No. 06-1248

IN THE
# Supreme Court of the United States

COLISEUM SQUARE ASSOCIATION, *et al.*,
*Petitioners*,

v.

ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF NATIONAL TRUST FOR HISTORIC PRESERVATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PAUL W. EDMONDSON
Vice President & General Counsel
ELIZABETH S. MERRITT (*Counsel of Record*)
Deputy General Counsel
MICHAEL D. SMITH
Assistant General Counsel
National Trust for Historic Preservation
1785 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-6035

*Counsel for Amicus Curiae*

April 13, 2007

BLANK PAGE

# TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* ..... 1

SUMMARY OF THE ARGUMENT ..... 2

ARGUMENT ..... 3

I. FEDERAL AGENCIES TOO OFTEN VIOLATE NEPA ..... 3

A. Federal Agencies Often Circumvent NEPA by Failing to Prepare Environment Impact Statements ..... 3

B. HUD Routinely Approves Funding for Major Projects Without Preparing An EIS ..... 6

1. HUD Has Uniformly Avoided Preparing EISs for HOPE VI Projects, Even Though the Program is Designed to "Significantly" Affect the Environment ..... 6

2. In New Orleans Alone, HUD is Currently Proposing to Demolish Four Major Historic Public Housing Projects Similar to St. Thomas, Without Preparing an EIS ..... 8

II. COMPLIANCE WITH NEPA IS CRUCIAL FOR HISTORIC PRESERVATION ..... 9

**TABLE OF CONTENTS -- Continued**

Page

A. Avoidance of NEPA's EIS Requirement Undermines the NHPA ..... 10

1. Overuse of EAs Can Harm the Public's Ability to Participate in the Section 106 Review Process ..... 11

2. Reliance on EA Documentation Can Skew Agency Determinations under Section 106 ..... 14

3. Failure to Prepare an EIS Reduces the Scope of Analysis for Impacts on Historic Resources ..... 14

B. Avoidance of NEPA's EIS Requirement Often Leads to Inadequate Consideration of Specially Designated Historic Resources ..... 16

1. Importance of the *National Register of Historic Places* ..... 17

2. Importance of *National Historic Landmarks* ..... 18

CONCLUSION ..... 19

## TABLE OF AUTHORITIES

Page

CASES

*Anderson v. Jackson*, 2007 WL 458232 (E.D. La. Feb. 6, 2007) ..... 9

*Coalition Against a Raised Expressway (CARE) v. Dole*, 17 Envtl. L. Rep. 20,466, 20,472 (S.D. Ala. Oct. 20, 1986), *aff'd*, 835 F.2d 803 (11th Cir. 1988) ..... 19

*Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) ..... 2

*Moody Hill Farms Ltd. Partnership v. United States Dep't of the Interior*, 205 F.3d 554 (2d Cir. 1999) ..... 17

*Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1981) ..... 11

*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) ..... 3,12

*Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) ..... 5,13

*Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir. 1976), *cert. denied*, 429 U.S. 999 (1976)) ..... 11

*United States v. 162.20 Acres of Land, More or Less, Situated in Clay County, Miss.*, 639 F.2d 299 (5th Cir. 1981) ..... 11

*Vieux Carré Property Owners, Residents & Assoc's, Inc. v. Brown*, 948 F.2d 1436 (5th Cir. 1991) ..... 10

# TABLE OF AUTHORITIES

Page

## STATUTES

16 U.S.C. § 470a(a)(1)(A) ..... 17
16 U.S.C. § 470a(a)(2) ..... 17
16 U.S.C. § 470f ..... 2,10,12,15
16 U.S.C. § 470(b)(3) ..... 10
16 U.S.C. § 470(b)(4) ..... 10
16 U.S.C. § 470h-2(f) ..... 19
16 U.S.C. § 470h-2(i) ..... 12
16 U.S.C. § 470h-2(*l*) ..... 11
42 U.S.C. § 1437v ..... 7
42 U.S.C. § 1437v(a)(1) ..... 7
42 U.S.C. § 4331(b)(2) ..... 9
42 U.S.C. § 4331(b)(4) ..... 9,10
42 U.S.C. § 4332 ..... 7,11
42 U.S.C. § 4344 ..... 3

## REGULATIONS

36 C.F.R. § 60.2(a) ..... 18
36 C.F.R. § 60.3(f) ..... 17
36 C.F.R. § 60.4 ..... 17
36 C.F.R. § 65.2(a) ..... 18
36 C.F.R. § 800.1(a) ..... 10
36 C.F.R. § 800.2(b) ..... 12
36 C.F.R. § 800.2(c) ..... 12
36 C.F.R. § 800.2(d)(3) ..... 13
36 C.F.R. § 800.6(c) ..... 11,12
36 C.F.R. § 800.10 ..... 19
36 C.F.R. § 800.10(c) ..... 19
36 C.F.R. § 800.16(*l*) ..... 15
40 C.F.R. § 1502.16(g) ..... 16
40 C.F.R. § 1508.8(b) ..... 9,15

