



SOCIETY FOR AMERICAN ARCHAEOLOGY

December 22, 2020

Ms. April Marchese
Director, Infrastructure Permitting
Improvement Center
U.S. Department of Transportation
1200 New Jersey Avenue SE, West Building
Room W12-140
Washington, DC 20590-0001

RE: DOT-OST-2020-0229

Dear Ms. Marchese,

The Society for American Archaeology (SAA) provides comments on the Office of the Secretary's proposal to update and codify the Department Of Transportation's (DOT) Order 5610.1C, "Procedures for Considering Environmental Impacts," which outlines the Department's procedures for complying with the National Environmental Policy Act (NEPA) and its implementing regulations.

The SAA is an international organization that, since its founding in 1934, has been dedicated to research about and interpretation and protection of the archaeological heritage of the Americas. With nearly 7,000 members, SAA represents professional and avocational archaeologists, archaeology students in colleges and universities, and archaeologists working at Tribal agencies, museums, government agencies, and the private sector. SAA has members throughout the U.S., as well as in many nations around the world.

The SAA understands that this proposed rulemaking is being made in order to bring the DOT's internal compliance policies into accordance with the Council on Environmental Quality's (CEQ) recently-published updates to the regulations for implementing the National Environmental Policy Act (NEPA). The SAA is [strongly opposed](#) to the CEQ's updates, on the grounds that they will undermine sound environmental and cultural resources stewardship, and will also fail to accelerate infrastructure project completions. Having said this, we make the following observations on the DOT's proposal in the hope of improving it.

1. The proposed updates specifically reference compliance with Section 106 and integrating those reviews with the NEPA process, both within the body of the regulations and in Appendix C. This is a positive development and we appreciate this contribution.

2. The proposed updates also recognize DOT's government-to-government relationship with tribes, Alaska Natives, and Native Hawaiians. This is another positive step and we laud the improvements.
3. Like the revised CEQ regulations, the DOT proposal leaves too much of the decision-making up to the Operating Administrations (OA), especially with respect to public scoping.
4. There are difficulties with the proposal's choice of words. As the SAA recently pointed out in its [comments](#) on a U.S. Forest Service rulemaking, each word—"must", "will" and "should"—has a different legal connotation. According to the Federal Register Document Drafting Handbook (Section 3), the following definitions apply:
 - a. Shall--imposes an obligation to act, but may be confused with prediction of future action
 - b. Will--predicts future action
 - c. Must--imposes obligation, indicates a necessity to act
 - d. Should--infers obligation, but not absolute necessity
 - e. May--indicates discretion to act

In this proposal, "Must" and "will" are used 133 and 22 times, respectively, while "should" and "may" are used 80 and 58 times, respectively. For instance, Section 13.13(c) "*Focused, quality documents*" states that "NEPA documents **should** effectively and concisely communicate the environmental effects of a proposed action to the public and decision maker." For the public to understand fully effects of an action, the effects must be communicated in a manner that the public can understand. Public involvement is the heart of the NEPA process. The SAA strongly suggests that the DOT reevaluate its use of "should" and "must", especially where public involvement is involved. We also suggest using "shall, as appropriate" or "must, as appropriate" instead of "should" and "may". In this vein, we point out several examples:

- a. Section 13.13(d) *Public involvement*: "The level of public involvement **should** be commensurate with the type of action..." Again, this leaves the final decision up to the OA. To ensure the public has an adequate opportunity to comment, the level has to be commensurate. Replace the term "should" with "must".
 - b. Section 13.19(h) *Public comment*: This section is inconsistent. The first sentence states that an OA "must" involve the public in the development of an Environmental Assessment (EA). The second sentence states "At its discretion, an OA may prepare a draft EA for public comment." This needs to be resolved.
 - c. Section 13.232(j) *Public notice and notice of availability* "OAs **should** notify the public of the availability of EISs..." To ensure adequate public involvement as NEPA requires, this needs to be mandatory. The rest of this section uses "must". This creates a substantial conflict.
5. Section 13.23(c) *Scoping*: How will an OA determine the scope and significant issues to be analyzed in an EIS? Will the public be involved in that scoping? This section references 13.15 "*Determination of the level of NEPA review*", but that section is not clear on how an agency goes about determining scope and issues, only things that the agency needs to consider.

Thank you for your time and attention to this letter. The SAA and its members remain committed to the integration of effective environmental reviews with historic preservation, and are ready to assist the DOT in ensuring that its regulations in this area reflect that objective.

Sincerely,

A handwritten signature in cursive script that reads "Joe E. Watkins". The signature is written in black ink and is positioned above the printed name.

Joe E. Watkins, Ph.D., RPA
President