



March 10, 2020

The Honorable Mary Neumayr
Chairman
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Docket ID No. CEQ-2019-0003

Dear Chairman Neumayr:

On behalf of the nation's mayors and cities, we appreciate the opportunity to comment on the Council on Environmental Quality's (CEQ) proposed rule to update the regulations implementing the procedural provisions of the National Environmental Policy Act (NEPA). The proposed rule aims to modernize and clarify the regulations to facilitate more efficient, effective and timely NEPA reviews by federal agencies.

Local elected officials are significant stewards of the environment, and our members take this responsibility seriously. Our cities spend over \$125 billion annually to build, operate, and maintain water and wastewater systems, as well as invest in robust recycling and solid waste management systems. These investments protect public health and the environment and are in line with NEPA's goals of protecting environmental quality.

NEPA requires federal agencies to consider the environmental impacts of proposed projects—from construction of roads, bridges, highways, transmission lines, conventional and renewable energy projects, broadband deployment and water infrastructure to management of activities on federal lands, such as grazing, forest management, wildfire protection and environmental restoration. NEPA has encouraged the federal government to consider alternatives and mitigation options to proposed federal projects, often resulting in a better balance between economic development and environmental protection. Importantly, the federal government should not circumvent their own NEPA process for non life-threatening projects.

Local governments often find the NEPA process to be cumbersome and inefficient. Administrative burdens alone can be overwhelming for local governments whose resources are limited. Therefore, in general, we support efforts to modernize and streamline the NEPA process, which has not been comprehensively updated in over 40 years.

In recent years, steps have been taken toward streamlining for infrastructure projects. For example, the current transportation authorization bill (Fixing America's Surface Transportation Act or FAST Act) includes a number of changes to federal law intended to streamline the environmental review process for infrastructure projects across the federal government. Specifically, the FAST Act created a new governance structure, set of procedures, and funding authorities to improve the federal environmental review and authorization process. The FAST Act also established the Permitting Council as an oversight council to oversee the cross-agency federal environmental review and authorization process. While the FAST Act did not change the NEPA review process, many of the law's streamline and agency coordination changes have not yet been implemented. We are hopeful that once fully implemented, these FAST Act changes will help move projects along more efficiently and effectively. We strongly encourage that any changes to the NEPA process reflect these changes and not provide any contradictory or conflicting processes.

The proposed rule is in response to Executive Order 13807, which established a One Federal Decision policy, including a two-year goal for completing environmental reviews for major infrastructure projects, and directed CEQ to consider revisions to modernize its regulations. As such, the proposed rule seeks to reduce unnecessary paperwork and delays, and to promote better decision-making consistent with NEPA's statutory requirements. With a focus on four key areas, the proposed rule would codify many pieces of existing CEQ guidance that agencies have been following for years, but that were not part of the formal process and were not assembled in one place.

Specifically, we support project streamlining proposals that will result in timely decisions, thereby reducing the overall cost of projects and burden on local governments. These include:

Time and page limits

Establishing time limits on decisions and page limits for environmental impact statements and environmental assessments will help simplify the process and ensure that projects are reviewed within a reasonable timeframe. As outlined below in our recommendations, we ask CEQ to clarify that if a decision is not made within the given time limit, that it does not mean an automatic yes to the project, but rather that the agency will grant more time for the review. While a shortened timeframe is a good goal, it should not circumvent environmental protection.

One federal decision/lead agency and concurrent reviews

Our members are very supportive of the proposal's recommendation to identify a single federal agency to be the lead agency and for reviews to be done concurrently as opposed to sequentially. There is much evidence that demonstrates that costly delays have occurred due to multiple federal agencies doing their project reviews only after another federal agency has completed their work. Additionally, if the agencies come to different conclusions, that uncertainty leads to further review and delays that can stall projects and add to the cost of the project. Having a lead federal agency that coordinates these efforts and is ultimately responsible for

making the decision, conducting concurrent reviews, and recording a single decision will streamline the review process and reduce the overall cost for the projects.

Allow state environmental review to substitute for federal review when more stringent

Projects are often delayed because they must go through a state environmental review, followed by a federal environmental review. Not only are these review processes often duplicative, but in some cases state environmental reviews are more stringent than federal. This duplicative process adds to project cost and is an inefficient use of local resources. We support enhancing coordination between local, state and federal governments and allowing state environmental reviews to substitute for federal review in cases where the state process is at least as stringent as the federal process.

Local governments as a “cooperating agency”

As intergovernmental partners cities serve as both co-regulators and implementers of federal policies and programs. When all levels of government can work together toward a common goal, better outcomes will be achieved for our citizens and our communities. Therefore, we are pleased to see that the proposed rule would standardize the qualifications for cooperating agencies, which currently vary widely across and within the federal government. This change will result in better coordination and involvement from local governments early in the NEPA process.

