



## ADVISORY COUNCIL ON HISTORIC PRESERVATION

### 36 CFR Part 805

#### RIN 3010-AA08

### Rescission of Procedures for Implementing the National Environmental Policy Act (NEPA)

**AGENCY:** Advisory Council on Historic Preservation.

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** The Advisory Council on Historic Preservation is rescinding its regulations implementing NEPA from the Code of Federal Regulations (CFR). In addition, this interim final rule requests comments on this action.

**DATES:** This interim final rule is effective on **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**ADDRESSES:** You may submit comments, identified by docket number and/or Regulation Identifier Number (RIN) number and title, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- Email: [kfanizzo@achp.gov](mailto:kfanizzo@achp.gov).
- Mail: Advisory Council on Historic Preservation, 401 F Street, NW, Suite 308, Washington, DC 20001.

*Instructions:* All submissions received must include the agency name and docket number or RIN for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Kelly Fanizzo, General Counsel,  
Advisory Council on Historic Preservation, (202) 517-0193, kfanizzo@achp.gov.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Advisory Council on Historic Preservation (ACHP) is an independent federal agency that promotes the preservation of America's historic places and advises the President and Congress on national historic preservation policy (see 54 U.S.C. Chapter 3041). Promulgated in 1980 to supplement the regulations established by the Council on Environmental Quality (CEQ), the ACHP's regulations at 36 CFR Part 805 set forth the procedures for the ACHP to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* The ACHP rarely proposes major federal actions that require review under NEPA and, therefore, rarely utilizes its regulations implementing NEPA at 36 CFR Part 805. The last NEPA document the ACHP developed was an Environmental Assessment in the late 1990s for its Section 106 rulemaking to revise and update 36 CFR Part 800, which concluded in a Finding of No Significant Impact (see 64 FR 27044; May 18, 1999). The ACHP is now rescinding its regulations implementing NEPA at 36 CFR Part 805. The ACHP 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.

On January 20, 2025, the President issued Executive Order (E.O.) 14154, Unleashing American Energy (90 FR 8353), revoking E.O. 11991, Relating to Protection

and Enhancement of Environmental Quality (42 FR 26967; May 24, 1977) and directing the CEQ to propose rescinding its National Environmental Policy Act (NEPA) regulations (40 CFR Part 1500). CEQ subsequently rescinded its NEPA regulations (90 FR 10610; February 25, 2025) and also issued a memorandum, dated February 19, 2025, providing guidance to agencies on implementing E.O. 14154 and revising existing agency NEPA procedures.

The ACHP is taking this action because the CEQ rescinded its NEPA regulations, which the ACHP's NEPA regulations were intended to supplement and, therefore, the references in the ACHP's regulations are outdated and obsolete. Congress has amended the NEPA statute twice since 2023 (see, e.g., the Fiscal Responsibility Act of 2023 (FRA), Public Law 118-5). In addition, the ACHP's NEPA regulations would have required revisions to align with the Supreme Court's landmark decision interpreting NEPA in *Seven County, Infrastructure Coalition v. Eagle County, Colorado*, 145 S. Ct. 1497 (2025). *Seven County* affirms that the ACHP has broad discretion when conducting NEPA reviews, and that the central principle of judicial review in NEPA cases is substantial deference to agencies, including about whether and the extent to which the agency should consider potential effects in a NEPA review given the agency's authority and the importance of the issue to the decisionmaker. These recent changes to the NEPA statute and its interpretation make it less likely that a future ACHP action would fall within the statute's scope. Therefore, the ACHP has concluded that there is no need for the ACHP to establish agency-specific procedures at this time. As noted above, the ACHP may develop internal NEPA procedures in the future if necessary and appropriate.

## II. Publication as an Interim Final Rule

ACHP has determined that an interim final rule is the appropriate mechanism to rescind its NEPA implementing regulations at 36 CFR Part 805.

The ACHP's NEPA regulations constitute rules of agency procedure and practice, under the Administrative Procedure Act (APA), and are subject to the APA exception for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" (5 U.S.C. 553(b)(A)). Part 805 proscribes procedures for the ACHP on when to prepare an environmental review document and how to incorporate the document and review into agency decision-making. The procedures do not establish any substantive requirements that would impose binding legal obligations on other parties or members of the public. Furthermore, the procedures do not dictate any substantive outcomes and are not legislative rules. As such, neither their promulgation nor their removal requires notice-and-comment rulemaking. The fact that the ACHP previously undertook notice-and-comment rulemaking in promulgating Part 805 (45 FR 4353) does not bind the ACHP to use such procedures in rescinding it (see *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) (holding that where notice-and-comment procedures are not required, prior use of them in promulgating a rule does not bind the agency to use such procedures in repealing it)).

