

**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”**

Docket ID No. CEQ-2018-0001<sup>1</sup>

August 20, 2018

**Introduction**

Business Roundtable CEOs have long advocated 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.”<sup>2</sup> Business Roundtable also strongly supported efforts for legislative reform of the federal permitting process for major infrastructure projects, which culminated in the passage of Title XLI of the Fixing America’s Surface Transportation Act, generally referred to as FAST-41.<sup>3</sup> Because of its longstanding interest in reforming the permitting process for major infrastructure projects, Business Roundtable appreciates the Council on Environmental Quality (CEQ) issuing an Advance Notice of Proposed Rulemaking (ANPRM) to consider updates to its regulations implementing the procedural provisions of the National Environmental Policy Act (NEPA).

Over the past decade, Congress has enacted significant reforms to the federal permitting process, including most recently the FAST Act<sup>4</sup> for surface transportation projects, the Water Resources Development Act (WRDA)<sup>5</sup> for federally funded water projects, and FAST-41 for certain major “covered projects.”<sup>6</sup> This Administration also has prioritized acceleration of project permitting through two key actions. The first is issuance of Executive Order No. 13807, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects”<sup>7</sup> (One Federal Decision Executive Order). The second is the 12-agency Memorandum of Understanding (MOU) that took effect in April 2018<sup>8</sup> and is designed

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<sup>1</sup> 83 Fed. Reg. 28591 (June 20, 2018) (ANPRM). By notice published July 11, 2018, CEQ extended the deadline for comments on the ANPRM until August 20, 2018. See 83 Fed. Reg. 32071.

<sup>2</sup> See Business Roundtable, *Permitting Jobs and Business Investment: Streamlining the Federal Permitting Process* (April 2012) at 3. This report may be accessed at:

[https://www.businessroundtable.org/sites/default/files/2012\\_04\\_23\\_BRT\\_Permitting\\_Jobs\\_and\\_Business\\_Investment.pdf](https://www.businessroundtable.org/sites/default/files/2012_04_23_BRT_Permitting_Jobs_and_Business_Investment.pdf).

<sup>3</sup> 42 U.S.C. § 4370m *et. seq.* (2015).

<sup>4</sup> Pub. L. No. 114-94.

<sup>5</sup> The Water Resources Development Act (WRDA) was included as Title I of the Water Infrastructure Improvement for the Nation Act, Pub. L. No. 114-322. The permitting reform provisions are contained in § 1156.

<sup>6</sup> 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. In response to this directive, the Federal Emergency Management Agency has adopted a Unified Federal Environmental and Historic Preservation Review process for disaster recovery projects associated with Presidentially-declared disasters under the Stafford Act. See <https://www.fema.gov/unified-federal-environmental-and-historic-preservation-review-presidentially-declared-disasters>.

<sup>7</sup> 82 Fed. Reg. 40463 (August 24, 2017)..

<sup>8</sup> On April 9, 2018, the White House issued an MOU signed by 12 federal agencies, including all major federal permitting agencies, to implement Executive Order No. 13807 requiring “One Federal Decision” with respect to permitting of “major

to streamline project permitting through implementation of the One Federal Decision Executive Order. These statutes and executive branch actions share many elements in common that have now become recognized as permitting best practices. Business Roundtable believes that CEQ's regulations implementing the procedural provisions of NEPA should be updated to also incorporate these widely supported best practices. Failure to do so may lead to confusion over the appropriate processes agencies should follow in preparing environmental reviews. Business Roundtable urges CEQ to update its NEPA procedural regulations by incorporating the bipartisan reforms reflected in the FAST Act, WRDA and FAST-41; the best practices identified by the Federal Permitting Improvement Steering Council (FPISC);<sup>9</sup> the NEPA procedural provisions addressed in Executive Order No. 13807; and the best practices identified in the One Federal Decision MOU. By updating its regulations accordingly, CEQ can take a major step towards modernizing its regulations to help expedite project reviews, while remaining faithful to the core requirements of NEPA to protect the environment.

