



September 29, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Brenda Mallory  
Chair  
Council on Environmental Quality  
730 Jackson Place, NW  
Washington, DC 20503

**RE: Notice of Proposed Rulemaking: National Environmental Policy Act Implementing Regulations Revisions Phase 2 (Docket No.: CEQ–2023–0003)**

Dear Chair Mallory:

The American Road & Transportation Builders Association (ARTBA) respectfully offers the following comments on the proposed National Environmental Policy Act (NEPA) Phase 2 rule from the Council on Environmental Quality (CEQ).<sup>1</sup>

ARTBA members strongly believe transportation improvements and environmental stewardship are not mutually exclusive. However, a needlessly convoluted and elongated NEPA process can impede necessary transportation infrastructure solutions and undermine their associated economic benefits, especially as the transportation construction industry and its partners utilize record federal dollars from the Infrastructure Investment and Jobs Act (IIJA). Besides doing little to address these concerns, the proposed rule does not comport with relevant provisions in the Fiscal Responsibility Act, which President Biden signed on June 3. Accordingly, CEQ should rescind this latest rule and meaningfully reduce the regulatory burden caused by an outdated and often dysfunctional NEPA process.

### **Background**

ARTBA represents approximately 8,000 members from both the public and private sectors of the transportation construction industry. Our members plan, design, build and maintain maintenance transportation assets across all modes. They work tirelessly to do so safely, efficiently and cost-effectively.

Currently, it takes an average of five to seven years to complete the environmental review process for a new federal-aid transportation project. In some instances, it has taken as long as 14 years. In previous comments, ARTBA noted there are as many as 200 major steps required to plan and

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<sup>1</sup> National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924, (July 31, 2023).



develop a transportation project, from the identification of the need to the start of construction.<sup>2</sup> Delays due to onerous regulatory requirements carry significant costs, ultimately borne by the taxpayers funding them.

CEQ's proposal eliminates references to the procedural nature of NEPA reviews.<sup>3</sup> The rule requires federal agencies to identify an "environmentally preferable" alternative and elevate this alternative above others.<sup>4</sup> At the same time, CEQ would allow projects with perceived long term environmental benefits (e.g., those believed to carry favorable environmental justice and climate change outcomes) to forego the review process altogether.<sup>5</sup> Finally, CEQ's rule would compel federal agencies to mandate mitigation measures beyond those required by other environmental statutes.<sup>6</sup>

CEQ also invites comments on whether to codify its 2023 Greenhouse Gas (GHG) guidance and proposes to incorporate several of its provisions in this rulemaking.<sup>7</sup> CEQ previously accepted comments on an interim GHG guidance.<sup>8</sup> ARTBA and many others filed comments on the guidance asking that it be rescinded due to vague and subjective requirements.<sup>9</sup> Although CEQ has not yet responded to those comments, it now seeks to codify that guidance here.

### **ARTBA's Comments on the Proposed Rule**

I. CEQ's proposal is outside the bounds of the NEPA statute and must be rescinded.

A. *NEPA is a procedural statute that is not meant to drive any particular outcome.*

CEQ's proposed rule strikes references to the procedural nature of the NEPA statute and inserts prescriptive requirements into the regulations. As an example, it dictates federal agencies to identify and promote an "environmentally preferable" alternative which is contrary to the intended purpose of the statute. NEPA reviews require consideration of alternatives that are economically and technically feasible. The statute asks agencies to evaluate multiple factors without elevating any one over others. In contrast, CEQ proposes a full NEPA shortcut for projects indulging current

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<sup>2</sup> See Comment from the American Road & Transportation Builders Association, filed on November 22, 2021, available at <https://www.artba.org/wp-content/uploads/2022/01/ARTBA-Comments-Re-Docket-No-CEQ-2021-0002.pdf>. Citing 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>.

<sup>3</sup> 88 Fed. Reg. 49924 at 49966-68.

<sup>4</sup> *Id.* at 49977.

<sup>5</sup> *Id.* at 49936.

<sup>6</sup> *Id.* at 49936.

<sup>7</sup> *Id.* at 49945.

