February 14, 2020

Council on Environmental Quality
730 Jackson Place NW
Washington, D.C. 20503
Attention: Edward A. Boling,
Associate Director for the National Environmental Policy Act

Re: Tribal Consultation and Extension of Comment Deadline for Docket Number CEQ-2019-003

Dear Associate Director Boling:

Thank you for the opportunity to submit comments on the Proposed Rule to change the implementing regulations of the National Environmental Policy Act (NEPA). The National Association of Tribal Historic Preservation Officers (NATHPO) is a nonprofit organization whose members are the Tribal government officials (THPOs) implementing the National Historic Preservation Act (NHPA) as delegates of the Secretary of the Interior on tribal land. NATHPO serves THPOs by providing training, coordination, advocacy, and elevation of their collective voices. As the entity representing a key constituency who will be substantially impacted by the changes proposed, we have several objections and concerns.

Two key procedural problems are the short timeline and lack of tribal consultation. Executive Order 13175 (E.O. 13175) requires that tribal consultation occur when an agency is considering regulatory changes that would affect tribal nations. The proposed NEPA regulations meet that threshold requirement. CEQ should conduct formal good-faith consultation on potential effects of the proposed regulations on tribal nations and address how these regulations will be implemented. Tribal nations should be given the opportunity to provide input, on a government-to-government basis, to assist CEQ with this rulemaking.

Two public hearings, February 11, 2020 in Denver, CO and February 25, 2020 in Washington, D.C., and one “tribal focused meeting” February 26, 2020 in Washington, D.C., do not constitute government-to-government consultation. Tribal consultations should occur in various regions throughout Indian Country, such that tribal concerns are broadly reflected and truly considered in good faith by CEQ in this rulemaking process. To that end, we request a 60-day extension of the current March 10 comment deadline. This additional time will ensure that tribal nations have time to consider and respond to the proposed rule.

As you know, the regulations governing NEPA are critical to protecting and preserving our shared resources, while also balancing the need for development. Tribal nations, as regular participants in the
NEPA process, are quite familiar with the current regulatory framework and guidelines. We do want to recognize a singular improvement in the proposed changes (noting that it is the only positive one) – namely, eliminating the provisions in the current regulations that limit tribal interests to reservations. Currently under NEPA, tribes have the same stature as states and local governments, and consultation off tribal land is not required. Any effort to acknowledge and improve the role of tribes in the NEPA process is a positive step. Removing this geographical restriction recognizes that tribal interests and ancestral territory are naturally encompassed by federal and private lands.

Under the National Historic Preservation Act (NHPA), tribes have special expertise on sites of religious and cultural significance to them and are required to be consulted regardless of where these places are located. Because NEPA includes “important historic, cultural, and natural aspects of our national heritage” within its legal mandate, the NEPA and NHPA Section 106 processes traditionally align, although they have independent requirements. CEQ and the Advisory Council on Historic Preservation (ACHP) have produced guidance on integrating NEPA and Section 106 and encourage agencies and project applicants to do so at the earliest possible stage. The proposed changes can only introduce confusion and delay into this integration.

There are numerous substantive problems with the proposed changes that directly oppose Congressional intent behind the original passage of NEPA, and would result in additional delays, expense, litigation, and project cancellations, achieving the exact opposite of the stated intent of streamlining the process. They include:

- Agencies can avoid analyzing the impacts of any action they determine not to be “major.” The definition of “major” is at agencies’ discretion, enabling them to exclude projects that are federally licensed but privately funded, such as the Dakota Access Pipeline.
- Agencies will no longer have to analyze indirect or secondary effects – that is, those impacts that are likely to occur after an action has been taken or at a distance from its site (e.g. erosion or pollution downstream from a dam after its construction).
- Agencies will no longer have to consider cumulative effects – that is, the impacts of a proposed action when added to (or subtracted from) the impacts of past actions and foreseeable future ones.
- Alternatives to a proposed action, and measures to mitigate an action’s adverse effects, will have to be “practicable” as determined by the relevant agency – with the possibility of input from project sponsors.
- Agencies may use Categorical Exclusions (CEs) even when “extraordinary circumstances” could still lead to significant effects, as long as mitigating factors are sufficient to avoid those significant effects. This internal evaluation lacks the transparency provided by Environmental Assessments and Impact Statements and creates opportunities for personal agendas to drive agency decisions.
- The proposed limits of one year and 75 pages for Environmental Assessments (EAs) and two years and 150 pages (300 pages for projects of “unusual scope or complexity”) for Environmental Impact Statements (EISs) are arbitrary and meaningless in the context of scientific analysis.
- Judicial review may only be filed after an agency’s Record of Decision, rather than completion of the Final EIS, and they may impose “an appropriate bond requirement or other security requirement as a condition for a stay.” This further decreases transparency, increases the chances of litigation, and places an undue burden upon concerned citizens.
• Any mitigation measures must have a “nexus to the effects of a proposed action.” Compensatory mitigation to similar or unrelated environmental and historic resources is a valuable option that would be eliminated.

• Only parties that participate in the public comment period of an EIS may participate in pertinent litigation (which is exacerbated by the shortened and arbitrary timelines). One of the main reasons NEPA was enacted was to give as many voices as possible a chance to be heard in the planning of publicly funded and permitted projects. Limiting access to legal remedies runs counter to one of the fundamental tenets of transparent government.

The proposed changes to the NEPA regulations are sweeping and substantial. Fifty years of existing case law and volumes of policies and procedures at the federal, state, and local level underpin the current regulations. The proposed regulations will surely be subjected to legal challenges, making their future uncertain. If enacted, the impacts will likely throw the entire environmental review process and industry into chaos – inviting even more legal challenge.

At this time, NATHPO, its members, stakeholders, and partners, request two things: an extension of the public comment period, and acknowledgement that tribal consultation is required under federal policy and will be initiated by CEQ before this rulemaking proceeds further. A public comment period and three group hearings do not constitute government-to-government consultation and will not be considered as such by the 574 sovereign Indian Nations to whom the federal government holds trust responsibilities. True consultation will provide an opportunity for Tribes to elucidate the catastrophic impacts of these proposed changes, before (yet again) litigation becomes the only way forward.

Sincerely,

Valerie J. Grussing, PhD
Executive Director