PUBLIC COMMENT 1

Re: Rescission of Procedures for Implementing the National Environmental Policy Act; Interim Final Rule (RIN 3010-AA08), 91 Fed. Reg. 34,159 (June 5, 2026)

Date submitted: June 5, 2026

I. Introduction and Interest of Commenter

I have an interest in the integrity of the NEPA process across federal agencies, including the Advisory Council on Historic Preservation (ACHP).

These comments do not contest the ACHP's authority to maintain or decline agency-specific NEPA procedures. They address *how* the agency has rescinded Part 805 — specifically, the procedural shortcuts invoked and three internal inconsistencies in the rule's stated rationale that warrant correction or fuller explanation in any final rule.

I attempted to send these comments to the Federal eRulemaking Portal (https://www.regulations.gov) but received this message: "***This document belongs to a Non-Participating Agency which does not accept comments on Regulations.gov. Refer to "Dates" and "Addresses" sections for comment instructions."*** I emailed them instead to kfanizzo@achp.gov.

II. Summary of Position

In brief, the commenter respectfully submits that:

- The agency's "good cause" basis for dispensing with notice-and-comment and for immediate effectiveness is not supported by the record the agency itself describes (Part III);
- The rule's reliance on *Seven County* over-reads the decision, conflating deference to the scope of effects analysis with the threshold question of NEPA's applicability (Part IV); and
- Curing "outdated and obsolete" references by deletion — rather than revision — leaves the ACHP with no NEPA procedures at all, a result in tension with CEQ's February 19, 2025 implementation memorandum and with the replacement procedures adopted by sister agencies (Part V).

The commenter does not ask the ACHP to retain Part 805 as written. The requested relief (Part VII) is narrower: that the final rule *either* rest the rescission squarely on the procedural-rule exemption alone and drop the unsupported good-cause findings, *or* supply the record those findings require; correct the *Seven County* characterization; and commit to a defined interim path for any qualifying action arising before replacement procedures exist.

III. The Good-Cause and Immediate-Effectiveness Findings Are Not Supported by the Agency's Own Description of the Record

A. The applicable standard

The APA permits an agency to forgo notice-and-comment only when it finds "for good cause" that those procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). A parallel finding is required to make a rule effective in less than 30 days. 5 U.S.C. § 553(d)(3). The good-cause exception is *narrowly construed and reluctantly countenanced*; it is not an "escape clause" for ordinary rulemaking.

B. The rule invokes "confusion" as the operative harm — but the agency simultaneously concedes dormancy

The rule asserts good cause because, once CEQ rescinded its regulations, the ACHP's supplementing regulations "ceased to properly function, which has resulted in confusion as to how the agency should meet its responsibilities under NEPA." Yet the same preamble states the ACHP "rarely" proposes major federal actions requiring NEPA review and that its *last* NEPA document was an Environmental Assessment in the late 1990s (FONSI at 64 FR 27044, May 18, 1999).

These two propositions sit uneasily together. "Confusion" as to how to comply is a live harm only where compliance is presently at issue. The agency identifies *no* pending or reasonably foreseeable major federal action to which the rescinded references would apply.

C. The findings argue "unnecessary," not "impracticable" or "contrary to the public interest"

Of the three statutory good-cause grounds, the rule's reasoning maps only to "unnecessary." It offers nothing to show that a brief comment period would have been *impracticable* or *contrary to the public interest*. "Unnecessary" in § 553(b)(B) is generally read narrowly to mean a technical or non-substantive change in which the public has no real interest — and then note the tension with Part IV-below, where OIRA found the rule "significant" under E.O. 12866 § 3(f). A rule the Executive deems "significant" is awkwardly paired with a finding that public comment was "unnecessary."

D. Recommended fix: stand on the procedural-rule exemption, not good cause

The cleaner and stronger ground is already in the rule: Part 805 is a "rule of agency organization, procedure, or practice" exempt under 5 U.S.C. § 553(b)(A), and *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015), confirms that an agency that used notice-and-comment to adopt such a rule is not bound to use it to repeal the rule. If that ground holds, the good-cause analysis is surplusage — and pleading both in the alternative invites the inference that the agency is not confident either ground stands alone. The final rule should either (i) rest solely on § 553(b)(A) and delete the good-cause findings, or (ii) supply the record the good-cause findings require. As written, the belt-and-suspenders approach weakens rather than fortifies the rescission.

IV. The Rule Over-Reads Seven County

The preamble cites *Seven County Infrastructure Coalition v. Eagle County*, 145 S. Ct. 1497 (2025), for the propositions that the ACHP enjoys "broad discretion" in NEPA reviews and is owed "substantial deference," and then reasons that recent changes "make it less likely that a future ACHP action would fall within the statute's scope." That inference does not follow from the holding.