**TABLE OF AUTHORITIES – Continued**

Page

40 C.F.R. § 1508.27(b)(8) ..... 9

MISCELLANEOUS

115 Cong. Rec. 40,415, 40,416 (1969) ..... 11

H.R. Rep. No. 1457, 96th Cong., 2d Sess. 38, *reprinted in* 1980 U.S.C.C.A.N. 6378, 6401 ..... 18

ADVISORY COUNCIL ON HISTORIC PRESERVATION, FEDERAL HISTORIC PRESERVATION CASE LAW, 1966-1996: THIRTY YEARS OF THE NATIONAL HISTORIC PRESERVATION ACT 41 ..... 11

CONSTANCE E. BEAUMONT, HOW SUPERSTORE SPRAWL CAN HARM COMMUNITIES 1-19 (National Trust for Historic Preservation 1994) ..... 15

COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: 25TH ANNIVERSARY REPORT 51 (1995), *available at* http://-ceq.eh.doe.gov/reports/1994-95/25th_ann.pdf..... 4,6

Council on Environmental Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years* 19-20 (Jan. 1997), *available at* http://www.nepa.gov/nepa/nepa25fn.pdf..... 4,5,6,7,13,14

Council on Environmental Quality, http://ceq.eh.doe.gov/neap/EISs_by_Year_1970_2006.pdf ..... 4

**TABLE OF AUTHORITIES – Continued**

Page

Council on Environmental Quality, http://ceq.eh.doe.gov/Calendar_Year_2006_Filed_EISs.pdf..... 7

Council on Environmental Quality, www.nepa.gov/neap/nepanet.htm ..... 9

Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 946 (May 2002)..... 4,5

Susan Popkin, et al., The Urban Institute and The Brookings Institution, *A Decade of Hope VI: Research Findings and Policy Challenges*, at 41 (May 2004), *available at* http://www.urban.org/uploadedPDF/411002_HOPEVI.pdf ..... 8

U.S. Department of Housing and Urban Development, http://.hud.gov/offices/pih/programs/ph/hope6/about/#1..... 7

U.S. Department of Housing and Urban Development, http://.hud.gov/offices/pih/programs/ph/hope6/about/#3..... 8

U.S. Department of Housing and Urban Development, http://.hud.gov/offices/pih/programs/ph/hope6/about/#5..... 8

**TABLE OF AUTHORITIES – Continued**

Page

U.S. General Accounting Office, *Report to the Ranking Minority Member, Subcommittee on Housing and Transportation, Committee on Banking, Housing, and Urban Affairs, U.S. Senate – Public Housing: HUD's Oversight of HOPE VI Sites Needs to Be More Consistent*, at 26 (May 2003) ..... 8

NationalRegisterofhistoricplaces.com, http://www.national Registerofhistoricplaces.com/LA/Orleans/ districts.html ..... 16

National Park Service, http://www.cr.nps.gov/nhl/ Lists/List07.pdf (April 2007) ..... 16

National Park Service, http://www.cr.nps.gov/nr/ Research/index.htm ..... 17

National Park Service, http://www.cr.nps.gov/nhl ..... 18

BLANK PAGE

## INTERESTS OF *AMICUS CURIAE*

*Amicus curiae* National Trust for Historic Preservation (National Trust)[1] is a private nonprofit organization chartered by Congress in 1949 to "facilitate public participation" in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 16 U.S.C. §§ 461, 468. With the strong support of our more than 277,000 members around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government.

The National Trust also has a role in overseeing the implementation of the National Historic Preservation Act (NHPA), since Congress designated the Chairman of the National Trust as a member of the Advisory Council on Historic Preservation, the independent federal agency responsible for implementing and enforcing the NHPA. *See id.* § 470i(a)(8).

The National Trust's expertise on historic preservation law is widely recognized. The Trust has participated as *amicus curiae* before this Court in a variety of cases involving historic preservation issues, ranging from constitutional cases to issues of statutory interpretation.[2] In

---

[1] Pursuant to Rule 37(6), counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amicus*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(2)(a), the National Trust has received written letters of consent to the submission of this brief from all parties, which have been filed with the Clerk of the Court.

[2] *E.g., Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg. Planning Agency*, 535 U.S. 302 (2002); *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998); *International College of Surgeons v. City of Chicago*, 522 U.S. 156 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989);

addition, the National Trust participated as *amicus curiae* in this case below, before the U.S. Court of Appeals for the Fifth Circuit.

## SUMMARY OF THE ARGUMENT

The National Trust believes this Court's review is necessary to resolve confusion among the federal courts regarding the standard of judicial review when an agency decides not to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). The Fifth Circuit's misinterpretation of *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360 (1989), will encourage federal agencies to avoid preparing EISs even when major federal projects may have significant impacts on protected resources. This approach has serious consequences for historic properties, and can frustrate the consultation and review process under Section 106 of the NHPA, 16 U.S.C. § 470f.

