



September 29, 2023

The Honorable Brenda Mallory  
Chair  
Council on Environmental Quality  
730 Jackson Place, NW  
Washington, DC 20503

**Re: National Environmental Policy Act Implementing Regulations Revisions  
Phase 2 (Docket No. CEQ-2023-0003)**

Dear Chair Mallory:

The American Cultural Resources Association (ACRA), the trade association for private firms that specialize in cultural resources management (CRM), appreciates this opportunity to comment on Phase 2 of the proposed revisions to the regulations implementing the National Environmental Policy Act (NEPA).

ACRA member firms undertake much of the legally mandated cultural resource management (CRM) studies and investigations in the United States and employ thousands of CRM professionals, including archaeologists, architectural historians, ethnographers, historians, and an increasingly diverse group of other specialists. To help guide smart, sustainable economic development and safeguard important historic and cultural heritage assets, ACRA members apply specialized research skills within a framework of federal, state, local, and/or Tribal law and facilitate an open dialog where every stakeholder has a voice.

NEPA is the nation's cornerstone law ensuring that federal agencies consider the impacts on the environment of any major action. The NEPA review process often works in tandem with the National Historic Preservation Act (NHPA) Section 106 process for considering the impacts of federally backed projects on cultural resources.

ACRA supports efforts to make the NEPA process work effectively. However, revisions made to NEPA in 2020 – in particular, arbitrary deadlines and limitations placed on the review process and leaving important considerations at the discretion of agencies without public input – were likely to invite more litigation, delay projects, prevent the public from engaging in the process, and threaten historic and cultural sites without recourse to considering how federal actions impact them. For these reasons, we strongly support the Council on Environmental Quality's (CEQ) efforts to reconsider the 2020 revisions.

ACRA's comments on specific provisions in the proposed revisions are found below.

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### **Purpose (§ 1500.1) and Policy (§ 1500.2)**

ACRA agrees with CEQ's proposal to restoring language in §1500.1, "Purpose," to the original intent and reinstate § 1500.2, "Policy." As CEQ notes, these proposals restore the historic intent of NEPA to "preserve historic, cultural, and natural resources," among other important policy goals.

ACRA recommends that CEQ more clearly define "all practicable means" in §1500.2(f), in that the phrase is subjective with interpretation that might vary widely from agency to agency.

### **Determine the Appropriate Level of NEPA Review (§ 1501.3)**

ACRA support's CEQ's proposal to revise § 1501.3 "to provide a more robust and consolidated description of the process agencies should use to determine the appropriate level of NEPA review, including addressing the threshold question of whether NEPA applies."

In particular, ACRA appreciates CEQ's proposal in paragraph (d)(1) to "restore the consideration of the context of the proposed action as a standalone consideration," which helps ensure that agencies consider "characteristics of the relevant geographic area such as proximity to unique or sensitive resources or vulnerable communities."

In addition, ACRA supports CEQ's proposal, in paragraph (d)(2)(iii), to add as a factor to consider "the degree to which the proposed action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, Tribal sacred sites, parkland, and various types of ecologically sensitive areas;" and CEQ's proposal to add to paragraph (d)(2)(vii) a factor "relating to actions that would affect historic resources listed or eligible for listing in the National Register of Historic Places." These actions restore the NEPA regulations to align with the legislative intent and historic application of the law.

However, ACRA is concerned that the proposal to assign determination of the level of NEPA review to the federal agency implies that the agency makes such a decision prior to any public input. For instance, an agency may decide that an action is not subject to NEPA.

Further, Sections §1501.3(a), (b), (c) and (d) are drafted in a way that may lead to situations where a federal agency could make a decision without public input, and there does not appear to be a method by which the public can be notified and offer their comments. ACRA recommends that CEQ revisit these sections to ensure that the public input and engagement processes are included before an agency makes a determination.

### **Categorical Exclusions (§1501.4)**

ACRA is concerned that, without full public disclosure, agencies will be tempted to use categorical exclusions (CE) as a way around preparing an environmental assessment (EA) or environmental impact statement (EIS). Full disclosure to the public about what an agency determines is a CE besides "extraordinary circumstances" is necessary to ensure transparency and accountability.

Section 1501.4(c) identifies specific instances in which an agency may identify CEs. Aside from this section and §1501.7(3)(c)(8), it is unclear how agencies are to notify the public and offer an opportunity to comment. ACRA recommends that CEQ develop a process, such as requiring agencies to publish a notification in the *Federal Register* with a link to the agency website (as specified under §1501.4(c)(6)).

#### **Environmental Assessments (§1501.5)**

ACRA recommends that CEQ provide examples under §1501.5(e) and (f) about how agencies can invite participation, similar to the examples provided under §1501.9(d)(iii).

#### **Public and Governmental Engagement (§1501.9)**

This section seems to emphasize EISs. ACRA recommends that CEQ revisit the section to discuss how engagement for EAs and EISs will differ; or, if not, clarify that they will not. EAs are intended to be used to determine if an action has significant or adverse effects that would warrant the preparation of an EIS; public input is a major avenue for determining effects and therefore needs to be considered in preparing an EA.

#### **Methodology and Scientific Accuracy (§ 1502.23)**

ACRA supports CEQ's proposed changes to § 1502.23 to reinstate the term "high-quality information," as used in the 1978 regulations, and clarify that "such information includes the best available science and reliable data, models, and resources." As CEQ notes, the 2020 NEPA revisions threatened to limit agencies to "existing" resources while precluding them from undertaking other forms of investigation and data collection that ensure decisions are made using the best and most up-to-date information available.

#### **Commenting on Environmental Impact Statements (§1503)**

The proposed rules are unclear how agencies should solicit comments from the public, and how the public will be notified about the availability of a draft EIS. ACRA recommends that CEQ address these questions.

#### **Innovative Approaches to NEPA Reviews (§ 1506.12)**

Although the intent of this section is laudable, namely enabling Federal agencies to pursue innovative approaches to comply with NEPA and the regulations to address extreme environmental challenges, ACRA is concerned that the provision could allow agencies to bypass public engagement opportunities, even in circumstances when public stakeholders are directly affected by the approach. Robust public engagement and outreach must be a component of the government's approach to NEPA compliance.

**Agency NEPA Procedures (§1507.3)**

CEQ has proposed, under §1507.3(2), that the public be offered an opportunity to review agency NEPA procedures; however the provisions do not specify that the public will be able to comment, nor does it specify how agencies are to notify the public about the opportunity to review. ACRA recommends that CEQ clarify these issues.

We look forward to working with you to ensure that the NEPA implementing regulations reflect the need to build a 21<sup>st</sup> Century infrastructure while protecting our nation's environmental and cultural heritage.

Sincerely,

A handwritten signature in black ink, appearing to read "Amanda Stratton". The signature is fluid and cursive, with the first name being more prominent.

Amanda Stratton  
Executive Director