Seven County addressed how far an agency must trace *effects* within a NEPA review — and the deference owed to that line-drawing — not the antecedent question whether a proposed action is a "major Federal action" that triggers NEPA in the first place. Deference to the *scope of analysis* does not shrink the universe of actions *subject to* NEPA. The two are different doctrinal questions, and conflating them supplies no support for the conclusion that fewer ACHP actions will fall within NEPA's scope.

Recommend the final rule either drop the "less likely … within the statute's scope" inference or recast it accurately — e.g., as a statement that the ACHP rarely proposes qualifying actions, which is the agency's actual point.

V. Curing Obsolete References by Deletion Leaves a Procedural Vacuum Inconsistent with the Broader Implementation Effort

The diagnosed defect is narrow: cross-references in Part 805 to the rescinded CEQ regulations are now "outdated and obsolete." The chosen remedy is broad: remove and reserve Part 805 entirely, leaving the ACHP with *no* agency-specific NEPA procedures — while the agency concedes it "may" need to write new ones later.

This is the opposite of what the rest of the federal government is doing. CEQ's February 19, 2025 guidance memorandum directed agencies to *revise* their NEPA procedures rather than operate without any. The ACHP's rarity rationale may make a temporary gap defensible *for this agency*, but the rule does not engage that tension or explain what governs a qualifying action that arises before replacement procedures exist.

The final rule should (i) acknowledge CEQ's direction to revise rather than abandon, and (ii) commit to a defined interim path — e.g., compliance directly under the NEPA statute and any operative CEQ/agency guidance — for the rare qualifying action, so that the rescission does not create an unaddressed procedural gap.

VI. Secondary Observations

— **Significance characterization.** The rule is framed as routine housekeeping yet was found "significant" under E.O. 12866 § 3(f) (though not economically significant under § 3(f)(1), and not "major" under the CRA, 5 U.S.C. § 804(2)). These standards differ and are not strictly contradictory, but the composite — procedural trivia / "significant" / not

major — invites the question why a "significant" rule warranted no pre-promulgation comment.

— **Timing of participation.** Part 805 is removed effective June 5, 2026, before any comment is read; comments can be addressed only in a later final rule, and because the rescission is binary, the window cannot realistically "change" the rule short of reversing it. The "with changes, if warranted" framing arguably overstates what the post-promulgation comment process can accomplish.

— **Authority citation.** The removal is taken "under the authority of … 42 U.S.C. 4332" — NEPA's EIS-mandating section invoked as authority to eliminate the agency's NEPA procedures.

VII. Requested Action

For the foregoing reasons, the commenter respectfully requests that, in any final rule, the ACHP:

— Rest the rescission on the § 553(b)(A) procedural-rule exemption and *delete* the good-cause findings under §§ 553(b)(B) and (d)(3) — or, alternatively, supply the record those findings require;

— Correct or withdraw the inference drawn from *Seven County* regarding NEPA's scope; and

— Acknowledge CEQ's direction to revise rather than abandon NEPA procedures and commit to a defined interim compliance path for any qualifying action arising before replacement procedures are adopted.

Respectfully submitted,

David L. Keys
Owner, Calthos
Personally Identifiable Information
[redacted]
[redacted]

PUBLIC COMMENT 2

July 6, 2026
Submitted Electronically via https://www.regulations.gov

General Counsel Advisory Council on Historic Preservation
ATTN Kelly Fanizzo
401 F Street NW, Suite 308
Washington, DC 20001

RE: Substantive Economic and Environmental Objections to the Interim Final Rule Rescission of NEPA Implementing Procedures – 36 CFR Part 805; RIN 3010-AA08 (91 FR 34159)

To Whom It May Concern:

As a small business owner operating in Northern Wisconsin, I am writing to voice my sharp opposition to the Advisory Council on Historic Preservation's (ACHP) interim final rule rescinding its National Environmental Policy Act (NEPA) implementing regulations at 36 CFR Part 805.
My business, like many in the Northwoods and other gateway communities near our National Forests and National Parks, relies on the predictable management of our public lands, natural resources, and cultural heritage sites. The ACHP's decision to summarily eliminate its codified NEPA framework without advance public notice or an empirical assessment of the consequences is arbitrary, short-sighted, and economically destabilizing. Do better.

I. Opaque "Internal Procedures" Harm Small Business Predictability

The ACHP asserts that notice-and-comment rulemaking is unnecessary because these regulations are merely rules of agency practice that do not impose substantive obligations on the public. This claim ignores the operational reality of running a business in a rural, resource-dependent region.
Our local economy is built on a delicate matrix of heritage tourism, outdoor recreation, and forest products. We rely on clear, transparent federal rules to understand how infrastructure projects, land-use agreements, and historic preservation directives will unfold.