In this case, the U.S. Department of Housing and Urban Development (HUD) approved funding for a massive project involving the demolition of nearly an entire historic public housing complex in New Orleans (116 out of 121 historic buildings, with approximately 1,500 residential units), without the benefit of the in-depth analysis required by an EIS. This project is by its very nature designed to have a significant impact on the human environment, and that impact includes irreparable harm to nationally recognized historic resources. The Court should grant this petition in order to resolve the confusion and correct the Fifth Circuit's misinterpretation of the law.

---

*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

## ARGUMENT

### I. FEDERAL AGENCIES TOO OFTEN VIOLATE NEPA.

The National Trust is concerned that federal agencies appear to be increasingly departing from the letter and spirit of NEPA, especially by attempting to avoid the preparation of EISs. The fundamental purposes of NEPA are circumvented when federal agencies avoid the preparation of an EIS despite the potential for "significant" impacts. As this Court has stated "[s]imply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). When agencies improperly avoid the preparation of an EIS, the environmental values that NEPA is intended to protect, including historic resources, are jeopardized. The petition before this Court presents such an instance.

#### A. Federal Agencies Often Circumvent NEPA by Failing to Prepare Environmental Impact Statements.

The Council on Environmental Quality (CEQ), the agency established by Congress to issue regulations implementing NEPA and to ensure that federal agencies meet their NEPA obligations,[3] has raised questions about the potential overuse of Environmental Assessments (EAs):

> Since NEPA was passed, the role of the EA has evolved to the point where it is the predominant way

[3] 42 U.S.C. § 4344.

> agencies conduct NEPA analyses. . . . With the increased use of EAs . . . comes the danger that public involvement will be diminished and that individually minor actions will have major adverse cumulative effects. . . .[4]

The CEQ further noted that "[s]ome states, citizen groups, and businesses believe that certain EAs are prepared to avoid public involvement . . . . Avoiding an opportunity for public comment on draft EAs and FONSIs can create mistrust and add costs and time as projects are delayed by ensuing controversy and legal challenges." *CEQ Effectiveness Study*, *supra* note 4, at 19.

While data is available on the numbers of EISs prepared by federal agencies each year, "[u]nfortunately, accurate comparisons of the numbers of EISs and EAs prepared are not available." *Id.* Statistics on EAs are "maddeningly difficult to ferret out,"[5] because "EAs are often not reported at all." *Id.* Nonetheless, the CEQ has estimated that, "since the CEQ regulations were promulgated, all signs point to a significant increase in EAs and a decrease in EISs."[6]

---

[4] Council on Environmental Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years* 19-20 (Jan. 1997), *available at* http://www.nepa.gov/nepa/nepa25fn.pdf [hereinafter *CEQ Effectiveness Study*].

[5] Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 946 (May 2002) ("In most agencies, even the NEPA compliance officers at agency headquarters do not track or compile EAs and FONSIs, devolving such duties to regional or subregional offices where record keeping may be lax or inconsistent across regions. Thus, in many cases it is difficult, if not impossible, for interested persons even to learn that an EA has been produced, much less to gain access to its contents.")

[6] *CEQ Effectiveness Study*, *supra* note 4, at 19; COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: 25TH ANNIVERSARY REPORT 51 (1995), *available at* http://ceq.eh.doe.gov/-reports/1994-95/25th_ann.pdf [hereinafter CEQ REPORT].

For example, in 1973, when NEPA was relatively new, federal agencies filed a total of about 2,000 EISs.[7] Even though the size and activities of the federal government as a whole have increased since that time,[8] the number of EISs prepared has decreased by 75%. In 2006, only 542 EISs were filed by federal agencies.[9] In contrast, the number of EAs has increased substantially since NEPA was enacted. The CEQ estimated that in 1993 about 50,000 EAs were prepared annually.[10]

The dramatic reduction in the number and proportion of EISs prepared since NEPA was enacted represents a trend that raises serious concerns about whether NEPA is functioning as it was intended. "Despite NEPA's lofty goal of 'fully informed' agency decisionmaking, most of the government's NEPA machinery is now devoted not to producing [EISs], but to producing just enough information to justify the conclusion that the 'fully informed' EIS inquiry is unnecessary." Karkkainen, *supra* note 5, at 920-21 (footnote omitted). In order to avoid the perceived time and cost of a "litigation proof" EIS, "the agency's most important objective becomes to avoid the statutory EIS tripwire in the first place." *Id.* at 919. Such an approach seriously undermines the goals of NEPA.

As the First Circuit has recognized, "those outside the agency have less opportunity to comment on an EA than on an EIS," and "those inside the agency might pay less attention to environmental effects when described in an EA than when described in an EIS." *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985) (Breyer, J.). According to the CEQ, "[t]he result is likely to be less rigorous scientific analysis, little or no public involvement, and consideration of

---

[7] *See id.*; http://ceq.eh.doe.gov/nepa/EISs_by_Year_1970_2006.pdf.

