



March 10, 2020

The Council on Environmental Quality
722 Jackson Place, NW
Washington, DC 20503

Re: Docket No. CEQ-2019-0003, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

On behalf of the more than 8,000 members of the American Road & Transportation Builders Association (ARTBA), I respectfully offer our support for the Council on Environmental Quality's (CEQ) recent proposed rulemaking on updating the regulations for implementing the National Environmental Policy Act (NEPA).

ARTBA's membership includes private and public-sector members that are involved in the planning, designing, construction and maintenance of the nation's roadways, waterways, bridges, ports, airports, rail and transit systems. Our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

ARTBA members seek to build transportation improvement projects as safely, efficiently and cost-effectively as possible. In doing so, they can provide first-hand, real-world knowledge about how NEPA shapes the process of project planning and delivery.

Introduction

ARTBA supports CEQ's proposed NEPA modernization. These reforms would focus NEPA on its original intent – assessing environmental impacts of major projects and actions supported by the federal government – instead of being used as a mechanism for causing delays and uncertainty in planning and building projects, including those in the transportation sector.

The NEPA law first took effect 50 years ago. A major purpose of NEPA, then as now, was facilitating public awareness of and feedback on the potential environmental impacts of federally-supported projects. In 1970, communications, technology and public participation were in the virtual Stone Age compared to the present day. By contrast, in less than a minute today, a citizen-activist can locate and download informative publications such as CEQ's *A Citizen's Guide to the NEPA: Having Your Voice Heard*. A modernized NEPA rule should reflect the current ubiquity of information and ease of public participation in the policymaking process, which should contribute to a much more efficient review process.

While NEPA is an essential tool for protecting the environment and ensuring meaningful feedback about projects, it has not been fundamentally improved in over three decades. Adversaries have weaponized NEPA's outdated review procedures to delay – often for years –

or to completely derail transportation improvement projects. Needless delays and uncertainties can add significant costs to these important projects, at a time when funding is constrained nationwide.

The proposed changes to NEPA will result in a more expeditious, while still thorough, review process, without impacting existing environmental standards. The revisions to NEPA will not undermine environmental stewardship in planning transportation projects, which will still need to comply with the federal Clean Air Act, Clean Water Act, Endangered Species Act and other statutes. Moreover, NEPA modernization will not—and should not—guarantee favorable decisions on projects, but will greatly improve the NEPA process’ reliability and timeline, which is critical to ARTBA members and their work.

The Need for NEPA Modernization

The rationale for the NEPA statute remains sound. As it relates to projects planned and built by ARTBA members, NEPA is intended to ensure a balance between meeting our nation’s transportation needs and protecting vital natural resources. These objectives do not have to conflict. As described below, Congress has enacted numerous streamlining provisions for transportation projects, enabling fulfillment of regulatory requirements in a smarter and more efficient manner. Moreover, many projects incorporate significant and meaningful environmental mitigation features. In short, this rulemaking and ARTBA’s comments are not intended to undermine or otherwise question the purpose of NEPA itself.

In reality, though, the application of NEPA is often a major burden for those planning and building transportation improvements. According to a report by the U.S. Government Accountability Office prior to the enactment of the Moving Ahead for Progress in the 21st Century (MAP-21) Act of 2012, as many as 200 major steps were involved in developing a transportation project, from the identification of the project need to the start of construction. The same report also shows it typically takes between nine and 19 years to plan, secure approval of, and construct a new major federal-aid highway project. This process involves dozens of overlapping state and federal laws, including NEPA, state NEPA equivalents, wetland permits, endangered species implementation, and clean air conformity.

Project delays resulting from the current NEPA process will often lead to demonstrable and significant costs to the taxpayers. This is simply common sense, based on continuing increases in labor and materials costs, among other factors. According to a 2016 report by the Texas A&M Transportation Institute based on example projects, delays were estimated to cost \$87,000 per month for a small project (e.g., reconstruction of a rural road), \$420,000 per month for a medium-sized project (e.g., widening of a semi-rural highway) and \$1.3 million per month for a large project (e.g. reconstruction of a highway in a large metro area)¹.

¹ “Assessing the Costs Attributed to Project Delay During Project Pre-Construction Stages,” Texas A&M Transportation Institute, March 2016, available at: <https://static.tti.tamu.edu/tti.tamu.edu/documents/0-6806-FY15-WR3.pdf>.

The current NEPA process can also increase the price tag for projects in a different way. In considering larger, complex projects for which the NEPA timeline is uncertain, potential bidders may incorporate the potential cost of NEPA delays into their bids (a form of “pricing risk”), or choose to forego the project entirely, thus limiting competition.

Currently, it takes an average of five to seven years to complete the environmental review process for a new federal-aid project. While that is unacceptable enough, there are also multiple examples of projects with significantly longer delays.