By removing Part 805 and stating that the agency may rely on undefined "internal NEPA procedures" in the future, you are replacing a clear public framework with regulatory guesswork. Capital investment and business planning require stability. Operating under unwritten, discretionary agency protocols increases risk and creates long-term economic friction.

II. The "Low Frequency" Justification Defies Scientific Risk Management

The notice argues that because the ACHP rarely proposes major federal actions—citing a gap since the late 1990s—it does not need established, agency-specific procedures. This is a fundamentally flawed approach to risk management.
In the physical sciences and corporate risk modeling, risk is calculated by multiplying the probability of an event by the magnitude of its potential impact (Risk = Probability \times Magnitude). Even if the probability of an ACHP-led major federal action is statistically low, the

magnitude of potential damage to irreplaceable historic, cultural, and environmental assets remains permanent.

A single poorly evaluated federal undertaking can disrupt a local watershed, impact sensitive public forest lands, or degrade historical sites that draw thousands of tourism dollars to our communities. The low frequency of an action is a scientifically invalid reason to completely dismantle the formal tools used to measure its environmental and physical fallout.

III. Destructive Separation of Cultural Resources from Ecological Baselines

The ACHP claims this rescission carries no external environmental or tribal impacts. This assertion relies on an unscientific, artificial separation of historic preservation from ecological reality.
In Northern Wisconsin, our historic sites, archaeological areas, and sacred tribal cultural landscapes are physically embedded within our forests and waterways. Any federal action that alters these spaces directly affects local geomorphology and hydrology and thus our local economies. For example:

- **Soil and Runoff Dynamics:** Physical changes or construction at historic sites alter surface-water runoff patterns, potentially accelerating soil erosion and affecting water quality in nearby trout streams and glacial lakes.
- **Cumulative Climate Stressors:** Our regional infrastructure is already under stress from shifting weather patterns, including shortened winter logging seasons and intense rainfall events.

Codified NEPA procedures under Part 805 require the agency to use rigorous, transparent baseline metrics to account for these compounding, cumulative ecological impacts. This process sets predictability that is the foundation of sound business investments. The ACHP has provided no empirical data or scientific rationale to prove that vague, unwritten internal protocols can properly evaluate these interconnected environmental risks.

IV. Infringement on Tribal and Public Collaboration

By utilizing the APA's "good cause" exception to bypass advance public and tribal input, the ACHP has shut out the very regional experts and stakeholders who understand these landscapes best. In our region, the history and health of the land are deeply bound to the sovereignty of neighboring Indian Tribes.

Dismissing tribal implications by claiming the rule only affects internal procedures ignores the federal government's trust responsibility. Tribes and local communities depend on codified regulations to hold federal agencies accountable during environmental reviews.

V. Necessary Solutions

To prevent regulatory confusion and protect the economic and environmental baselines of rural communities, the ACHP must:

1. **Withdraw the Interim Final Rule Immediately:** Halt the rescission of 36 CFR Part 805.
2. **Initiate Standard, Transparent Rulemaking:** Propose targeted *amendments* to modernize Part 805 through the standard public notice-and-comment process rather than erasing it entirely.
3. **Formalize Binding Commitments for Future Guidelines:** If internal procedures are developed, the ACHP must legally commit to publishing those drafts in the Federal Register for a 60-day public review period before adoption.

As a small business owner, I expect federal agencies to maintain rigorous, clear, and science-based processes. Deleting your environmental regulations does not eliminate your environmental obligations. I urge the Council to withdraw this rescission and maintain a codified, accountable NEPA framework in the CFR.

Sincerely,

James Rasmussen

PUBLIC COMMENT 3

USET
SOVEREIGNTY PROTECTION FUND

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Transmitted Electronically

July 2, 2026

Travis Voyles
Vice Chairman
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Re: USET SPF Comments to ACHP on its Interim Final Rule to Rescind Procedures for Implementing NEPA, Docket ID No. HPAC-2026-0101-0001

Dear Vice Chairman Voyles,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Advisory Council on Historic Preservation's (ACHP) Interim Final Rule (IFR) to rescind procedures for implementing the National Environmental Policy Act (NEPA). The IFR revises ACHP's NEPA implementing regulations at 36 CFR Part 805 in response to publication of the Council on Environmental Quality's (CEQ) February 25, 2025 Interim Final Rule (IFR), which rescinded certain procedures and guidance for federal agencies to implement NEPA. CEQ's IFR was issued in response to the issuance of Executive Order (EO) 14154, "Unleashing American Energy," and recent court decisions impacting federal agency implementation of NEPA. USET SPF is extremely concerned with ACHP's decision to move forward in revising or rescinding its NEPA regulations without initiating formal government-to-government consultation with Tribal Nations. By adopting this IFR without engaging in Tribal consultation, the ACHP is failing to assess the potential harmful effects this action could have on Tribal homelands, sacred sites, cultural and natural resources, and the public well-being of our citizens in violation of federal trust and treaty obligations.

