

Business Roundtable Comments on Council on Environmental Quality (CEQ) Notice of Proposed Rulemaking

“Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act”

Docket ID No. CEQ-2019-0003¹

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Introduction & Summary

Business Roundtable CEOs have long advocated for changes to the federal permitting process to “simplify, streamline and accelerate America’s permitting process with the goal of encouraging large-scale capital investments in the U.S. economy while maintaining the nation’s commitments to health, safety and soundness.”² Business Roundtable has also strongly supported efforts for legislative reform of the federal permitting process for major infrastructure projects, and was a key proponent of FAST-41.³ These efforts have been consistently bipartisan – as they should be.

At the outset, it is worth emphasizing that the National Environmental Policy Act (NEPA) is a purely procedural statute. It requires an agency to do two things when reviewing a project for approval: (1) prepare a detailed statement of the environmental effects of “major Federal actions significantly affecting the quality of the human environment;” and (2) disclose the results of that analysis to the public.⁴

Unfortunately, over the past three decades, those analyses have increasingly taken longer and become more complex. Not only have average page lengths of Environmental Impact Statements (EIS) increased far beyond the 150 pages specified in current CEQ regulations,⁵ but the time to complete these reviews has inexorably increased. It has been estimated that every year, completion of an EIS takes a month longer than it did the previous year.⁶ As noted by CEQ in its database of EIS timelines from 2010-2017, the average EIS completion time across all agencies from a notice of intent to prepare an EIS to the publication of a record of decision

¹ 85 Fed. Reg. 1684 (January 10, 2020).

² See Business Roundtable, *Permitting Jobs and Business Investment: Streamlining the Federal Permitting Process* (April 2012) at 3, available at

https://s3.amazonaws.com/brt.org/archive/2012_04_23_BRT_Permitting_Jobs_and_Business_Investment.pdf.

³ 42 U.S.C. § 4370m *et. seq.* (2015).

⁴ *Id.* § 4332(2)(C).

⁵ See 40 C.F.R. § 1502.7.

⁶ Howard, Phillip K. “*Two Years Not Ten Years: Redesigning Infrastructure Approvals*” (September 2015), at 13, citing Piet DeWitt and Carole A. DeWitt, “How Long Does It Take to Prepare an Environmental Impact Statement?,” *Environmental Practice* 10, no. 4 (December 2008), p. 164. This report, produced by Common Good, is available at <https://www.commongood.org/wp-content/uploads/2017/07/2YearsNot10Years.pdf>.

averaged 4.5 years.⁷ Federal Highway Administration projects averaged over 7 years⁸ and, as CEQ has noted, these times may exclude substantial pre-filing work on the part of applicants and agencies.⁹ There is no obvious reason why these reviews cannot be conducted more expeditiously without sacrificing the reasoned analysis required under NEPA.¹⁰

Nor must the goal of updating the NEPA rules be an inherently partisan process, or one that will conceal climate or other impacts. Indeed, the risks associated with our changing climate are a principal reason why we need a more expeditious, streamlined and predictable permitting process. Addressing climate-related risks will require the U.S. to transition to a lower carbon economy, which will entail massive public and private sector investment in new infrastructure, not only to produce and more efficiently utilize energy, including renewable energy,¹¹ but also transport both energy and captured carbon to where it will be needed or stored. New investments will also be needed to harden existing infrastructure and to build in increased resilience to account for rising sea levels and more severe weather events. Virtually all of this infrastructure will require federal permits and some level of review under NEPA. This review needs to be as efficient and expeditious as possible if we are to successfully address the climate challenge, as well as the challenges we face associated with repairing or replacing already deficient infrastructure that both parties agree needs to be upgraded to serve a growing economy.¹²

Given the central role that NEPA plays in the federal permitting process, any effort to accelerate that process must address the procedural steps agencies take in their required NEPA reviews. For this reason, Business Roundtable filed detailed comments on the Advance Notice of

⁷ <https://www.whitehouse.gov/wp-content/uploads/2017/11/CEQ-EIS-Timelines-Report.pdf>, at 7.

⁸ *Id.* at 10.

⁹ *Id.* at 2.