[8] *See* Karkkainen, *supra* note 5, at 920.

[9] *See* http://ceq.eh.doe.gov/nepa/EISs_by_Year_1970_2006.pdf.

[10] CEQ REPORT, *supra* note 6, at 51; *CEQ Effectiveness Study*, *supra* note 4, at 19; Karkkainen, *supra* note 5, at 920 & nn.73-74.

fewer alternatives, all of which are at the very core of NEPA's strengths."[11]

### B. HUD Routinely Approves Funding for Major Projects Without Preparing an EIS.

In virtually all cases, HUD approves federally funded public housing demolition and redevelopment projects without preparing an EIS. HUD is among the agencies whose decrease in EIS preparation has been especially dramatic. In 1979, HUD prepared a total of 170 EISs,[12] but that number has plummeted by 99%. Since 1998, HUD has prepared between zero and five EISs annually, and in 2006 HUD prepared just two EISs in the entire agency.[13] By contrast, HUD was one of five agencies that produced 80% of the 50,000 EA's produced in 1993. *CEQ Effectiveness Study*, *supra* note 4, at 19. The implication is that not a single HUD-approved project, except perhaps one or two each year, will have a "significant" effect on the environment – a position that is difficult to comprehend, and which is a central question of the petition.

#### 1. HUD Has Uniformly Avoided Preparing EISs for HOPE VI Projects, Even Though the Program is Designed to "Significantly" Affect the Environment.

Implementation of the HUD program at issue in this case – the "HOPE VI" Program ("Homeownership and Opportunity for People Everywhere") – demonstrates that HUD rarely ever prepares an EIS to satisfy NEPA, even though the whole purpose and philosophy of the program is

---

[11] *CEQ Effectiveness Study*, *supra* note 4, at 20.

[12] *See* CEQ REPORT, *supra* note 6, at 534.

[13] *See* CEQ http://ceq.eh.doe.gov/nepa/-Calendar_Year_2006_Filed_EISs.pdf.

designed to "significantly affect[] the quality of the human environment," 42 U.S.C. § 4332(2)(C). Although the program was initiated through Congressional appropriations starting in 1992, Congress codified the HOPE VI program in 1999. *Id.* § 1437v. The program's purpose is to create economic incentives for private developers through grants to local housing authorities to demolish, rehabilitate, reconfigure, or replace "severely distressed public housing projects." *Id.* § 1437v(a)(1). The intent of the program is to disperse concentrated urban poverty by relocating public housing to "non-poverty" neighborhoods and promoting mixed-income communities.[14]

The types of projects proposed by HOPE VI are ones that by their very nature are likely to have "significant" impacts on the environment, including historic resources. The HOPE VI program is designed in part to "benefit the surrounding neighborhood and even the larger city and region. Supporters argue that HOPE VI's ability to *transform entire neighborhoods* is one of the program's most revolutionary opportunities and significant outcomes."[15]

The significant unaddressed impacts of HOPE VI projects have been exacerbated by HUD's inability to adequately oversee the grants, including the review of EAs prepared by local housing authorities.[16]

---

[14] *See* http://www.hud.gov/offices/pih/programs/ph/hope6/about/#1.

[15] Susan J. Popkin, et al., The Urban Institute & The Brookings Institution, *A Decade of HOPE VI: Research Findings & Policy Challenges*, at 41 (May 2004) (emphasis added), *available at* http://www.urban.org/-uploadedPDF/411002_HOPEVI.pdf.

[16] U.S. General Accounting Office, *Report to the Ranking Minority Member, Subcomm. on Housing & Transp., Comm. on Banking, Housing, & Urban Affairs, U.S. Senate – Public Housing: HUD's Oversight of HOPE VI Sites Needs to Be More Consistent*, at 26 (May 2003) ("According to various reports and HUD field staff, the limited number of grant managers, a shortage of field staff, and confusion about the role of field offices have diminished the agency's ability to oversee HOPE VI grants.").

The two largest categories of HOPE VI grants are "Demolition" and "Revitalization," which funds the capital costs of major rehabilitation, new construction, and other physical improvements; demolition of severely distressed public housing; acquisitions of sites for off-site construction; and community and support service programs for residents, including those relocated as a result of revitalization efforts.[17] From 1993 to 2006, the HOPE VI program awarded 236 "Revitalization" grants nationally (including the $25 million grant involved in this case), for a total of $5.9 billion.[18] And from 1996 to 2003, HOPE VI awarded 287 "Demolition" grants, for a total of over $395 million.[19] Yet from 1998-2006, HUD prepared and completed a total of only 21 EISs, for all projects and programs funded by the entire agency.[20] One can deduce from these numbers that very few – if any – of HUD's HOPE VI projects has ever been the subject of an EIS.

2. In New Orleans Alone, HUD is Currently Proposing to Demolish Four Major Historic Public Housing Projects Similar to St. Thomas, Without Preparing an EIS.