USET SPF is a non-profit, inter-Tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Turtle Island.[1] USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Tribe (VA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Background

CEQ's February 2025 IFR—and subsequent Final Rule adopted in January 2026—concluded that the rescission of its NEPA implementing regulations did not carry implications for Tribal Nations or our communities, and that Tribal consultation was therefore not required in the rulemaking process. This conclusion is inaccurate and based on faulty reasoning. NEPA serves as a pivotal legal framework that ensures federal decision-making processes consider the rights and interests of Tribal Nations. Further, consultation with Tribal Nations through the NEPA review process is a critical method by which the federal government meets its trust and treaty obligations. In the absence of Tribal consultation, the rescission of binding NEPA regulations and their replacement with voluntary guidance is an abrogation of this responsibility. Historically, failures to effectively engage with Tribal Nations have caused irreversible damage and harm to Tribal resources, cultural practices, and public health. Despite the total rescission of NEPA implementing regulations by CEQ's 2026 Final Rule, there has been no Tribal consultation on this action or on the ACHP's IFR.

With over 80 federal agencies mandated to comply with NEPA, any proposed revisions will inevitably impact Tribal Nations. This will impact the deployment of critical infrastructure like broadband, roads, the energy grid, water and wastewater systems; fee-to-trust applications; cultural resources; and Tribal trust and treaty rights. Moreover, any NEPA proposed revisions will also impact the deployment of infrastructure on our traditional homelands outside of our current jurisdictional boundaries. The NEPA process plays a significant role for Tribal Nations and our communities, not just in the protection of our health and environment, but also of our irreplaceable traditional lifeways, sacred sites, and historic places. Natural resources are cultural resources, and their protection ensures cultural continuity and community well-being across generations.

The ACHP Has Compounded CEQ's Error in Concluding that No Tribal Consultation was Required Regarding the Rescission of Its NEPA Implementing Regulations.

Following CEQ's rescission of guidance on implementing NEPA regulations, the ACHP has also failed to conduct any consultation and outreach activities with Tribal Nations regarding the impacts of rescinding or revising its NEPA regulations. Specifically, in its IFR, the ACHP has merely asserted under § IV.G. that "[t]his rule will not have a substantial effect on Indian Tribal Governments." This conclusion is based on a fundamental misreading and misunderstanding of Tribal consultation obligations under Executive Order (EO) 13175 and the federal government's trust and treaty obligations. Previously, CEQ concluded that its IFR—and its subsequent Final Rule—did not have Tribal implications, and that therefore Tribal consultation was not required, "because it does not impose substantial direct compliance costs on Tribal governments" and "does not preempt Tribal law." CEQ IFR § V.F. The ACHP's IFR incorporates a similar rationale. Yet, these are not exceptions to Tribal consultation requirements. To the contrary, they *add to*, rather than narrow or define, what it means for a policy to have "Tribal implications" under EO 13175. USET SPF asserts that the ACHP has inappropriately adopted CEQ's reasoning for not engaging in formal consultation with Tribal Nations prior to issuance of its IFR, nor has it announced any plans to engage in consultation prior to the July 6, 2026 comment deadline.

EO 13175, "Consultation and Coordination with Indian Tribal Governments," has, for nearly twenty-five years, required federal agencies to "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." Sec. 5(a). The phrase "policies that have tribal implications" is defined as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." Sec. 1(a). Given the stakes

involved for Tribal Nations and communities in the NEPA review process, any NEPA policy revisions, much less wholesale rescissions of NEPA regulatory frameworks, clearly meet this standard and therefore require Tribal consultation.

Rather than rely on the appropriate standard for "Tribal implications," however, CEQ's IFR and Final Rule erroneously relied on language taken out of context. Nowhere in the definition of Tribal implications is there a specific mention of compliance costs or preemption of Tribal law. That is because EO 13175 treats these factors, and others, as specific circumstances warranting *heightened* agency action beyond, *and in addition to*, the minimum requirements for Tribal consultation. While these factors may make it clearer to a federal agency that a policy has Tribal implications, their absence does not mean Tribal implications do not exist. The provision cited for CEQ's first justification provides in full that "no agency shall promulgate any regulation that has tribal implications, that imposes direct compliance costs, *and* that is not required by statute" without undertaking certain actions. Sec. 5(b) (emphasis added). Similarly, the provision cited for CEQ's second justification provides in full that "no agency shall promulgate any regulation that has tribal implications *and* that preempts tribal law." Sec. 5(c) (emphasis added). In both cases, it is apparent from the plain language of EO 13175 that the existence of Tribal implications is a question that is separate from, and in addition to, any question regarding compliance costs or Tribal law preemption. Despite this, CEQ provided no other justification for concluding that the rescission of its NEPA implementing regulations did not carry Tribal implications, and that Tribal consultation was therefore not required.[2]

In keeping with CEQ's decision not to engage in formal consultation with Tribal Nations, the ACHP has also apparently determined that no consultation was required when it decided to publish its own IFR to rescind its NEPA implementing regulations. Therefore, the ACHP's decision not to engage in any consultation efforts with Tribal Nations in publishing this IFR is contrary to the consultation directives of EO 13175. This is especially egregious for the ACHP as an entity that other federal agencies look to for guidance in conducting NEPA and National Historic Preservation Act (NHPA) reviews, and other activities that commonly have direct Tribal implications.