¹⁰ Early results from the Federal Permitting Improvement Steering Council indicate that meaningful reductions in permitting time can be accomplished through better coordination; earlier scoping; and establishing timelines for key milestones. See *testimony of Alex Herrgott, Executive Director of the Federal Permitting Improvement Steering Council* before the Senate Homeland Security and Governmental Affairs Committee, Permanent Subcommittee on Investigations (April 30, 2019) available at:

<https://www.hsgac.senate.gov/imo/media/doc/Herrgott%20Testimony1.pdf>.

¹¹ A large and increasing number of qualifying projects under FAST-41 are renewables projects or electric transmission lines designed to connect renewable resources with load. A list of FAST-41 projects is available on the Federal Permitting Improvement Steering Council website: https://www.permits.performance.gov/projects/fast-41-covered?title=&term_node_tid_depth=All&term_node_tid_depth_1=All&field_permitting_project_adpoint_administrative_area=All&field_project_status_target_id=All&field_eo_mip_value=All&page=1.

¹² “House Democrats unveil \$760 billion infrastructure package – and call on Trump for bipartisan push,” Washington Post (Jan. 29, 2020), available at

https://www.washingtonpost.com/local/trafficandcommuting/house-democrats-unveil-760-billion-infrastructure-package--and-call-on-trump-for-bipartisan-push/2020/01/29/2656e2d0-42ce-11ea-b5fc-eefa848cde99_story;

“Building a Stronger America: President Donald J. Trump’s American Infrastructure Initiative,” (Feb. 12, 2018), available at <https://www.whitehouse.gov/briefings-statements/building-stronger-america-president-donald-j-trumps-american-infrastructure-initiative/>.

Proposed Rulemaking (ANPRM) that CEQ published in 2018.¹³ We are pleased to see many of our suggestions contained in the current proposed rule.

As the proposed rule recognizes, implementation of NEPA has often lost sight of the statute's fundamental objective, which is to provide useful information to decision-makers contemplating major federal actions significantly affecting the quality of the human environment. A group led by David Hayes, Deputy Secretary of the Interior under the Obama Administration, has noted that "[c]ontractors typically take a formulaic approach that can produce documents of extraordinary length and complexity, leading to legitimate questions about whether massive EISs are providing useful information that is, in fact, being reviewed and weighed by decision-makers."¹⁴

An unfocused NEPA process that analyzes numerous alternatives, many of which are not economically or technically feasible, not only adds complexity, cost and time to reviews, but also complicates decision making.

We particularly commend and support:

- CEQ's codification in its regulations of the significant bi-partisan legislative reforms that have been enacted over the past decade, including the FAST Act¹⁵ for surface transportation projects, the Water Resources Development Act (WRDA)¹⁶ for federally-funded water projects, and FAST-41 for certain major "covered projects."¹⁷
- Incorporating into the NEPA regulations the presumptive timelines, coordination of reviews and dispute resolution mechanism established in Executive Order No. 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects."¹⁸ As we noted in our comments on CEQ's ANPRM, these statutes and executive branch actions share many elements in common, elements that have now become widely recognized as permitting best practices. Establishment of detailed schedules, shared with all parties, that identify critical path items is especially essential to expediting reviews.

¹³ Business Roundtable Comments on CEQ Advance Notice of Proposed Rulemaking, "Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act," available at <https://www.regulations.gov/document?D=CEQ-2018-0001-11957>.

¹⁴ Stanford Law School Policy Lab Class 413P, "Comments and Recommendations on NEPA Reform for the White House Council on Environmental Quality" (July 15, 2014) (Hayes Report), at 5. Available at <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/04/NEPA-Submittal-to-CEQ-FINAL-5.pdf>.

¹⁵ Pub. L. No. 114-94.

¹⁶ The Water Resources Development Act of 2007, Pub. L. No. 110-114. Project acceleration provisions were substantially amended by the Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, § 1005(a)(1). Provisions are codified at 33 U.S.C. 2348.

¹⁷ 42 U.S.C. § 4370m *et. seq.* (2015). *See also* the Sandy Recovery Improvement Act of 2013 (Division B of Pub. L. No. 113-2) where Congress in § 1106 directed the President to establish an expedited and unified environmental and historical preservation review process for disaster recovery actions.