In addition to the national implications of this case, the issues raised in the petition will have a direct bearing on HUD's ongoing activities in the Gulf Coast in particular. For example, HUD is currently proposing to demolish four more major historic public housing complexes in New Orleans, all of which are either listed or eligible for listing on the National Register.[21] A total of about 5,000 residential

---

[17] *See* http://www.hud.gov/offices/pih/programs/ph/hope6/about/#3.

[18] *See* http://www.hud.gov/offices/pih/programs/ph/hope6/about/#5.

[19] *Id.*

[20] *See* http://www.nepa.gov/nepa/nepanet.htm.

[21] *See* http://www.hano.org/announcement.htm (Section 106 Consultation).

units are proposed for demolition – without preparation of an EIS – and the majority of the new housing units will be mixed-income and market rate.[22] While these massive projects will be using funding sources other than HOPE VI, HUD's avoidance of the EIS requirement is just as inappropriate as it is in the instant case.

## II. COMPLIANCE WITH NEPA IS CRUCIAL FOR HISTORIC PRESERVATION

NEPA plays a crucial role in the protection and preservation of our nation's historic resources. The Act clearly recognizes as part of NEPA's purpose the intent to "*preserve important historic, cultural*, and natural aspects of our national heritage," and to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings," 42 U.S.C. §§ 4331(b)(4), (b)(2) (emphasis added). The CEQ regulations further emphasize the inclusion of historic and cultural resources as an identified environmental value. *See* 40 C.F.R. §§ 1508.8(b), 1508.27(b)(8).[23] Thus, avoidance of the EIS requirement can lead to greater effects on historic resources, as well as impact the Section 106 process under the NHPA.

---

[22] The former tenants of these four housing projects have filed suit against HUD to challenge the demolition plans. *See Anderson v. Jackson*, 2007 WL 458232 (E.D. La. Feb. 6, 2007) (upholding a cause of action under § 3608 of the Fair Housing Act and the Due Process Clause).

[23] The CEQ regulations define "effects" or "impacts" to the environment to include "ecological . . . , aesthetic, *historic, cultural*, economic, social, or health" effects. 40 C.F.R. § 1508.8(b) (emphasis added). In defining "significantly," the regulations require consideration of "[t]he degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources," as one of ten factors to determine whether the "intensity" or "severity" of an action's effects are significant. *Id.* § 1508.27(b)(8).

### A. Avoidance of NEPA's EIS Requirement Undermines the NHPA.

The close relationship between NEPA and NHPA increases the possibility that misuse of NEPA's EA process can also negatively impact the application and analysis of NHPA. In turn, potential adverse effects to historic properties will likely be given little or cursory examination.

In 1966, Congress enacted the NHPA in recognition that "historic properties significant to the Nation's heritage are being lost or substantially altered," and that "the preservation of this irreplaceable heritage is in the public interest," 16 U.S.C. §§ 470(b)(3), 470(b)(4).[24] Section 106 of the NHPA is aimed at ensuring that federal agencies "take into account" the potential effects of their actions on historic properties. *Id.* § 470f.

Like NEPA, Section 106 of the NHPA is a strictly procedural requirement, which federal agencies must follow prior to approving any proposed action, but which often has the effect of encouraging agencies voluntarily to modify their programs and projects in a substantive way that will reduce harm to historic resources.[25] The fundamental goal of the Section 106 consultation process is to "seek ways to avoid, minimize or mitigate any adverse effects on historic properties." 36 C.F.R. § 800.1(a). Those measures are then typically reflected in a Memorandum of Agreement (MOA), which is binding and enforceable. *See* 16 U.S.C. § 470h-2(*l*); 36 C.F.R. § 800.6(c).

Both NEPA and the NHPA direct federal agencies to examine how a proposed action will impact environmental values, including historic resources, and "both are designed

---

[25] *See Vieux Carré Property Owners, Residents & Assoc's, Inc. v. Brown*, 948 F.2d 1436, 1447 (5th Cir. 1991) ("There is . . . a broad range of remedies that could conceivably emerge from NHPA review.").

to insure that the agency 'stop, look, and listen' before moving ahead." *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1981). "While the [NHPA] may seem to be no more than a 'command to consider,' . . . the language is mandatory and the scope is broad." *United States v. 162.20 Acres of Land, More or Less, Situated in Clay County, Miss.*, 639 F.2d 299, 302 (5th Cir. 1981).

Even though NEPA and the NHPA often apply together to a proposed federal action, "compliance with the NHPA . . . does not assure compliance with NEPA. Each mandates separate and distinct procedures, both of which must be complied with when historic buildings are affected." *Preservation Coalition, Inc.*, 667 F.2d at 859 (citing *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 444-45 (9th Cir. 1976), *cert. denied*, 429 U.S. 999 (1976)).[26] Thus, completion of the Section 106 process, even through the execution of an "MOA" with the ACHP,[27] as was done in this case, "does not relieve a federal agency of the duty of complying with the [EIS] requirement 'to the fullest extent possible.'" *Id.* at 859 (quoting 42 U.S.C. § 4332).