Tribal Consultation Must be a Paramount Requirement in Any Agency Reforms to NEPA Regulations or Policies

CEQ's erroneous conclusion that rescission of its NEPA implementing regulations lacked Tribal implications does not negate the ACHP's responsibilities to conduct Tribal consultation in rescinding its own NEPA policies. As noted above, one of the guiding principles of EO 13175 is to ensure regular and meaningful consultation and collaboration with Tribal Nations in the development of federal policies. NEPA itself emphasizes federal agencies' "continuing responsibility" to "preserve historic, cultural, and natural aspects" of our environment in carrying out the statute's goals,[3] and acknowledge the unique implications of Tribal sovereignty by ensuring Tribal Nations have a seat at the table during the federal decision-making process through designation as a "cooperating agency."[4] Together, these key directives stress the significance of NEPA to Tribal sovereignty and the importance of the NEPA environmental review process to upholding the federal government's trust and treaty obligations, both in and around Indian Country. Further, CEQ's Memorandum on NEPA implementation guidance, issued February 19, 2025, suggests "all

[2] Notably, EO 13175 also directs agencies to explore and use "consensual mechanisms for developing regulations, including negotiated rulemaking," where "issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights" may be involved. Sec. 5(d). NEPA implicates issues relating to all of these aspects, further emphasizing the ACHP's and other federal agencies' obligations to engage in Tribal consultation—at a minimum—regarding changes to their NEPA implementation regulations and policies.

[3] 42 U.S.C. § 4331(b)(4).

[4] 42 U.S.C. §§ 4336a(a)(3), 4336e(2).

agencies' implementing procedures, at a minimum, should" include the establishment of "protocols for engaging with state, Tribal, territorial, and local government agencies." Thus, NEPA undoubtedly implicates Tribal rights and interests, and federal agencies must conduct Tribal consultation when revising their NEPA policies or regulations.

The ACHP Should Not Go Through with a Wholesale Rescission of its NEPA Implementing Regulations

As emphasized throughout these comments, the ACHP's decision to forgo Tribal consultation obligations is an abdication of its duty and role as an *advisory body*. In addition, for the ACHP to blatantly state that its NEPA regulations are not required because it "rarely utilizes" them itself does not necessarily mean that such a review will not be required in the future. In its IFR the ACHP has stated that it "may determine at a later date that internal NEPA procedures would be useful for the rare occasion it proposes a major federal action and, if so, the ACHP may develop such procedures." Rather than rescind its NEPA implementing regulations, only to have to revisit the possibility of re-establishing them again later, it would promote government efficiency and preserve existing reliance interests to simply retain the ACHP's existing regulations.

Further, the ACHP's reasoning that its NEPA regulations are not needed because they are "rarely utilized" would also establish an inappropriate, detrimental example for other federal agencies to follow. The ACHP should set the gold standard for regulatory compliance with NEPA, including its Tribal consultation procedures, particularly in light of the ACHP's role in guiding other federal agencies on NHPA compliance and without the CEQ regulations to act as a baseline. NEPA and NHPA reviews are often inextricably intertwined in practice, and we remain concerned about how any revisions or rescissions of NEPA regulations across the federal government may inadvertently impact the NHPA review process.

Should the ACHP decide to revise rather than rescind its NEPA implementing regulations, USET SPF urges the agency to carefully consider the concerns outlined in other parts of these comments and to carry out meaningful Tribal consultation during that rulemaking process.

Any Proposed Revisions to NEPA Regulations that Expands Categorical Exclusions Requires Tribal Consultation

USET SPF has noted that some agencies that are pursuing revisions to their NEPA implementing regulations over the past year have also considered expanding categorical exclusion (CATEX) categories without engaging in meaningful Tribal consultation. For this reason, if the ACHP decides to revise its NEPA implementing regulations—rather than adopting a wholesale rescission—and such revisions include proposals to expand CATEXs, these must be considered in consultation with Tribal Nations. While CATEXs have been utilized by agencies since the late 1970s, recent federal agency proposals to expand them are unprecedented. Moreover, agencies have no mandate from CEQ or otherwise, to make CATEX changes of this magnitude. Tribal Nations must have a seat at the table for all federal decision-making that may affect Tribal Nations' cultural resources, public health, or sovereignty—whether located on or off Tribal lands. Our interests extend both to upholding and promoting the exercise of Tribal sovereignty through expanded CATEXs on Tribal lands and protecting our resources from potential harm if CATEXs are expanded for projects occurring off of Tribal lands.

