



AMERICAN PUBLIC WORKS ASSOCIATION

*Your Comprehensive
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September 28, 2023

Submitted via <https://www.regulations.gov>

Amy Coyle
Deputy General Counsel
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Proposed Rule, Council on Environmental Quality, “National Environmental Policy Act Implementing Regulations Revisions Phase 2,” 88 Fed. Reg. 49924 (July 31, 2023)

Dear Ms. Coyle:

On behalf of the more than 32,000 members of the American Public Works Association (APWA), we appreciate the opportunity to submit comments to the Council on Environmental Quality (CEQ) on procedural provisions to the National Environmental Policy Act (NEPA). APWA includes not only personnel from local, county, state, and federal agencies, but also private sector personnel with direct oversight and involvement in the environmental issues for their respective organizations. The responsibilities of our nation’s public works professionals include the planning, design, construction, and maintenance of infrastructure and they must balance those tasks with protecting the environment and public health. Our members take these duties very seriously and are constantly looking for avenues to submit constructive input as to how we can achieve a balance between sound guidelines while reducing regulatory burdens that may negatively impact valuable projects.

Our nation’s infrastructure needs updating and maintenance, and in some cases full replacement. Roads, bridges, drinking water, wastewater, emergency management, sanitation, cybersecurity and much more need investment right now. While the federal government does appropriate funds for projects like these across the country and our members are grateful for additional resources through the Infrastructure Investment and Jobs Act/Bipartisan Infrastructure Law, some communities are deciding against applying for federal funds due to the onerous nature of accompanying requirements, including NEPA. As a result, many communities seek out other sources of financing in order to avoid costly permitting processes that come with federal dollars. While some communities that cannot pursue other financing options rely on federal funding and end up spending a large portion of the project dollars on permitting requirements rather than on infrastructure improvement. In the worst cases, some communities must defer until infrastructure fails. We have seen this occur across the country and the consequences for people and the environment can be disastrous. Some communities are not upgrading and maintaining infrastructure as needed, and this leads to a lower quality of life for residents, as well as lower environmental protections and increased public health risks.

As you know, NEPA is the regulatory framework for protecting America’s environment while allowing vital infrastructure projects to be undertaken. Signed into law in 1970, the 53 years in which NEPA has been active have

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seen environmental protection become a prime consideration in all stages of infrastructure projects. Like any policy that has been in place for over five decades, NEPA needs modernizing. It is important to consider efficiencies that can be helpful in reducing unnecessary red tape and associated costs, while also protecting the environment.

Data from 2010 to 2018 showed the average (i.e., mean) time to complete an EIS, from notice of intent (NOI) to record of decision (ROD), was 4.5 years and the median was 3.5 years (Figure 1). One quarter of the EISs took less than 2.2 years, and one quarter took more than 6 years. The period from publication of an NOI to the notice of availability of the draft EIS took on average 58% of the total time. Preparing the final EIS, including addressing comments received on the draft EIS, took on average 32% of the total time. The period from the final EIS to publication of the ROD took on average 9% of the total time.

These figures and their growth in size over the past several decades can be attributed to increasing administrative burdens, which can overwhelm public works professionals in carrying out their responsibilities especially for limited staff in small and disadvantaged communities. APWA places high priority on respecting state and local control regarding infrastructure projects and has strongly encouraged the federal government and industry to coordinate with state and local governments to enhance the project process.

APWA has engaged with CEQ over many years and been supportive of efforts under administrations of both parties to develop a more predictable, transparent, and timely federal review and authorization process for delivering infrastructure projects. APWA supported streamlining undertaken initially in the Fixing America's Surface Transportation (FAST) Act and later extending those efforts to projects beyond the surface transportation sector. Consequently, we are grateful for the implementation of provisions in the Fiscal Responsibility Act, particularly:

- Expanding use of a lead federal agency to develop a joint review schedule and preparation of a single environmental document and joint record of decision for projects that require multi-agency reviews.
- The adoption of page and time limits with required “starting points” for deadlines, the requirement to consult with the applicant on deadline extensions and the right of action allowing project sponsors to petition courts for relief if an agency fails to meet deadlines.
- The requirement for analysis of the effects of a no-action alternative, including adverse environmental effects.
- Facilitating the ability of agencies to utilize Categorical Exclusions (CEs) established by other agencies.
 - We are pleased to see the U.S. Department of Transportation (DOT) has already taken advantage of this and adopted the Department of Energy's (DOE's) Electric Vehicle Charging Stations CE for use in DOT programs and funding opportunities.
- Clarifying no new research is required when making a threshold determination for environmental reviews.

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Additionally, APWA supports analysis of cumulative effects of the environmental impacts of infrastructure projects and NEPA requires the review process to look at any proposed action not in isolation but within the context of past, present, and “reasonably foreseeable” future actions. APWA members are always conscious of the resiliency of infrastructure. In order to comprehensively view the resiliency of an infrastructure project in the context of extreme weather events, changing demographics, and increasing use of technology, a cumulative review is necessary.

