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September 5, 2023

Via E-Mail

Kym Hall, Director, National Capital Region
National Park Service
1100 Ohio Drive, SW
Washington, DC 20024

Teri Hawks Goodmann, Chair
National Capital Planning Commission
401 9th Street, NW, Suite 500N
Washington, DC 20004

Re: National Park Service Must Address All Impacts and Alternatives Before Starting Tidal Basin Seawall Project

Dear Director Hall and Chair Hawks Goodmann:

In light of the upcoming National Capital Planning Commission meeting on September 7, 2023, at which the National Park Service (“NPS”) will request final approval for the pending project: “Rehabilitation of the Tidal Basin and West Potomac Park Seawalls Project (“Project”), the FDR Memorial Legacy Committee (“FDR Committee”) submits this letter for your review, consideration and hopeful action.

As well documented, the FDR Committee has expressed its concern for the project. This letter seeks to enumerate once again those concerns in consideration of the potential violations of the National Environmental Protection Act (“NEPA”) and Administrative Procedure Act (“APA”).

A. NPS has not fully or adequately analyzed the ongoing and long-term flooding risk at and near the FDR Memorial, and throughout the rest of the Tidal Basin. Flooding is projected to increase in coming years due to sea level rise and intense rain and storm events. This will lead to heightened flooding risk within the rooms of the FDR Memorial as detailed in maps shared by Jim O’Donnell in past FDR Committee submissions. Presently, access to the FDR Memorial and enjoyment of its full cultural landscape, which includes access via the seawall, is regularly compromised by the significant overtopping of the seawall.

- B. NPS has not fully or adequately considered alternatives to the project as required by the National Environmental Protection Act (NEPA). The potential alternative of repairing and modifying the Tidal Basin Tidal Gates in coordination with the Army Corps of Engineers was not fully considered, nor were any best practices from experts in flood mitigation using tidal gate modifications explored.
- C. While the FDR Committee understands that NPS has the authority to determine project priorities, the selection of the area along Ohio Drive remains surprising for the following reasons:
 - i. Despite the reported high level of settlement and erosion of the seawall along Ohio Drive, the pedestrian walkway for Ohio Drive along the Potomac River is a paved surface on a berm several feet above the impacted seawall. Visitor access is not impeded by the failing walls in that region.
 - ii. There are areas of the Tidal Basin that are higher volume use areas, are potentially dangerous, pose accessibility challenges, and are visual eyesores that are not being treated such as the area near the paddle boats.
- D. This project is out of sequence and premature in seeking clearance before the development of a comprehensive plan for the Tidal Basin. The project fails to consider the Tidal Basin in its entirety and does not address the larger climate change challenges and solutions available for, and that will certainly impact, the full Tidal Basin area. As such, this project is a piecemeal approach to a larger issue of climate change and flooding and signals the potential segmentation of the protection and preservation of the Tidal Basin and the national treasures along its shoreline.

Background

The FDR Committee is a citizen-led organization with the mission to promote education about the FDR Memorial, improve inclusion and accessibility so all visitors can experience the Memorial, and preserve the Memorial for future generations. Given its roots, the FDR Committee is the leading advocate for full accessibility of the Tidal Basin area. The FDR Committee has held a strong and demonstrated interest in the proposed project since NPS announced it in July 2022, engaging in numerous advocacy efforts to ensure the proposed project would account for impacts to the FDR Memorial. The FDR Committee submitted comments during the scoping process and on the environmental assessment (“EA”) prepared pursuant to NEPA, provided testimony at the January 5, and June 1, 2023 National Capital Planning Commission hearings on the project, and submitted a letter to the Commission of Fine Arts for the February 16, 2023 meeting on the project. The FDR Committee is also a consulting party to the project for purposes of National Historic Preservation Act (“NHPA”) Section 106, and in that capacity requested and participated in several meetings with NPS to express its

concerns that the proposed project may exacerbate flooding at the FDR Memorial and request that NPS analyze those impacts and consider alternatives especially use of the Tidal Gates.

On May 22, 2023, NPS issued a Finding of No Significant Impact (“FONSI”), asserting the proposed project will not have a significant effect on the human environment and therefore does not require preparation of an Environmental Impact Statement (“EIS”) under NEPA. The FDR Committee believes that NPS’s EA/FONSI potentially does not comply with NEPA because NPS did not adequately analyze the effects to adjacent memorials along the Tidal Basin, consider alternatives that would satisfy the objectives of the project, or explain how proceeding prematurely now with repairs to only a portion of the Tidal Basin seawalls fits into or makes sense in light of the upcoming comprehensive plan for Tidal Basin seawall repairs.¹

The EA/FONSI also contravenes NEPA’s requirement to consider a reasonable range of alternatives. The evaluation of alternatives is the “heart” of a NEPA analysis, and agencies must “rigorously explore and objectively evaluate all reasonable alternatives.”² Whether an alternative is reasonable is governed by the “rule of reason.”³ Accordingly, agencies must discuss in detail those alternatives that are “objectively feasible as well as ‘reasonable in light of [the agency’s] objective.’”⁴ NPS selected the proposed action on the basis that it would provide “some flood protection.”⁵ The FDR Committee warned NPS of the potential flooding risk posed by the project’s design and proposed an alternative that would satisfy objective of the project while also protecting the FDR Memorial and other areas of the Tidal Basin. The FDR Committee proposed that NPS consider repairs to the Tidal Basin inlet gates to control flooding, whether as a supplement to the rehabilitation of the seawall as or an alternative.⁶ NPS dismissed the proposal on grounds that (1) the inlet gates were under the jurisdiction of the U.S. Army Corps of Engineers (Corps), (2) the Corps had already determined that any physical repairs would not be made for several years, and (3) the gates are not flood control mechanisms.⁷ None of these constitute a reasoned explanation for rejecting the FDR Committee’s proposed alternative. Agencies may not “disregard alternatives merely because they do not offer a complete solution to the problem” or are outside their jurisdiction.⁸ Neither the EA nor the FONSI provides any clear information that NPS made efforts to coordinate with or engage the Corps, outside of the permitting process, or on potentially repairing the inlet gates on a priority basis to support NPS’s efforts to control flooding. And NPS merely speculates that, because the inlet gates were present during past flood events, they could