Any Revision to NEPA Regulations Must Ensure that Timelines for Review Explicitly Accommodate Meaningful Consultation with Tribal Nations

In addition to concerns regarding the potential expansion of CATEXs in revising its NEPA regulations, we are also concerned about any potential revision to timelines for environmental reviews. USET SPF

emphasizes to the ACHP that any compressed review period outside the standard minimum 30–45 days limits Tribal consultation and our participation in these critical environmental reviews. Adoption of such limited timelines to participate in these reviews undermines federal trust and treaty obligations to Tribal Nations that ensure the protection of Tribal resources in perpetuity. Historically, inadequate Tribal consultation has led to irreparable damage and harm to Tribal cultural, natural, and environmental resources and practices and costly litigation activities. Expedited reviews would directly jeopardize Tribal Nations' efforts to protect and preserve our religious freedoms and cultural heritage, conserve our culturally significant areas and species, and protect our water, air, and lands. The ACHP must not truncate review processes, including emergency procedures, at the cost of our culture and natural resources. Further, the ACHP must ensure early and ongoing engagement with Tribal Nations throughout this process.

No Delegation of Federal Consultation Obligations Under NEPA

The trust relationship exists between the federal government and Tribal Nations exclusively. With this in mind, ACHP must not delegate its consultation obligation under NEPA to third-party entities, which include non-profit organizations, industries/corporations, hired consultants and contractors, non-Tribal archaeologists and anthropologists, and other units of government. We have witnessed federal agencies rely on third-party industry consultants to conduct environmental assessments and environmental impact statements as the foundation for initial NEPA review procedures. These activities are often conducted without Tribal collaboration and consultation, which frequently result in findings of no significant impact on our lands, and environmental, historic, and cultural resources. When other entities are party to or involved in federal actions, the federal government, as trustee, must exercise appropriate oversight in ensuring Tribal interests are not adversely impacted. Tribal Nations, and no other entity, are the final arbiters of whether a federal action impacts our governments, homelands, cultures, public health, or sacred sites.

The ACHP Must Support Tribal Requests for Full Funding and Technical Assistance to Effectively Participate in Environmental Reviews

As part of our inherent sovereignty, Tribal Nations have oversight and authority for environmental and permitting reviews on Tribal lands. However, project proposals and construction on our traditional homelands located outside of our jurisdictional boundaries often proceed with limited to no coordination with Tribal Nations. This can lead to irreparable harm to our sacred sites, areas of cultural significance, and critical natural resources, such as nearby waterways essential for our communities. Just as the federal government has trust and treaty obligations to protect our lands, cultural heritage, and well-being, it also has obligations to empower us to exercise self-determination and utilize funds and other resources to protect what is important to us.[5] The resources available to Tribal Nations to fully participate in the NEPA review process have always been inadequate. Funding for Tribal Historic Preservation Officers (THPOs) has been largely stagnant for decades and will be further strained by a disparate approach to NEPA regulations, as THPOs will have to navigate procedures that vary by agency and potentially contend with unrealistically truncated review timelines.

Where Tribal Nations have a THPO and/or a cultural or natural resources department, these individuals and departments are often inundated with multiple projects and permit applications that exceed available

[5] For example, EO 13175 applies "fundamental principles" to guide federal agencies' development and implementation of policies with Tribal implications, including that: "The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination." Sec. 2(c). Additionally, one of the policy goals articulated by EO 13175 is "to reduce the imposition of unfunded mandates upon Indian tribes." Pmbl. *See also* EO 13175 § 3(a) (providing that "[a]gencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments" when developing and implementing policies with Tribal implications).

capacity and resources. THPOs and departmental staff may also fulfill multiple roles within their Tribal government due to the historic and persistent failures of the federal government to fund its trust and treaty obligations, including appropriating the necessary resources for these positions. It is not uncommon for a THPO/cultural resource manager to also fulfill the role of a natural resource manager or serve in an emergency management role, for example. Review processes can be lengthy and burdensome because they are often broken into multiple, segmented assessments of a single project and span multiple agency jurisdictions and oversight authorities.

The ACHP must support requests for federal agencies implementing NEPA to receive additional funding for Tribal Nations and THPOs to conduct NEPA reviews. Providing sufficient resources for Tribal Nations to adequately participate in the NEPA review process and consultation activities will ultimately amount to expedited review and permitting timelines and potentially avoid costly litigation. Further, while the Department of the Interior is ultimately responsible for funding THPO offices, this funding is insufficient and requires a whole-of-government approach with each agency providing the necessary resources and technical support for these offices to effectively participate in NEPA review processes. While the ACHP is primarily tasked with reviewing historic preservation cases and providing training on historic preservation law and policy, we urge the ACHP to support its federal and Tribal partners to receive additional funds to fully participate in NEPA and historic preservation reviews.