1. Overuse of EAs Can Harm the Public's Ability to Participate in the Section 106 Review Process.

The preparation of an EIS furthers NEPA's "action-forcing" procedures in two ways.[28] It ensures that the agency's decision will be informed by awareness and consideration of the environmental consequences, and it also "guarantees that the relevant information will be made

---

[26] Conversely, a discussion of historic resources in an EIS is not sufficient for compliance with NHPA Section 106. *See* ADVISORY COUNCIL ON HISTORIC PRESERVATION, FEDERAL HISTORIC PRESERVATION CASE LAW, 1966-1996: THIRTY YEARS OF THE NATIONAL HISTORIC PRESERVATION ACT 41. *See also* 16 U.S.C. § 470h-2(i).

[27] *See* 36 C.F.R. § 800.6(c).

[28] *Robertson*, 490 U.S. at 348-49 (citing 115 Cong. Rec. 40,416 (1969) (remarks of Sen. Jackson)).

available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson*, 490 U.S. at 349.

A key component of that "larger audience," *id.*, which an EIS helps to inform, includes the interested parties who participate in the consultation process required under Section 106 of the NHPA, 16 U.S.C. § 470f; *see also* 36 C.F.R. § 800.2.[29] Thus the failure to prepare an EIS – and confusion about whether and when an EIS may be required – has important implications for the Section 106 review process, and can be very prejudicial to its effectiveness.

The views of the public are considered "essential to informed Federal decisionmaking in the section 106 process." 36 C.F.R. § 800.2(d)(3). Yet, in contrast to the public notice and comment requirements for an EIS,[30] the Section 106 regulations do not include specific requirements regarding the timing or content of a public notice.[31] Instead, the regulations encourage agencies to use their NEPA procedures for the public participation component of Section 106 review. *See id.*

---

[29] These parties include the ACHP; the State and/or Tribal Historic Preservation Officer (SHPO/THPO); Indian Tribes; local governments; applicants for federal assistance, permits, licenses, or approvals; parties with a legal or economic relation to the undertaking or affected properties; and those concerned about the project's effects on historic properties. 36 C.F.R. § 800.2(b)-(c).

[30] CEQ regulations establish public notice requirements and timeframes for commenting on EISs, requiring publication in the Federal Register and established minimum time periods for commenting to the authorizing agency. *See* 40 C.F.R. §§ 1506.6, 1506.10.

[31] The Section 106 regulations state that "agency officials shall seek and consider the views of the public *in a manner that reflects the nature and complexity of the undertaking* and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking." 36 C.F.R. § 800.2(d)(1) (emphasis added). There is little guidance as to how or when agencies must provide such notice to the public.

However, unless the agency prepares an EIS, those NEPA procedures often require virtually nothing in terms of any meaningful opportunity for public involvement.[32] The public is less likely to know about an action at all when an EA is prepared, and as a result the agency remains largely unaccountable.[33] The CEQ itself has noted that EAs substantially limit public involvement, and "can create mistrust and add costs and time as projects are delayed by ensuing controversy and legal challenges." *CEQ Effectiveness Study, supra* note 6, at 19.

Since the Section 106 regulations rely directly on agency NEPA procedures for public involvement, e.g., 36 C.F.R. § 800.2(d)(3), the lack of meaningful public notice and comment requirements for EAs will often severely limit the public's opportunity for an effective role under Section 106. Thus, when agencies give NEPA short shrift by avoiding the preparation of EISs, public participation in the Section 106 process suffers.

This case is a classic example of how the "lowest common denominator" of EA public involvement procedures fatally infected the Section 106 consultation process. On Christmas Eve, 2002, HUD placed a legal notice in the local newspaper that the EA was available for comment until January 8, 2003. However, the consulting parties under Section 106 were not notified until more than two weeks later, on a Friday afternoon, just three business days before an extended comment deadline of January 15, 2003. When the National Trust requested that a portion of the EA be made available electronically or by fax – specifically, the

---

[32] *See* 40 C.F.R. §§ 1501.3, 1503.1, 1506.6; *Sierra Club v. Marsh*, 769 F.2d at 875 (citing *Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983)). *CEQ Effectiveness Study*, *supra* note 6, at 19-20 (*e.g.*, "little or no public involvement").

[33] When preparing an EA, the agency is only required to "involve environmental agencies, applicants, and the public, *to the extent practicable*." 40 C.F.R. § 1501.4(b) (emphasis added).

Draft MOA prepared under Section 106, and information regarding effects on historic properties – the agency flatly refused, stating that the six-volume EA was only available for in-person viewing in New Orleans during regular business hours. Clearly, HUD's actions thwarted the opportunity for meaningful public comment.