¹⁸ 82 Fed. Reg. 40463 (August 24, 2017).

- Reforms aimed at increasing utilization of categorical exclusions where appropriate.

By updating its NEPA regulations in these ways, CEQ can take a major step toward modernizing and clarifying its regulations to promote more efficient, effective and timely project reviews, while remaining faithful to the core requirements of NEPA to protect the environment.

Statement of Interest

Business Roundtable exclusively represents chief executive officers (CEOs) of America’s leading companies. These CEO members lead companies with more than 15 million employees and more than \$7 trillion in annual revenues. As major employers in every state, Business Roundtable CEOs take seriously the responsibility of creating quality jobs with good wages. These leaders join with communities, workers and policymakers to build a better future for the nation and its people. For more than 45 years, the membership of Business Roundtable has applied CEO expertise to the major issues facing the nation. Through research and advocacy, Business Roundtable promotes policies that spur job creation, improve U.S. competitiveness and strengthen the economy.

Comments

As CEQ has noted in its proposed rule, the NEPA regulations have not been comprehensively updated since their promulgation in 1978. It is difficult to imagine that any set of rules largely unchanged for more than forty years does not warrant a comprehensive re-look. Indeed, experience over those four decades, as well as the advance of technology over that period, has made clear that these regulations are outdated and do not provide the clarity needed for the efficient administration of the underlying statute.¹⁹ Business Roundtable strongly supports CEQ’s efforts to comprehensively rewrite its existing NEPA regulations in order to accommodate current and future technology, clarify important terms to codify key court decisions and guidance, and incorporate best permitting practices enacted in bi-partisan legislative enactments and recent Executive Orders. Efficient administration should be the goal of all governments and the proposed regulations take a large step toward achieving this goal.

CEQ specifically requested comment on a number of proposed changes. To the extent Business Roundtable has a view, ours follow, keyed to the renumbered sections of the proposed rule:

§ 1508.1(q) - Definition of “Major Federal Action”

NEPA speaks of “major Federal actions significantly affecting the quality of the human environment.”²⁰ One of the canons of statutory interpretation is that no word should be surplusage – every word should add some sort of meaning to the others. As CEQ explains, the NEPA rules have historically interpreted “major” to mean “significantly affecting the

¹⁹ See also the Hayes Report at 6 (“[T]he NEPA framework can and should be modified to account for both the experiences of the past forty years and recent innovations and updated technologies.”).

²⁰ 42 U.S.C. § 4332(2)(C).

environment” – that is, the rules have made “major” redundant. Now, CEQ is proposing that Congress must have meant for the word to mean something additional: i.e., that the action in question is subject to “major” federal control and responsibility. Thus, actions with only “minimal federal involvement or funding” would be excluded. The Roundtable generally agrees with this interpretation. A small or tangential federal role should not necessarily bring an entire project under NEPA scrutiny.

The Roundtable also agrees that failures to act should not be considered “actions.” Outside of omissions in statements, where the failure to say something may render what is said misleading, the law has generally treated actions and failures to act differently. That is the most reasonable way to approach “action” in the NEPA context. Agencies have innumerable opportunities to act, and the only manageable standard is to limit NEPA to cases where agencies do in fact take some action.

§ 1501.4 – Categorical Exclusions

The Roundtable recommends that agencies develop categorical exclusions (CEs) to the broadest extent permissible under the law. CEs offer the single greatest potential under NEPA for administering agencies to use their resources efficiently. CEQ has long directed agencies to evaluate the potential environmental impacts of routine activities, such as maintenance, using the CE process when the type or nature of the activity, individually and cumulatively, would have minimal impacts to the natural and human environment.²¹ Business Roundtable also supports the idea of CEs that can be utilized at the department level or across the executive branch, which would allow agencies with similar or overlapping jurisdictional authorities to utilize any applicable CE. We encourage CEQ to issue guidance to agencies on how to ensure that a CE from another agency fulfills an agency’s legal requirements.