The ACHP Must Support and Acknowledge Tribal Reserved Rights in NEPA Policies and Regulations

The ACHP should consider how federal actions may impact the reserved rights of Tribal Nations in its NEPA procedures. Tribal Nations reserve for themselves all our sovereign rights and authorities not otherwise lawfully relinquished by us via treaty and not taken from us by statute. As the U.S. Supreme Court explained long ago, a "treaty [i]s not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[6] The U.S. Supreme Court has also long recognized Tribal Nations' "aboriginal" rights, including the right to use and occupy our homelands,[7] which "need not be 'based upon a treaty, statute, or other formal government action'"[8] and persist despite the encroachment of the United States, and outsiders before it, on Tribal Nations' homelands over time.[9] Indeed, by taking Tribal Nations' lands and resources, including through war and treaty-making, the United States assumed ongoing debt-based trust and treaty obligations to Tribal Nations and Native people.[10] Therefore, any ACHP rescissions or revisions to NEPA must include consideration of potential impacts on Tribal reserved rights, such as subsistence hunting and fishing rights, in the NEPA process. The ACHP must recognize that Tribal Nations exercise these reserved rights to protect our natural environments, resources, sacred, cultural, and historic sites, lifeways, and the public safety and health of our communities and citizens. The ACHP must consider these impacts in the NEPA review and decision-making process.

Tribal Nations are Distinct from "Stakeholders" and the "Public"

Tribal Nations are and always have been inherently sovereign governments, a status that predates the arrival of outside forces and, while existing independently from the United States' affirmation by treaty or

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[6] *United States v. Winans*, 198 U.S. 371, 381 (1905).
[7] *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 544 (1832); *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823); *Oneida Indian Nation of N.Y. v. Oneida Cnty.*, 414 U.S. 661, 667 (1974).
[8] *Oneida*, 414 U.S. at 669 (citation omitted).
[9] *See, e.g.*, *Mitchel v. United States*, 34 U.S. 711, 746 (1835); *Sac & Fox Tribe of Indians of Okla. v. United States*, 383 F.2d 991, 998 (Ct. Cl. 1967).
[10] *See Morton v. Mancari*, 417 U.S. 535, 551–52 (1974); *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

otherwise,[11] is recognized in the U.S. Constitution[12] and consistently by the U.S. Supreme Court.[13] Because of this, Tribal Nations have a unique government-to-government, Nation-to-Nation relationship with the United States. Therefore, the ACHP must not treat or define Tribal Nations as mere "stakeholders" or the "public" for NEPA purposes. Rather, Tribal Nations are owed consultation and coordination prior to any decision-making process, and in advance of any public scoping meetings with "stakeholders" and the "public," on NEPA projects that may directly or indirectly affect our rights or cultural and natural resources. Meaningful consultation includes timely notification to Tribal Nations, engagement of Tribal governments in the earliest stages of NEPA processes and positively acting upon Tribal guidance and input. Inappropriately grouping Tribal Nations with "stakeholders" or the "public" undermines Tribal consultation requirements, risking irreparable damage to our sacred sites and the public health and well-being of Tribal Nations across the country, in violation of the federal government's trust and treaty obligations.

Proposed Revisions to the "Purpose and Need" Requirement for Environmental Impact Statements Should Rely on the Original 1978 NEPA Regulations

The "purpose and need" section of an environmental impact statement (EIS) requires agencies to describe the underlying purpose and need for a proposed agency action. This description then provides the basis for evaluating reasonable alternatives to meeting those goals, and agencies must still comply with these requirements when conducting NEPA reviews in response to applications for federal permits or other authorizations. However, the original 1978 definition of "purpose and need" was modified in 2020 and could be interpreted by agencies to prioritize an applicant's "goals" over the rights and priorities of Tribal Nations. Federal agencies must always consider the impacts of a proposed project or activity on the public health and environmental, natural, and cultural resources of Tribal Nations. Similarly, federal agencies must coordinate and communicate with Tribal Nations regarding project applications that may impact our people and environmental, natural, and cultural resources.

NEPA Procedures Must Protect Sensitive Tribal Cultural Information and Indigenous Knowledge from Public Disclosure and Interagency Sharing Without Tribal Consent

Tribal Nations are best positioned to identify what qualifies as sensitive information or Indigenous Knowledge that should be protected from public dissemination. Indigenous Knowledge refers to a body of observations, oral and written knowledge, innovations, practices, and beliefs developed by Tribal Nations through interaction and experience with our environment. Tribal consultation often involves some disclosure of Indigenous Knowledge or otherwise sensitive information regarding Tribal cultural sites, resources, and practices, and what qualifies as sensitive is different for every Tribal Nation. Federal agencies must take steps to ensure such information, at the determination of the consulting or coordinating Tribal Nation, is protected from disclosure to the public in NEPA rulemaking and documentation, and, to the greatest extent possible, shield it from Freedom of Information Act (FOIA) requests and other public disclosure laws.