In Denver, the I-70 widening project – a \$1.2 billion effort to alleviate severe traffic congestion through the expansion of 12 miles of highway – has become an infamous illustration of the need for NEPA reforms. The NEPA process for this stretch of highway took over 13 years to complete, involved over 200 hundred public meetings, and set a record for length—almost 16,000 pages. During this extended NEPA period, the Colorado Department of Transportation (CDOT) spent \$40 million on studies, and over \$30 million on viaduct repairs that should have been spent on new construction. At the end of the NEPA process, despite CDOT’s publicly making 148 different environmental mitigation commitments at an additional taxpayer cost of \$50 million, the project was still the subject of five separate legal actions. This I-70 story provides the very definition of a broken NEPA process.

In the Washington, D.C. area, the Purple Line light-rail project, which was formally proposed in 2003, was delayed for 14 years because of NEPA-related issues. This environmentally-beneficial project will provide transit service for an estimated 70,000 daily riders while removing 17,000 vehicles from local roads.

Finally, the St. Croix River Crossing project – connecting Houlton, Wisconsin, and Stillwater, Minnesota – required a 2012 act of Congress to proceed after being delayed for 40 years. The replacement of the congested, accident-prone and deteriorating two-lane Stillwater Lift Bridge had been identified as a regional priority since the 1970s.

Congress Wants Transportation Projects Delivered More Efficiently

On a bipartisan basis, Congress has made significant progress in streamlining the permitting and approval process for transportation improvement projects. These have included key provisions in the past four federal surface transportation reauthorization laws: the Transportation Equity Act for the 21st Century (TEA-21) of 1998; the Safe, Accountable, Flexible Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) of 2005; MAP-21; and, most recently, the Fixing America’s Surface Transportation (FAST) Act of 2015. Each of these measures shows Congress’ intent to reduce delay in the delivery of transportation projects without sacrificing regulatory safeguards.

Congress first addressed this issue in 1998 with the passage of TEA-21, focusing on establishing concurrent project reviews by different federal agencies. The concept was that multiple reviews done at the same time, as opposed to one after the other, would reduce the amount of overall time it took to get a project approved. While this improvement was a step in the right

direction, it had limited impact, as concurrent reviews were discretionary, rather than mandatory. Thus, it was up to the federal agencies involved in a project whether or not to take advantage of this new benefit.

In 2005, SAFETEA-LU sought to further reform the project delivery process by establishing a wider range of new ways to deliver transportation improvements. Specifically, SAFETEA-LU gave greater authority to the U.S. Department of Transportation (U.S. DOT) as “lead agency” during the project delivery process, limited the window during which lawsuits could be filed against projects, and reformed the process for determining impacts on historical sites and wildlife refuges.

The clear lesson between the 1998 and 2005 surface transportation bills was that simply giving federal agencies the ability to complete regulatory reviews in a more efficient manner in no way guarantees that authority would be utilized. As such, SAFETEA-LU took more aggressive steps to influence non-transportation agencies into making transportation project reviews a higher priority.

While SAFETEA-LU’s environmental streamlining provisions were a significant improvement from those enacted in TEA-21, the transportation project delivery process remained at an unacceptable pace. As such, both MAP-21 and the FAST Act took project delivery reform even further, with more tools for reducing delay. In addition to building upon the concept of “lead agency” begun in SAFETEA-LU, the two most recent laws included specific deadlines for permitting decisions as well as a scheduling mechanism to ensure environmental impact statements (EISs) do not take longer than four years.

In short, over more than two decades, Congress’ intent has been clear. However, while Congress has provided potentially-useful tools to streamline the review of projects, NEPA and other administrative processes remain barriers to efficient project planning and delivery. This underscores the need for CEQ’s reform proposal.

“One Federal Decision”

One of the priorities of CEQ’s NEPA proposal is implementation of President Trump’s Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," also referred to as "One Federal Decision" (OFD). Building OFD into the CEQ proposal will reduce unnecessary delay by aligning federal environmental reviews among multiple agencies and mandating a two-year average for completion of the environmental review and approval process. It should also be noted that OFD is a part of “America’s Transportation Infrastructure Act” (ATIA), a surface transportation reauthorization measure unanimously passed by the Senate Environment and Public Works Committee last year.

Currently, there is no set time limit for NEPA decisions. When project planners begin a NEPA review, they have no sense of when the process is going to be completed. Implementation of

OFD would add predictability to the NEPA process and allow project planners to more accurately establish schedules for environmental review.

Perhaps as important as the two-year time limit, OFD would also require a lead agency for every infrastructure project and allows it to set schedules for other participating agencies during the project delivery process.

Designating a lead agency for each infrastructure project addresses one of the basic problems in the project delivery process— multiple agencies evaluating the impacts of the project as required by NEPA, each according to its own schedule. While it would seem that the NEPA process would establish a uniform set of regulations and submittal documents nationwide, this has not been the case. For example, the United States Environmental Protection Agency (EPA), Army Corps of Engineers (Corps), Fish and Wildlife Service (FWS) and their companion state agencies each require an independent review and approval process, forcing separate reviews of separate regulations, and unique determinations of key benchmark issues—such as the purpose and needs of a project— and requiring planners to answer multiple requests for additional information. Also, each of these agencies issues approvals according to independent schedules.