§ 1501.10 – Time Limits

Business Roundtable supports CEQ’s proposed presumptive time limits of one year for an environmental assessment (EA) and two years for an EIS. As CEQ notes, its 1981 “Forty Most Asked Questions” guidance says an EIS should generally not require more than *one* year. Business Roundtable does not believe that the proposed time limits will result in inadequate EAs and EISs. For one thing, CEQ proposes that the senior agency official at each agency could extend a deadline if he or she did so in writing. No agency wants to have its EISs overturned in court because of the adverse impacts on both the agency and the project proponent from the resulting increased expense and project delays. Thus, we expect that agencies will grant themselves extensions wherever they think they need to do so in order to

²¹ See 40 C.F.R. § 1500.5(k); see also Memorandum to the Heads of Executive Departments and Agencies from Nancy Sutley re “Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act” (Nov. 23, 2010), 75 Fed. Reg. 75628 (Dec. 6, 2010).

conduct a thorough analysis. But the presumptive limit will impose at least some discipline – and create an expectation of dispatch – where neither exists now.

The Roundtable also urges CEQ to direct agencies to shorten the timeframes for agency reviews, both within the lead federal agency and among cooperating agencies. A substantial portion of EIS schedules is currently allocated to agency reviews. Consolidating and streamlining these review periods would create a more efficient process.

§ 1501.7(g) – Single EA/FONSI or EIS/ROD

The requirement of a single decision document flows from the “One Federal Decision” component of E.O. 13807. CEQ has proposed to require a single decision document “where practicable.” That hardly seems unreasonable. In fact, Business Roundtable suggests that CEQ strengthen this requirement. For example, the rules could establish the presumption of a single decision document unless the senior agency official of the lead agency decides otherwise in writing, similar to the exception to the 1 to 2-year time limits.

§ 1500.3(d) - No Presumptions of Irreparable Harm or Entitlement to Injunctive Relief

Business Roundtable supports CEQ’s proposal to codify the holdings of recent Supreme Court decisions and eliminate the potential for lawsuits to disrupt projects without first meeting the traditional four-part test for obtaining an injunction.

§ 1507.2 – Agency Capability to Comply

Business Roundtable agrees that “each agency sh[ould] be capable (in terms of personnel and other resources) of complying with the requirements of NEPA.” We also support CEQ’s statement in the preamble that “senior agency officials should ensure that agency staff have the resources and competencies necessary to produce timely, concise, and effective environmental documents.”²² A crucial element of determining the adequacy of resources, and of identifying savings opportunities, is for agencies to track their costs of preparing EISs. CEQ discusses this idea in the preamble, but has only implicitly proposed to require it (*see* proposed § 1502.11 (g)). Business Roundtable recommends that CEQ expressly require cost tracking.

Other Proposed Efficiencies

The Roundtable also supports the following provisions, all of which are designed to simplify the EIS process and make it more efficient:

- § 1501.9 – *Scoping*. The proposal starts “scoping” where “pre-scoping” happens now, before the Notice of Intent. The proposal also adds detail to this section to “ensure that agencies conduct the scoping process in a manner that facilitates implementation of the [One Federal Decision] policy for multi-agency actions, including by proactively soliciting comments

²² 85 Fed. Reg. 1700.

on alternatives, impacts, and relevant information to better inform agency decision making.”²³ The bulk of the Hayes Report’s recommendations involve making the scoping process more “directive” and “discipline[d].”²⁴ We strongly support these changes.

- § 1502.2 – *Implementation*. The first two subsections of this section provide that EISs should be analytic rather than encyclopedic, and discuss issues only in proportion to their significance. CEQ should develop additional guidance to explain more clearly the level of detail necessary for NEPA analysis. Often, agencies require NEPA analyses to be much more granular than necessary for the decision they are intended to support. This burdens the process, delays the schedule, and adds to the excessive length of the document. Applicants have often been required to develop highly refined engineering. It is premature, excessively costly, and unreasonable to expect applicants to invest in refined engineering before a preferred alternative is selected and before major permits are secured.