Prior to the sharing of Indigenous Knowledge during consultation, there must be an established and respected high level of trust between the federal government and Tribal Leaders and our recognized cultural/spiritual leaders. This trust has been broken in the past and its restoration will require federal agencies to actively adopt, implement, and adhere to policies that provide the highest level of protection for Tribal Nations sharing sensitive Indigenous Knowledge. The ACHP must work with our Tribal Leaders and our recognized cultural/spiritual leaders to ensure that sensitive Indigenous Knowledge is protected from

[11] *See, e.g.*, *Worcester*, 31 U.S. at 520 (explaining retained Tribal sovereignty is based on "the settled doctrine of the law of nations"); *Haaland v. Brackeen*, 599 U.S. 255, 308 (2023) (Gorsuch, J., concurring) (similar).
[12] U.S. Const. art. I, § 8, cl. 3 (Indian Commerce Clause); *id.* art. II, § 2, cl. 2 (Treaty Clause); *see also id.* art. VI, cl. 2 (Supremacy Clause); *id.* art. IV, § 3, cl. 2 (Territory Clause); *id.* art. I, § 2, cl. 3 (Indians Not Taxed Clause).
[13] *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55−56 (1978); *Brackeen*, 599 U.S. at 308 (Gorsuch, J., concurring).

public disclosure to the greatest extent possible. Further, ACHP officials receiving Indigenous Knowledge from Tribal Nations should not share this information with other federal agencies in the absence of express of free, prior, and informed Tribal consent. We should be the sole determiners regarding whether this information should be shared or withheld.

In addition, during Tribal consultation sessions and prior to the sharing of any sensitive or Indigenous Knowledge, the ACHP should inform Tribal Nations of the federal government's legal obligations for the release of information to the public under FOIA and other public disclosure laws. ACHP officials must work with Tribal Leaders to ensure that any recording, taking of notes, or direct transcription of a consultation by machine or other methods does not create a record of sensitive Indigenous Knowledge and cultural information that could potentially be disseminated to or accessed by the public. Tribal Leaders should be notified in advance of any recording or transcription methods and have an opportunity to object to their use when Indigenous Knowledge or cultural information is divulged, and federal agencies must adhere to those objections. Furthermore, requests for the redaction of sensitive Indigenous Knowledge and cultural information from the consultation record or NEPA documentation should be allowed to be stated verbally during consultation sessions and in any follow-up written materials submitted to federal agencies.

Moving forward, the ACHP must develop guidance on how FOIA requests implicating Indigenous Knowledge should be handled, recognizing that we—and not the federal government—should be the sole and final arbiters in identifying what constitutes Indigenous Knowledge and sensitive information. First and foremost, upon the exchange of Indigenous Knowledge and other sensitive Tribal cultural information during consultation, the ACHP should actively work with Tribal Leaders to determine what information should be redacted from public dissemination and protected from FOIA requests and other public disclosure laws, and seek those redactions to the greatest extent allowable under the applicable legal authorities.

Furthermore, federal agencies must inform Tribal Nations when FOIA requests are made to access our information and consult our Tribal Leaders, THPOs, and other individuals Tribal Nations expressly identify, such as our recognized cultural/spiritual leaders, as authorities in determining what information may be withheld or redacted, consistent with applicable law. Similarly, federal agencies should inform Tribal Nations when the agency receives these requests, including the identity of the requester and the information being requested.

Conclusion

USET SPF supports NEPA regulations that safeguard and protect Tribal Nations' right to our natural and environmental resources and cultural heritage. We also generally support the goals of efficiency and effectiveness, but we assert that this cannot be accomplished at the expense of Tribal sovereignty, health, spirituality, and culture. However, USET SPF is opposed to any and all NEPA regulatory or policy revisions that would undermine the federal government's trust and treaty obligations to consult with Tribal Nations and protect Tribal resources.

USET SPF urges the ACHP to discontinue its wholesale rescission of its NEPA regulations and to engage in meaningful consultation with Tribal Nations with any further revisions, as such efforts would undermine upholding its trust and treaty obligations to Tribal Nations. Further, any revision or rescission of the ACHP's NEPA implementing regulations could lead to irreparable harm to our homelands, sacred sites, cultural and environmental resources, and the public health and safety of our citizens. Should you have any questions or require further information, please contact Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,

Chief Kirk Francis
President

Kitcki A. Carroll
Executive Director