2. Reliance on EA Documentation Can Skew Agency Determinations under Section 106.

In addition to the reliance on agency NEPA procedures in the Section 106 regulations, Federal agencies also frequently rely on their NEPA documentation for purposes of conducting the NHPA's Section 106 review. Indeed, the Section 106 regulations provide a specific procedure for coordination between NEPA and Section 106 review, by setting out criteria that the NEPA documentation must satisfy in order to be eligible for the dual purpose of compliance with both NEPA and Section 106 of the NHPA. *See* 36 C.F.R. § 800.8(c)(1)(i)-(v). If the agency's NEPA documentation is inadequate or cursory, Section 106 consideration is likely to be inadequate as well. An EA is likely subject to "less rigorous scientific analysis, little or no public involvement, and consideration of fewer alternatives." *CEQ Effectiveness Study*, *supra* note 6, at 20.

3. Failure to Prepare an EIS Reduces the Scope of Analysis for Impacts on Historic Resources.

NEPA applies to a broader range of protected resources than Section 106 of the NHPA, and addresses a broader range of environmental impacts as well. Thus, neither the agency nor the public can rely on Section 106 to compensate for the failure to prepare an EIS when it comes to evaluating impacts on historic and cultural resources.

For example, Section 106 is only applicable to properties

that are listed or eligible for listing on the National Register of Historic Places. 16 U.S.C. §§ 470f, 470w(5); 36 C.F.R. § 800.16(*l*). NEPA, by contrast, also applies to properties of historic, cultural, and/or architectural significance that may not meet the strict qualifications for the National Register.[34] *See, e.g., Boston Waterfront Residents Ass'n, Inc. v. Romney*, 343 F. Supp. 89 (D. Mass. 1972) (NEPA applied even though buildings to be demolished were not listed on or determined eligible for the National Register). These may include historic properties designated as significant by state or local governments.

In addition, while Section 106 requires agencies to consider whether a particular project may lead to the demolition or neglect and deterioration of historic properties, 36 C.F.R. § 800.5(a)(2)(i), (vi), the kind of social and economic analysis called for under NEPA is often more suited to predicting these impacts.[35] For instance, the construction of big-box retail stores can lead to urban disinvestment in smaller businesses, which can translate directly into physical adverse effects on historic properties through reduced investments in maintenance, leading to deterioration.[36]

NEPA requires that EISs include an evaluation of impacts such as "growth inducing effects and other effects

---

[34] *See* 40 C.F.R. §§ 1508.27(b)(3), (b)(8) (an agency must consider the "unique characteristics of the geographic area such as proximity to historical or cultural resources" and "[t]he degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic places or may cause loss or destruction of significant scientific, cultural, or historical resources," as part of its assessment of intensity to determine whether an action will "significantly" affect the human environment).

[35] *See generally* 42 U.S.C. § 4332. In addition, the CEQ regulations require the study of effects that include "aesthetic, historic, cultural, economic, social, or health" impacts. 40 C.F.R. § 1508.8(b).

[36] *See generally* CONSTANCE E. BEAUMONT, HOW SUPERSTORE SPRAWL CAN HARM COMMUNITIES 1-19 (National Trust for Historic Preservation 1994).

related to induced changes in the pattern of land use, population density or growth rate." 40 C.F.R. § 1508.8(b).[37] This kind of analysis is directly relevant to assessing the potential for future speculative demolition, or neglect and deterioration, of historic properties resulting from an individual project.

In sum, a federal agency cannot simply assume that Section 106 review will cover all historic resources and all types of impacts. The agency will lose the opportunity for a broader look at how a proposed action may impact historic resources, if it attempts to bypass an EIS by straining to apply an EA.

### B. Avoidance of NEPA's EIS Requirement Often Leads to Inadequate Consideration of Specially Designated Historic Resources.

At the heart of this case is the incompatibility of the St. Thomas HOPE VI redevelopment project with the unique historic character of New Orleans, which is one of the most significant and distinctive historic cities in the nation. New Orleans has a total of 110 National Register listings, including 28 National Register Historic Districts,[38] and 25 National Historic Landmarks (NHLs).[39] These resources, important to the historic fabric of New Orleans, represent scarce historic properties, which are increasingly susceptible to damage, destruction, or loss.

The Section 106 review for the St. Thomas project identified 12 National Register Historic Districts, two NHL

---

[37] EISs must also include consideration of "[u]rban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures." 40 C.F.R. § 1502.16(g).

[38] *See* http://www.nationalregisterofhistoricplaces.com/LA/Orleans/-districts.html.

[39] *See* http://www.cr.nps.gov/nhl/designations/Lists/List07.pdf, at 34-35 (Apr. 2007).

Districts, and two individual NHLs as potentially affected by the project. *See* Appendix I to Petition for Certiorari. Indeed, the entire St. Thomas public housing development was itself historic (including more than 1500 residential units in 121 buildings); it was entirely within the Lower Garden District, which the NPS listed on the National Register in 1972, and the St. Thomas development was deemed as "contributing" to the significance of the historic district.