- § 1502.9(d) - *Supplemental EISs*. The proposal would only require these where the action in question has not been completed and (i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. The proposal also would allow an agency to prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so. Business Roundtable supports these changes as useful clarifications to the regulations. In particular, we urge CEQ to:

- Confirm that these changes provide agencies with enough flexibility to prepare a Supplemental EIS in those situations where the need for additional analysis becomes apparent during the final review even in situations where a significant effect has been previously identified and analyzed.
- Allow applicants to make minor changes and optimizations, without triggering the need for new analysis. Often, applicants are discouraged from improving their project to reduce impacts, out of concern that any change will delay an EIS schedule. If an applicant wants to improve a project in response to public comments, the applicant has to decide between taking a schedule delay or making a change that would be in the public’s best interest. The NEPA process should be flexible and allow applicants to improve their project in response to public comments without delaying the process.

- § 1502.13 - *Purpose and need statements*. Where the major federal action involves an applicant, the purpose and need statement must reflect the applicant’s goal. In the preamble, CEQ quotes the Connaughton Letter’s recommendation that, where multiple agencies are

²³ *Id.* at 1699.

²⁴ Hayes Report at 10.

involved, they should agree on a single purpose and need statement.²⁵ Business Roundtable suggests incorporating this requirement into the text of the rule. We also note that this is consistent with the spirit of the *Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807*, which was signed by 12 permitting agencies and is designed to improve interagency cooperation and the timely processing of environmental reviews and authorization decisions for major infrastructure projects.²⁶ We further recommend that only agencies with permitting responsibilities – agencies “that have a decision to make” – be required or expected to agree on the purpose and need statement, and that cooperating and participating agencies not be allowed to delay development of an EIS by disagreeing with the purpose and need statement for the proposed activity.²⁷

- § 1502.25(a)- *Integrating NEPA reviews with other analyses “to the fullest extent possible.”* We support integrating NEPA reviews with other analyses to the fullest extent possible. If done correctly, this integration should lead to less duplication, greater agency efficiency and could shorten overall document preparation times. We also believe that the proposed regulation gives agencies enough flexibility to ensure that integration does not, in fact, lead to more complexity and inefficiency rather than less.

- § 1506.5 – *Allowing project proponents (and their contractors) to draft documents, subject to agency supervision.* Federal permitting agencies are resource constrained and sometimes lack the expertise necessary to fully analyze unique environmental issues that may arise. This often adds additional delay to the review process. While permitting agencies retain sole responsibility to independently analyze the environmental effects and ultimately decide whether to approve a project, there is no sound practical or policy reason why project sponsors and their contractors should not be able to prepare needed documents subject to agency direction, supervision and guidance. Business Roundtable has long supported providing this type of assistance to permitting agencies and notes that today, many functions of the federal government, including highly sensitive national and homeland security and intelligence functions, are performed by federal contractors under careful supervision of the contracting agency. Allowing proponents’ contractors to draft documents under the same sort of supervision would bring CEQ’s regulations more in line with prevailing practices throughout the federal government and would provide agencies with greater flexibility in the preparation of environmental documents. This should streamline and shorten the process.

- *Expediting Federal Register publication.* Several provisions of the NEPA rules require agencies to publish notices of availability of documents in the Federal Register.²⁸ Roundtable members are seeing a minimum of five days of delay in such cases. CEQ should work with

²⁵ 85 Fed. Reg. 1701.

²⁶ Available at <https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf>.

²⁷ 85 Fed. Reg. 1701.

²⁸ *E.g.*, 40 C.F.R. § 1501.7 (notices of intent); § 1506.6(b)(2) (notices of DEISs, EISs and RODs in cases with effects of national concern). These provisions would remain as §§ 1501.9(d) and 1506.6(b)(2).

agencies and the Office of the Federal Register to improve the speed with which such notices are published. This is a needless source of delay in EIS schedules.

Conclusion

Business Roundtable commends CEQ for its efforts to update its outdated NEPA regulations in order to accommodate existing and future technology, clarify important terms to codify key court decisions and guidance, and incorporate best permitting practices enacted in bipartisan legislative enactments and recent executive orders. By finalizing this proposed rule, CEQ can take a major step toward modernizing and clarifying its regulations to promote more efficient, effective and timely project reviews, while remaining faithful to the core requirements of NEPA to protect the environment.

For further information about these comments, please contact:

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