of NEPA, yet their concerns are often exactly the environmental impacts that the drafters of NEPA envisioned for consideration. Currently, agencies consider general comments that raise concerns about a project, whether or not those comments are phrased in technical language or specifically reference scientific data and methodological flaws. This practice should continue, and concerns raised by local citizens without specialized expertise should not be disregarded.

We further oppose the changes that would require the public to submit comments at multiple steps in the NEPA process, at the risk of being precluded from filing a lawsuit alleging noncompliance with NEPA. The proposed language that contemplates requiring a monetary bond to be posted as a condition of judicial review should also be rejected. Lawsuits brought by citizens and public interest groups are the primary mechanism for NEPA enforcement. The proposed restrictions would frustrate enforcement actions, making them more complex to initiate, more expensive, and less likely to succeed. These changes would likely become a substantial barrier to citizen and community groups advocating for the recognition and consideration of the valued historic resources in their communities.

We are especially concerned about, and object to, the proposed language of 40 C.F.R. § 1500.3(d), which would declare that the regulations “do not create a cause of action or right of action for violation of NEPA,” and that the regulations “create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm.” This runs fundamentally contrary to the existing case law interpreting NEPA, as well as the Administrative Procedure Act (APA), and seems intended to insulate agencies and applicants from any accountability for compliance. As the federal courts have noted, “the risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation. The difficulty of stopping a bureaucratic steam roller, once started, still seems to us . . . a perfectly proper factor for a district court to take into account in assessing that risk, on a motion for a preliminary injunction.” *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989). The proposed regulations would negate the ability

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*See United States v. Florida East Coast RR. Co.,* 410 U.S. 224, 252 n.6 (1973) (a single agency’s attempt to interpret the APA does not warrant judicial deference).
of the courts to prevent that “real environmental harm.”

The proposed regulations are likely to cause confusion, delay, and more litigation, which will undermine the stated goal of streamlining NEPA compliance.

Overall, the proposed changes represent a very significant revision of the existing NEPA regulations, which are well understood and supported in their implementation by long-standing agency-specific regulations and decades of case law precedent. If adopted, these changes would not only diminish the consideration of impacts to historic resources, but would also create confusion and uncertainty for government agencies and business interests alike. The proposed revisions would trigger litigation challenging the new regulations themselves and would likely lead to project-specific litigation as well. Reviews for individual projects would inevitably be delayed by uncertainty, as agency staff and consultants alike struggle to guess how to implement new procedures. Simultaneously, already understaffed federal agencies would be forced to devote time to rewriting their own agency’s implementing regulations, further slowing down project reviews. The overall result of adopting the proposed revisions would be to reduce efficiency and predictability in decision-making, in direct opposition to the stated purpose of the proposal.

Improving NEPA implementation and outcomes is a goal that many, including the National Trust, support. However, the proposed revisions do not address the major driver of delayed infrastructure projects, which studies have shown is not inefficient regulation, but inadequate capital funding for the projects. Agencies that are understaffed, inadequately trained, or lack necessary expertise will struggle to adequately conduct NEPA reviews under any regulatory scheme. The proposed rule would undermine existing NEPA effectiveness and practice, thus increasing business risk and threatening economic uncertainty, as well as reducing protections for environmental and cultural resources. In our view, the best way to improve NEPA implementation is to ensure that all agencies have the staff, experience, information technology, resource databases, and training to complete NEPA reviews efficiently, while still satisfying the law’s mandate to disclose and consider impacts on environmental, historic, and cultural resources in federal decision-making.

CEQ’s tribal consultation on this rulemaking is inadequate.

We support the proposal to add a reference to “Tribal” governments where “State and local” governments are referenced throughout the regulations. This is a positive change that will better integrate tribal governments into the decision-making process under NEPA. However, many other provisions of the regulations are potentially harmful to the interests of Tribes who are focused on preventing harm to cultural and environmental resources. In developing these proposed regulations, CEQ has failed to engage in adequate tribal

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consultation that could address tribal perspectives and concerns. Federal law requires agencies to engage in government-to-government consultation with tribes when considering regulatory changes that would affect tribal nations. Given the magnitude of the proposed changes, and the importance of NEPA in protecting tribal cultural resources, this rulemaking clearly requires formal tribal consultation

The public comment process for the proposed regulations has been inadequate.

The limitation of the public comment period to 60 days, and the convening of only two public hearing days, has been grossly inadequate in light of the complexity and radical changes proposed to these regulations that have been in place for more than 40 years. Indeed, these dramatic proposals represent a “major federal action” that requires the preparation of an EIS. 40 C.F.R. § 1508.18(a), (b)(1).

Conclusion.

While the National Trust understands that some minor changes to the NEPA regulations could potentially be useful in improving the review process, the proposed changes will not satisfy that goal. We urge CEQ to withdraw the rulemaking, and instead focus on the real issues that can slow down NEPA reviews, including lack of adequate staff to comply with its requirements. Our members and supporters, and communities across the country, deserve a strong NEPA that fully considers cultural and environmental resource impacts, including the impacts on America’s valued historic places. The National Trust respectfully requests that this proposed rulemaking be withdrawn.

Sincerely,

Sharee Williamson
Associate General Counsel

Elizabeth S. Merritt
Deputy General Counsel

Cc: Paul W. Edmondson, President and CEO, National Trust
    Thompson M. Mayes, Chief Legal Officer and General Counsel, National Trust