1. Importance of the *National Register of Historic Places*

When Congress enacted the NHPA in 1966, the Secretary of the Interior was authorized to expand and maintain the National Register of Historic Places to include "districts, sites, buildings, structures, and objects significant in American history architecture, archeology, engineering, and culture." 16 U.S.C. § 470a(a)(1)(A).[40] Congress also gave the Secretary the authority to promulgate and administer regulations in order to set criteria and procedures for the National Register. *Id.* §§ 470a(a)(1)(A), 470a(a)(2).

The National Register regulations established standard criteria for eligibility, 36 C.F.R. § 60.4, and created the "Keeper" of the National Register. *Id.* § 60.3(f); *see also Moody Hill Farms Ltd. Part. v. United States Dep't of the Interior*, 205 F.3d 554, 558 (2d Cir. 1999).

The National Register plays an integral role in ensuring that our Nation's significant historic resources are preserved and protected for future generations. Although National Register listing is honorific in nature, it serves as a unifying

---

[40] *See* http://www.cr.nps.gov/nr/research/index.htm. There are about 80,000 listings in the National Register of Historic Places. However, since many of these listings are historic districts, each of which includes a number of individual historic properties, the total number of properties included within the National Register is estimated at approximately 1.4 million. *Id.*

national standard for identifying and designating significant historic resources. Listing a property in the National Register does not prohibit its demolition or destruction. It should, however, merit consideration of the property under NEPA and Section 106 of the NHPA when a proposed federal action has the potential to adversely affect the property. In addition, the National Register is used by many state and local governments as a planning tool for identifying and protecting significant resources. *See* 36 C.F.R. § 60.2(a).

2. Importance of *National Historic Landmarks*

National Historic Landmarks represent the "cream of the crop" of our nation's heritage. In fact, fewer than 2,500 NHLs have been designated nationwide.[41] These highly significant properties are designated by the Secretary of the Interior, and represent historic "properties of exceptional value to the nation as a whole rather than to a particular State or locality." 36 C.F.R. § 65.2(a). As the National Park Service emphasized in this case, "[NHLs] are considered to be the most important historic properties in the Unites States. They are national treasures worthy of extra caution."[42]

Under Section 110(f) of the NHPA, which was added to the Act in 1980,[43] federal agencies have a substantially higher responsibility for protecting NHLs than they do for historic properties generally. Section 110(f) specifically requires that "[p]rior to the approval of any Federal undertaking which may directly and adversely affect any

---

[41] *See* http://www.cr.nps.gov/nhl/-designations/Lists/LIST07.pdf; http://www.cr.nps.gov/nhl.

[42] Petition for Writ of Certiorari at 92a (letter from Paul B. Hartwig, Associate Regional Director, National Park Service, to David G. Blick, Historic Preservation Specialist, HUD (Nov. 18, 2002)).

[43] *See* H.R. Rep. No. 1457, 96th Cong., 2d Sess. 38, *reprinted in* 1980 U.S.C.C.A.N. 6378, 6401 (Section 110(f) establishes a "higher standard of care to be exercised by Federal agencies" for projects that may affect NHLs).

[NHL], the head of the responsible Federal agency *shall, to the maximum extent possible*, undertake such planning and actions as may be necessary to *minimize harm to such landmark*." 16 U.S.C. § 470h-2(f) (emphasis added).

Satisfaction of the procedural requirements of Section 106 of the NHPA is not enough to meet the higher threshold required by Section 110(f) when NHL properties may be harmed by a proposed action. *See Coalition Against a Raised Expressway (CARE) v. Dole*, 17 Envtl. L. Rep. 20,466, 20,472 (S.D. Ala. Oct. 20, 1986), *aff'd*, 835 F.2d 803 (11th Cir. 1988); *see also* 36 C.F.R. § 800.10. However, the Section 106 process includes special provisions applicable to NHLs. *See, e.g.,* 36 C.F.R. § 800.10(c).

In this case, the St. Thomas development is immediately adjacent to two NHL churches (St. Alphonsus Church, and Sts. Mary's Assumption Church), and in close proximity to the NHL Garden District. *See* Petition for Writ of Certiorari, at App. 35a and App. I (map). Yet, despite the requirement in Section 110(f) to minimize harm to these properties "to the maximum extent possible," HUD did nothing to address the potential for harm to these highly significant resources. HUD's failure to consider these significant impacts was not only legally erroneous under NEPA, but it also prevented HUD from meeting its higher obligations under Section 110(f) of the NHPA.

## CONCLUSION

For the foregoing reasons, this Court should grant petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

PAUL W. EDMONDSON
Vice President & General Counsel
ELIZABETH S. MERRITT (*Counsel of Record*)
Deputy General Counsel
MICHAEL D. SMITH
Assistant General Counsel
National Trust for Historic Preservation
1785 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-6035

*Counsel for Amicus Curiae*

April 13, 2007