<sup>8</sup> See National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, (January 9, 2023).

<sup>9</sup> See Comments from the American Road & Transportation Builders Association, filed on April 10, 2023, available at <https://www.artba.org/wp-content/uploads/2023/04/ARTBA-Comments-Re-Docket-No-CEQ-2022-0005.pdf>.



politically-driven environmental policy priorities.<sup>10</sup> CEQ's proposal undermines the very intent of NEPA, which is to provide a clear and comprehensive picture of a particular project's impacts. CEQ's rule also strikes common sense language in favor of ambiguous, subjective terminology. The debasement of this rule would also negatively affect the delegation of NEPA responsibilities to certain states, widely considered a successful development in recent years. ARTBA members – including numerous transportation agencies – in those states have expressed concern that the proposal's lack of clarity would hinder their continued compliance with NEPA requirements.

*B. The rule is unenforceable and would result in costly litigation and project delays.*

Currently, federal agencies utilize the NEPA process to consider climate effects that have a “close-causal relationship” between the proposed project and the anticipated impacts. CEQ's rule evaluates a broad scope of impacts that may or may not have a close relationship to the proposal. It fast-tracks projects with perceived climate benefits while potentially delaying those that have perceived adverse climate impacts.

CEQ's proposal also mandates that federal agencies require mitigation. Not only is this mandate unenforceable, but it is also duplicative and wholly unnecessary. Federal environmental permitting reviews already require mitigation (e.g., under the Clean Water Act, and the Endangered Species Act). Forcing agencies to consider these additional factors within their NEPA reviews would further complicate and delay what is already an untenable process. The new Fiscal Responsibility Act statutorily requires CEQ to enact regulations shortening the length of pages and amount of time to conduct these reviews. This rule would do the exact opposite.

Furthermore, CEQ is not a regulatory agency and has no mechanism to enforce these new mandates. Instead, federal agencies and project sponsors would become entangled in new litigation any time an outside party contends – justifiably or not – that a NEPA review does not meet CEQ's new requirements. The historic federal investment levels in the IJIA would be matched by new tools used by would-be litigants to delay or derail worthy projects, curtailing their economic benefits and wasting government resources.

II. CEQ must account for the real-world impacts of delays in its proposal.

In previous comments, ARTBA noted the demonstrable economic impacts of transportation improvement delays.<sup>11</sup> One ARTBA member recently shared that for a large-scale project, every

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<sup>10</sup> *Id.*

<sup>11</sup> 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).



month of delay costs nearly 80 million dollars. State departments of transportation note that procurement cannot take place until the NEPA review is completed. Litigation further lengthens that timeline. These delays – or even their threat – can increase costs in two ways: 1) the cost of labor and materials tends to rise over time, and 2) contractors usually “price” risk into their bids, so many would account for and quantify these potential NEPA-related delays accordingly. CEQ does not acknowledge any of these direct economic impacts within its proposal. Nor does it address the enhancements to safety, a key outcome of transportation improvement projects, that are deferred by NEPA-driven delays.

### Conclusion

The purpose and spirit of NEPA is to ensure that agencies consider all impacts of a particular project and convey this information to the public. ARTBA members are committed to ensuring transparency and engagement with all parties to minimize the burdens of the transportation improvements they deliver. Members are engaging in new and innovative ways to provide this information, such as e-NEPA and other digital mechanisms to streamline and make information more accessible.

CEQ’s proposal would make these outcomes impossible. It would force federal agencies to insert duplicative and unnecessary analyses into their NEPA reviews. The rule attempts to tip the scale in favor of specific policy outcomes. CEQ’s proposal is beyond the statutory authority of NEPA and would directly undermine the effectiveness and impact of the bipartisan infrastructure law. The better approach would be to rescind the current proposal and pursue meaningful improvements to the NEPA process, as is provided in the Fiscal Responsibility Act.

ARTBA appreciates your review of these comments. Should you have any questions or require further information please contact Prianka Sharma, Vice President and Counsel for Regulatory Affairs by email at [psharma@artba.org](mailto:psharma@artba.org).

Sincerely,

*Prianka Sharma*

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