Excluding projects of a certain size

The challenges associated with the NEPA process are even more evident for small communities, which also tend to have smaller projects given the size of the community. Therefore, we support excluding non-federal projects, particularly those with minimal federal funding or involvement, from the NEPA process.

Concerns

We are concerned, however, about provisions in the proposed rule that would undermine the intent of NEPA, create uncertainty for local governments, and open the door to litigation against local governments. Specifically, we are concerned about (1) the removal of the requirement to analyze cumulative impacts; (2) the removal of the definition of “significance;” and (3) regulatory uncertainty relating to the transition period while federal agencies are updating their guidance documents to reflect the new CEQ rule.

First, the removal of the requirement to analyze cumulative impacts is potentially inconsistent with the NEPA statute and case law interpreting it. We believe that this proposed change is likely to result in litigation, which will inevitably create uncertainty in the application of the new CEQ rule. The practical effect will be delay in the implementation of the rule, which will impede our ability to secure necessary approval for municipal projects. Moreover, as extreme weather events become more severe and more frequent and are impacting communities across the country, it is critical that local, state and federal infrastructure projects take into consideration the effects that climate change will have on the life of the project. This will not only help to save

lives, but will also save taxpayer dollars, build more resilient infrastructure, and strengthen the economy.

Second, the proposal to remove the definition of “significance” appears likely to create issues for municipalities, as well as for federal agencies that have existing guidance and procedures that currently define “significance.” The effect of removing this definition in the NEPA context seems likely to result in uncertainty and delay. Removal of the definition will also cast doubt on established methodologies for examining impacts of municipal projects, with the same likely result.

Third, we are concerned about the regulatory status of local government projects while federal agencies are updating their guidance to comport with the new CEQ rule, which in the past has often taken years. New Section 1506.12 and the effective date language needs to provide clear direction on how NEPA will be implemented in the transition period between the adoption of the new rule and the 12-month period provided for agencies to update their respective regulations. For example, what rules will be applied to projects already underway when the new CEQ rule is finalized? What rules will apply to projects that begin after the new rule is finalized but before the agency guidance is updated? What happens if an agency takes more than 12 months to update its guidance? Does Executive Order 13891 apply such that agencies must go through formal notice and comment rulemaking to update their NEPA guidance?

Recommendations

Ensure proper staffing and funding at agencies to fulfill timely reviews

The NEPA review process is routinely criticized for the length of time it takes to get approval for a project. While there are important and cost-savings opportunities that moving efficiently and quickly through the NEPA process will offer, the federal government must ensure that adequate staffing and resources are available to properly handle the workload. It is unclear if the current level of workforce responsible for NEPA reviews is adequate to meet the current needs, much less than meet the new expedited time guidelines sought in the proposed rule. We suggest that CEQ conduct a historical analysis to determine the staffing levels and other resources needed, and for those needs to be met.

Maintain adequate local government input and transparency

One of the twin aims of NEPA is to inform the public about agency decision-making. This element of NEPA is as important to local governments as the consideration of environmental impacts. Local governments and the citizens we serve need to be appropriately informed about and engaged with federal agency decision making that may affect our communities.

Clarify that if time expires on decision, and there is no decision, then that does not mean the project is approved

As mentioned above, while we are supportive of a more streamlined approach with specified timeframes for decisions to be made, we would strongly suggest that the timeframes are goals and not deadlines that if not met, automatically result in a project being approved. It may be

unrealistic to expect a one or two year project review, especially given the concerns of inadequate staffing and resources. We are concerned that if this is not specified in the final rule, projects that are not approved within the timeframe, will automatically move forward which can have detrimental environmental impacts. This clarification needs to be included in the final rule.

Include climate change considerations in NEPA review process

As communities across the country are seeing the effects of climate change, these impacts should be taken into account for all major infrastructure projects. The proposed rule would remove the terms “direct,” “indirect,” and “cumulative” from the definition of “effects,” providing that effects must instead be “reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives.” The requirement that there be a “reasonably close causal relationship” could limit analysis and disclosure of certain indirect impacts, such as: upstream and downstream pollution (both air and water, other non-point pollution sources). Additionally, specifying that the effects “may” include effects that are later in time or further removed in distance leaves the evaluation of indirect effects as optional rather than mandatory. As a result, both provisions could be used to justify the omission of climate change-related considerations from NEPA reviews. We recommend no change to the definition of “effects.”

Clarify what “Senior Agency Official” can extend the decision time

We strongly suggest that CEQ more clearly define what is meant by a “Senior Agency Official.” Given the importance of that role in extending a decision timeframe, we think it is vitally important to clarify who within a particular agency would qualify to make that decision.

In closing, thank you for considering the local government perspective as you move forward with these proposed revisions. Working together we can achieve our mutual goals of environmental protection and improved community development. If you have any questions, don’t hesitate to contact our staff: Judy Sheahan (USCM) at 202-861-6775 or jsheahan@usmayors.org and Carolyn Berndt (NLC) at 202-626-3101 or berndt@nlc.org.

Sincerely,



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