Designation of a lead agency in accordance with OFD would allow U.S. DOT to serve as the focal point of the review process, as opposed to being a peer on equal footing with non-transportation agencies. Further, setting a mandatory schedule for companion agencies will add a needed sense of predictability to the project review and approval process.

Page Limits on NEPA Documents

ARTBA supports CEQ's proposed page limit thresholds on the length of EISs and environmental assessments (EAs). Setting page limits would compel authors of these documents to write in clear and more concise terms, for the benefit of related government agencies and the community. Additionally, it would reduce the delay associated with new transportation construction projects by dramatically cutting down the time needed to complete the final document.

Currently, the EIS process for a new highway project is a multi-year endeavor. A major reason for this is the length of the EIS itself, which can literally span multiple volumes totaling thousands of pages under the current NEPA regulations.

The EIS is meant as a resource for affected members of the community to gain information about the proposed project. In practice, an overly-voluminous EIS can be impossible for many lawyers to understand, much less community members without any prior training in the fields of law or environmental consulting. One factor behind lengthy EISs is the fear of litigation on the part of project developers. In an effort to anticipate issues which could be used to delay a project through litigation, project developers have reportedly attempted to "bulletproof" their EISs. This results in a document which attempts to address every possible contingency or scenario to arise in connection with a proposed project, no matter the relevance or how likely it

is to be a factor in environmental decision making. The end product of this process is an EIS which is completely unwieldy and does not serve its intended purpose.

CEQ's recommendation would help alleviate these concerns. ARTBA also appreciates CEQ's allowing flexibility for more complex projects by adding the option for EISs of "unusual scope or complexity." Such flexibility allows for the fact that every transportation construction project is unique, and some are, inevitably, more complicated than others.

Allowing the Use of Existing Agency Documents to Satisfy NEPA

ARTBA supports CEQ's proposal to allow existing agency documents to serve as a "functional equivalent" to NEPA requirements if the data is sufficient.

For transportation projects, an extensive amount of information is gathered during the planning process, which often occurs prior to the actual triggering of NEPA requirements. Allowing information gathered during the planning process, to the extent it is still current and relevant, to satisfy NEPA requirements would limit duplicative reviews and reduce the amount of delay in the NEPA process. If current information is already available as the result of compliance with transportation planning requirements, that information should satisfy NEPA regulations as well. This would increase efficiency and maintain environmental protection. Duplicative reviews serve no redeeming purpose as part of the NEPA process, and should be eliminated wherever possible.

NEPA and Greenhouse Gas (GHG) Emissions

CEQ has asked commenters to address "whether it should codify any aspects of its proposed GHG guidance in the regulation and, if so, how it should address them in the regulation."

NEPA was designed to address the direct impacts of federal actions. For transportation projects, this means tangible effects on the environment, such as removal of wetlands and impacts to wildlife. Congress enacted NEPA in 1969—long before GHGs and climate change were contemplated from a regulatory perspective. The statute does not contain the proper regulatory mechanism for assessing GHGs and climate change. Moreover, climate change impacts are distinct from the impacts traditionally addressed by NEPA analyses. They are more speculative, harder to quantify, and may not be realized until long after a project is completed.

Expanding the scope of NEPA to cover GHGs and the effects of climate change could counteract all of the aforementioned efforts to reduce the amount of time for the review and approval process. With this in mind, ARTBA is supportive of the approach taken by the CEQ guidance, which states "[a]gencies are not required to quantify effects where information necessary for quantification is unavailable, not of high quality, or the complexity of identifying emissions would make quantification overly speculative." ARTBA also agrees with CEQ that "[a]gencies preparing NEPA analyses need not give greater consideration to potential effects from GHG emissions than to other potential effects on the human environment."

As agencies do consider greenhouse gas emissions for transportation projects, ARTBA recommends these analyses take into account both the potential benefits and adverse impacts of the project in question. For example, a complete analysis should consider a reduction in GHGs resulting from the extent to which a transportation improvement alleviates traffic congestion. Emissions from vehicles stuck in traffic are much greater than those on roads where traffic is free flowing.

Additionally, any proposed NEPA GHG and climate change analysis should be limited to the project itself. NEPA was not meant to ascertain the impacts of what may or may not happen once a project is completed. Thus, if a transportation improvement is reviewed under NEPA for GHG and climate change impacts, the analysis should focus only on the actual project and not attempt to include subsequent development which may or may not occur once the project is complete.

Conclusion

ARTBA commends the CEQ for advancing a comprehensive and thoughtful NEPA modernization proposal. The nation's transportation infrastructure needs are too pressing, and funding is too constrained, to continue wasting time and taxpayer dollars on unnecessary project delays resulting from the current NEPA process. Everyone involved in this process can continue to serve as good environmental stewards while achieving the efficiencies envisioned in CEQ's proposal. NEPA modernization is welcome and long overdue.

ARTBA looks forward to continuing to work with CEQ on these efforts.

Sincerely,



David Bauer
President & CEO