Additionally, the ACHP has "good cause" to rescind Part 805 as an interim final rule, meeting the APA exception in 5 U.S.C. 553(b)(B). The APA authorizes agencies to issue regulations without notice and comment when an agency finds, for good cause, that notice and comment is "impracticable, unnecessary, or contrary to the public interest" (5 U.S.C. 553(b)(B)), and to make the rule effective immediately for good cause (5 U.S.C.

553(d)(3)). The ACHP's NEPA regulations were promulgated to supplement the CEQ's NEPA regulations. When the CEQ rescinded its NEPA regulations, the ACHP's existing NEPA regulations ceased to properly function, which has resulted in confusion as to how the agency should meet its responsibilities under NEPA. Accordingly, while the ACHP is not required under the APA's good cause exception to engage in notice-and-comment rulemaking, the agency has determined that the most appropriate mechanism to resolve any confusion while still allowing for public participation, is to issue an interim final rule providing 30 days for public comment thereafter.

Further, an interim final rule containing all elements required by the APA for a Notice of Proposed Rulemaking, as provided in 5 U.S.C. 553(b)-(d), satisfies the APA's procedural requirements. This interim final rule contains all of the APA-required elements for notice-and-comment rulemaking: a reference to legal authority, as required by 5 U.S.C. 553(b)(2); a description of the terms and substance of the rule, as required by 5 U.S.C. 553(b)(3); and a request for public comment, as required by 5 U.S.C. 553(c). The ACHP finds that an interim final rule is the most appropriate mechanism to meet both the President's and CEQ's direction and the principles of public participation in regulatory action.

### **III. Request for Comments**

The ACHP requests and encourages public comments on this interim final rule. The ACHP will consider the comments it receives and provide responses in a final rule, with changes, if warranted.

### **IV. Regulatory Compliance Analysis**

#### **A. E.O. 12866, "Regulatory Planning and Review"**

E.O. 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distribution of impacts; and equity). The Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) has determined that this rulemaking, while not "economically significant" under 3(f)(1), is "significant" per the other subsections of 3(f).

**B. Congressional Review Act (5 U.S.C. 801 *et seq.*)**

OMB OIRA has determined that this rulemaking, if finalized, does not meet the criteria set forth in 5 U.S.C. 804(2) under Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act).

**C. Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*)**

The rule does not contain any information collection requirements that require the approval of the OMB under the Paperwork Reduction Act (44 U.S.C. chapter 35).

**D. Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)**

The ACHP has determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if finalized, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require the ACHP to prepare a regulatory flexibility analysis.

**E. Sec. 202, Public Law 104-4, "Unfunded Mandates Reform Act"**

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of \$100 million in 1995 dollars, updated

annually for inflation. That threshold is currently approximately \$206 million. This rulemaking will not result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, in excess of the threshold. Thus, no written assessment of unfunded mandates is required.

**F. E.O. 13132, “Federalism”**

The ACHP has determined that this action does not contain policies with federalism or “takings” implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively. This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of Government. This action contains no Federal mandates for State and local Governments and does not impose any enforceable duties on State and local Governments. This action addresses only internal ACHP procedures for implementing NEPA.

**G. E.O. 13175, “Consultation and Coordination with Indian Tribal Governments”**

E.O. 13175 establishes certain requirements that an agency must meet when it promulgates an interim final rule (and subsequent final rule) that imposes substantial direct compliance costs on one or more Indian Tribes, preempts Tribal law, or effects the distribution of power and responsibilities between the Federal Government and Indian Tribes. This rule will not have a substantial effect on Indian Tribal Governments.

**List of Subjects in 36 CFR Part 805**

Environmental impact statements.

**PART 805 [REMOVED AND RESERVED]**

For the reasons stated in the preamble and under the authority of 54 U.S.C. chapter 3041 and 42 U.S.C. 4332, the Advisory Council on Historic Preservation removes and reserves 36 CFR part 805.

**Travis Voyles,**

*Vice Chairman, Advisory Council on Historic Preservation.*

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