¹ See www.nps.gov/news/item/205/ (“In the future the National Park Service will complete a comprehensive plan for East and West Potomac Parks, to include the Tidal Basin, that considers alternatives to rehabilitate the landscape, address sea level rise, and protect and enhance the setting while accommodating visitors.”).

² 40 C.F.R. § 1502.14.

³ *Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978).

⁴ *Flaherty v. Pritzker*, 195 F.Supp.3d 136, 150 (D.D.C. 2016) (citing *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999)).

⁵ See EA at 1.

⁶ See April 5, 2023 Comment Letter.

⁷ See FONSI, Appendix C – Response to Comments.

⁸ *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972); CEQ, Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981).

not possibly provide flood control.⁹ NPS's failure to provide a reasonable analysis of the feasibility of the FDR Committee's proposed alternative thus contradicts the intent of NEPA.

NPS's decision to select the Ohio Drive section for the project, and its rejection of solutions to mute the tide using the Tidal Gates, pose a potential violation to the APA. Under the APA, an agency's decision is arbitrary and capricious or otherwise not in accordance with law when it has "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency."¹⁰ For a decision to pass muster under the APA, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."¹¹

NPS should pause the current project until the following is completed:

1. NPS should accelerate its work on a comprehensive plan for the Tidal Basin so that this project can be considered in the totality of an overall plan. This comprehensive plan should be open for public involvement, review, and comment and provide a long-term, sustainable solution to the flooding risk of monuments and their seawalls along the Tidal Basin. This plan should include but not be limited to:
 - a. Detailed and meaningful analysis of the ongoing flooding impacts to the untreated areas of the Tidal Basin – with a 25- and 50-year projection.
 - b. Include best practice alternatives that would meet the protection and preservation of the entire Tidal Basin and all of its shoreline assets outside of just raising walls such as use of tidal gate modifications. Initial analysis on this was presented to NPS by the FDR Committee. (see attachment).
2. In the upcoming NCPD meeting on September 7, 2023, NPS should address how proceeding now to repair only a portion of the Tidal Basin seawalls fits into or makes sense in light of NPS's upcoming comprehensive plan for Tidal Basin seawall repairs.¹² NPS is aware that the proposed project could impact areas throughout the Tidal Basin,¹³ yet it has not explained to the public the drawbacks of proceeding with its piecemeal plan versus a more comprehensive approach to addressing seawall disrepair and flooding along the entire Tidal Basin. It is unclear how the proposed project would square with a comprehensive plan for minimizing flood risks to important national sites along the Tidal Basin. NPS appears to put the cart

⁹ See FONSI, Appendix C – Response to Comments.

¹⁰ *Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹¹ *Id.*

¹² *Supra.*

¹³ See EA at 15 (stating that "to mitigate adverse effects that cannot be avoided or minimized, the NPS would complete a comprehensive plan for the Tidal Basin that would include alternatives to rehabilitate the cultural landscape and protect/enhance area aquatic environment").

before the horse, which could potentially foreclose reasonable options for the projected comprehensive plan.

Furthermore, in the upcoming meeting, NPS should be required to present meaningful analysis of alternatives explored for this project that would satisfy the objectives of the project while also providing long term protection of the FDR Memorial and other memorials along the Tidal Basin. This project as currently described is to provide a 100-year solution for the repaired walls. The projection of 100 years for the FDR Memorial and the rest of the untreated Tidal Basin is dire. This focus is needed given that NEPA mandates agencies to analyze the environmental impacts of “major federal actions” to ensure that “important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.”¹⁴ Because NEPA prohibits uninformed decision-making,¹⁵ agencies must consider the reasonably foreseeable direct and indirect effects¹⁶ of proposed actions and a reasonable range of alternatives.¹⁷ NPS failed to do that here.

3. In addition, we ask for the following information to be made publicly available by October 6, 2023:
 - a. Documentation outlining the rationale for the prioritization of the Ohio Drive seawall repair.
 - b. Documentation of the alternatives explored for this project as required by NEPA.
 - c. Copies of the contracts entered into for this project.

It is the position of the FDR Committee that NPS’s decision to proceed with the proposed project at this time is ill-advised and potentially skirts important legal requirements. The FDR Committee calls on NCPC to use its regulatory oversight in its upcoming meeting to meet the requests outlined in points 1-3 above.

Sincerely,
Members of the FDR Memorial Legacy Committee Board of Directors and Advisory Board

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Mary Kay Turner

¹⁴ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

¹⁵ *Id.* at 351.

¹⁶ See 40 C.F.R. § 1508.8 (direct effects are caused by the action and occur at the same time and place, and indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable).

¹⁷ See 40 C.F.R. § 1502.14.

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