



November 22, 2021

Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Re: Docket No. CEQ-2021-0002; National Environmental Policy Act Implementing Regulations Revisions

Today I respectfully offer comments on the Oct. 7 proposed rulemaking by the Council on Environmental Quality (CEQ) regarding the National Environmental Policy Act (NEPA) Implementing Regulations Revisions.

Introduction

ARTBA opposes CEQ's proposed NEPA rule revisions. The proposal directly conflicts with key provisions in the Infrastructure Investment and Jobs Act (IIJA), which President Biden signed into law on Nov. 15. The new law includes reforms – fashioned on a bipartisan basis – which set a two-year goal for the completion of NEPA reviews. Congress included this section to alleviate regulatory confusion, project delays and bureaucratically-induced costs long associated with NEPA's implementation. Unfortunately, rather than functioning as a means of carrying out Congress' intent in this regard, CEQ's proposed rule will actually undermine it.

The NEPA Process Is Broken

Currently, it takes an average of five to seven years to complete the environmental review process for a new federal-aid transportation project. While this time frame is unacceptable enough, ARTBA has also previously provided CEQ with multiple examples of projects taking up to 14 years for review.

According to a 2012 report by the U.S. Government Accountability Office¹, as many as 200 major steps are required to plan and develop a transportation project, from the identification of the project need to the start of construction. The same report also described how 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 compliance, 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 simple logic, based on continuing increases in labor

¹ U.S. Government Accountability Office, "Highway Projects: Some Federal and State Practices to Expedite Completion Show Promise," July 10, 2012, available at <https://www.gao.gov/products/gao-12-593>.

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)².

The 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.

These are among the compelling reasons why CEQ sought to reform NEPA implementation administratively in 2020 and Congress did so legislatively in the IIJA.

CEQ’s Proposed Rule Conflicts with Recent Legislative and Administrative Improvements

In coming together to pass and sign the IIJA into law, the Biden administration and Congress committed to an historic investment in our nation’s infrastructure, intended to drive associated economic benefits across all communities. A key part of this effort must be ensuring infrastructure investment gets to those communities in a timely fashion. 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.

The IIJA builds on this rationale by seeking to complete the NEPA process for a project within two years³. Unfortunately, CEQ’s proposed rule makes this two-year goal all but impossible to attain by returning to the very same policies that have resulted in the aforementioned super-sized NEPA reviews.

While CEQ states in the proposal that “environmental reviews should be efficient and effective,” it would reverse the agency’s 2020 administrative reforms toward this objective (which have, in fact, never been fully implemented), in addition to conflicting with the IIJA’s legislative intent as described above.

Specifically, CEQ would undo recent beneficial changes made to the “purpose and need” and “effect” analysis sections of NEPA by removing sensible limitations on what can be considered under both aspects of NEPA review. ARTBA agrees with CEQ that “[w]hile a purpose and need statement that is too narrow is inconsistent with NEPA’s requirement to consider alternatives

² “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>.

³ Sec. 11301, Codification of One Federal Decision

to the proposed action, so too is a boundless set of alternatives.” However, in its proposal, CEQ rolls back modifications made in 2020 which were designed to prevent consideration of “boundless” alternatives. Additionally, CEQ offers no additional reforms which would help to qualify the types of alternatives that can be offered to a proposed project, simply returning to the pre-2020 regulations.

Similarly, CEQ would rescind regulatory reforms made to the types of project impacts which must be analyzed under NEPA. In 2020, CEQ clarified that NEPA reviews must only analyze those effects directly related, as well as those that are “reasonably foreseeable and have a reasonably close causal relationship” to the project in question. This revision improved the NEPA process by preventing reviews from considering impacts which bear little or no relationship to the project being considered.

In proposing to reverse the improvements made in 2020 and undermine the clear intent of the IIJA, CEQ would preserve the frustrations of NEPA implementation which have featured excessive litigation over projects and procedural minutiae with little or no meaningful relationship to the identification, analysis, and disclosure of the environmental effects of federal actions. The public bears these costs in the form of delayed projects, higher costs, and regulatory uncertainty. Federal and state agencies also shoulder the costs of unnecessarily lengthy reviews and documentation, which strain limited agency resources.

Conclusion

CEQ’s proposed NEPA revisions are an unfortunate anachronism. They are, at the very least, in direct conflict with the recent, generational commitment to improving our nation’s transportation infrastructure found in the IIJA. President Biden and Congress have sent a clear signal to “build.” The IIJA’s resulting economic benefits would be severely undermined by returning to archaic NEPA provisions which delay that building without demonstrable environmental benefits.

Accordingly, ARTBA urges CEQ to focus instead on implementing the relevant provisions of the IIJA as President Biden and Congress intended them.

We appreciate your review of these comments, and those in which ARTBA is participating through a coalition of trade associations, and which we incorporate here by reference.

Thank you for considering the viewpoint of the transportation construction industry on this important policy matter. ARTBA is available to provide more information as needed.

Sincerely,

A handwritten signature in black ink, appearing to read "David Bauer".

David Bauer
President & CEO