In terms of cumulative reviews, infrastructure itself is being built and rebuilt on a consistent basis. We see this fact played out in the aftermath of natural disasters. In areas that are prone to such disasters, public works professionals strive to build and care for infrastructure that will withstand the next disaster. However, we have concerns regarding the following provisions particularly what sort of metrics and thresholds will be used to measure compliance, the burden such reporting may create, and how that will impact the accessibility and distribution of federal funds along with the risk of litigation:

- Requires environmental documents to include consideration of any reasonably foreseeable climate change-related effects. There were multiple sections that raised questions:
 - “Where appropriate, agencies shall use projections when evaluating the reasonably foreseeable effects, including climate change-related effects. Such projections may employ mathematical or other models that project a range of possible future outcomes, so long as agencies disclose the relevant assumptions or limitations.”
 - How complex will these models be, to what degree will they be adaptable to different projects, and how much of the burden will fall on public works professionals to provide data for input?
 - “For example, an agency should consider short-term construction-related GHG emissions from a renewable energy project in light of long-term reductions in GHG emissions when determining the overall intensity of effects. In this situation, the agency could reasonably determine that the climate effects of the proposed action would not be significantly adverse, and therefore an EIS would not be required.”
 - Would such logic also apply to infrastructure projects such as a mass transit project not requiring an EIS due to future reductions in emissions? Conversely, would this put certain road projects more at risk of triggering an EIS due to not only emissions from construction, but also future usage by vehicles?
 - “Climate projections can vary based on different factors and assumptions such as geography, location, and existing and future GHG emissions.”
 - Related to the previous questions, would certain areas be at a disadvantage for transportation funds due to their rural nature and current or projected composition of vehicles on the road?
- Encourages agencies to consider the characteristics of the relevant geographical area such as proximity to unique or sensitive resources or vulnerable communities and requires environmental justice considerations.

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- “Finally, CEQ proposes to add paragraph (a)(14) to provide that agencies must discuss the potential for disproportionate and adverse health and environmental effects on communities with environmental justice concerns. The addition of this paragraph would clarify that EISs generally must include an environmental justice analysis to ensure that agency actions do not unintentionally impose disproportionate and adverse effects on these communities.”
 - This provision would seem to increase the chance of triggering an EIS though it is unclear at what point this would occur and may deter some infrastructure improvements.
- The removal of exhaustion provisions implemented in 2020, which established comments not submitted within the comment period are considered forfeited and without their inclusion could increase litigation.
- An agency must identify a preferred alternative and an environmentally preferred alternative, which could result in litigation if the environmentally preferred alternative isn’t also the preferred alternative of a locality and could disproportionately impact certain public works projects particularly for certain localities.
 - “Identify the environmentally preferable alternative or alternatives. The environmentally preferable alternative will best promote the national environmental policy expressed in section 101 of NEPA by maximizing environmental benefits, such as addressing climate change-related effects or disproportionate and adverse effects on communities with environmental justice concerns; protecting, preserving, or enhancing historic, cultural, Tribal, and natural resources, including rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders; or causing the least damage to the biological and physical environment. The environmentally preferable alternative may be the proposed action, the no action alternative, or a reasonable alternative.”
- The creation of a new Public Engagement Officer at agencies, who would facilitate community engagement across the agency and, where appropriate, the provision of technical assistance to communities. The purpose of this role was not part of the agreement reached by Congress and there seems to be a lack of clarity as to whether such an individual would help mediate towards a resolution that would allow for the more efficient completion of more projects or potentially the exact opposite effect.
- Clarification that agencies can prepare a mitigated Finding of No Significant Impact (FONSI) if the action will include mitigation to avoid the significant effects that would otherwise occur or minimize or compensate for them to the point that the effects are not significant. Depending on how this is applied, this could result in more EAs rather than EISs, but more clarity on mitigation requirements going forward would be helpful.
- Expansion from effects on “critical habitats” to all habitats of endangered or threatened species, which would seem to risk significantly reducing areas available for infrastructure projects.

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We are concerned about ambiguity and subjectiveness, while potentially beneficial by providing flexibility for a regulatory agency in implementation that may also lead to further litigation. We want to ensure any update to NEPA produces a more efficient process and worry if implemented improperly changes could negate the benefits of the other provisions. APWA would also like to recommend and reaffirm additional changes within the NEPA process that would allow infrastructure projects to be delivered faster to our nation's citizens:

- In accordance with directives related to EO 13807 "One Federal Decision," CEQ should endeavor to ensure NEPA rules are uniform for all federal agencies. Agencies with different requirements under NEPA result in unnecessary delays due to project sponsors having to meet different standards.
- Reduce duplicative reporting and paperwork requirements by allowing state or local standards to substitute for federal standards when those standards are at least equally stringent if not more.
- Place greater limits on judicial review to expedite legal proceedings.
- Allow for right-of-way acquisition prior to completion of NEPA requirements specifically for projects that can demonstrate no significant adverse impact.
- NEPA language could be clarified so that state and local projects do not become subject to federal laws and regulations until the project has been approved to receive federal funds, not retroactive to past project phases.
- An exemption for small projects with levels for "minimal federal funding or involvement" set for projects that receive less than \$5 million in federal funding, or projects that use federal funds for less than 25% of overall project costs.

APWA members pride themselves on being committed to public service by profession, and being a resource for federal initiatives is just another way we work to protect our communities. We look forward to continuing to work with the CEQ to share information with our membership as well as provide input on behalf of public works practitioners across the country. If APWA may be of further assistance, please contact Ryan McManus, APWA Government Affairs Manager, at rmcmanus@apwa.org or 202-218-6727. Thank you for your time and consideration of these comments.

Sincerely,

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