### **Statement of Interest**

Business Roundtable is an association of chief executive officers of America's leading companies working to promote a thriving U.S. economy and expanded opportunity for all Americans through sound public policy. The CEO members who compose Business Roundtable lead companies with more than 16 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 high-quality jobs. They are committed to joining communities, employees and policymakers to build a better future for the nation and its people. For the past 45 years, the membership of Business Roundtable has applied CEO expertise and experience to the major issues facing the nation. Through research and advocacy, Business Roundtable is a partner in promoting policies to spur job creation, improve U.S. competitiveness and strengthen the economy. Each year, Business Roundtable member companies provide health care and retirement benefits to tens of millions of Americans and their families; generate more than \$440 billion in revenues for small- and medium-sized businesses, invest \$130 billion annually in research and development, and contribute more than \$6 billion to charitable causes.

### **Comments**

CEQ's NEPA regulations became effective in July 1979, and have not been updated since 1986. Among other things, the current regulations generally call for lead agencies to supervise preparation of environmental impact statements (EIS), encourage federal agencies to set time limits for individual actions in the environmental review process, urge agencies to integrate NEPA requirements with other agency environmental review and consultation, and emphasize the importance of interagency cooperation early in the NEPA process to avoid delay. However, the

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infrastructure projects." The One Federal Decision MOU was effective on April 10, 2018. See <https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf>.

<sup>9</sup> Federal Permitting Improvement Steering Council, *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018* (December 2017) (Best Practices Report). This report may be accessed at: <https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/documentation/40856/fast-41fy-2018best-practices-report.pdf>.

current regulations do not contain the types of specific requirements needed to create project review efficiencies.

The need for such efficiencies is clear. Over the last three decades, environmental reviews have taken longer and become more complex. While current CEQ regulations anticipate that final EIS will normally be less than 150 pages, and EISs for projects of unusual scope or complexity should normally be less than 300 pages,<sup>10</sup> these expectations are not borne out in practice. EISs and environmental assessments (EAs) now often comprise a thousand or more pages.<sup>11</sup> The time needed to complete these reviews also has become progressively longer. It has been estimated that every year, completion of an EIS takes a month longer than it did the previous year.<sup>12</sup> Thus, “[a]s it has evolved, . . . environmental review often consumes five to ten years, and for controversial projects, even longer.”<sup>13</sup> With respect to significant highway projects, the Government Accountability Office (GAO) found that on average, completion of the EIS takes seven years, although the time for review has begun to decline as a result of the reforms that have been enacted for surface transportation projects.<sup>14</sup> The National Association of Environmental Professionals conducts an annual review of NEPA activities and its most recent report found that in 2016, the average EIS required 5.1 years from Notice of Intent to Final EIS.<sup>15</sup> Common Good has estimated that the costs of avoidable permitting delays (assumed to be six years)<sup>16</sup> on major infrastructure projects is \$3.9 trillion.<sup>17</sup> While some portion of these delays is no doubt attributable to state and local governmental action or inaction, there is also no doubt that the CEQ could take action to shorten these review times.

Against this background, updating the CEQ NEPA regulations is appropriate to reflect statutory changes to federal permitting under FAST-41, the changes for surface transportation projects in the FAST Act, and improved permitting for water resources projects under WRDA. In addition to updating its regulations to reflect recent statutory changes, CEQ should modernize its regulations by incorporating FPISC-identified best practices and the administrative reforms set forth in Executive Order No. 13807 and the One Federal Decision MOU into the NEPA procedural rules. The ANPRM notes that CEQ has over the years issued numerous guidance documents, and this agency guidance should be considered as CEQ refreshes its NEPA regulations to “ensure a more

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<sup>10</sup> See 40 C.F.R. § 1502.7.

<sup>11</sup> See Howard, Phillip K. “Two Years Not Ten Years: Redesigning Infrastructure Approvals” (September 2015) (Common Good Report), at 13. This report, produced by Common Good, is available at: <https://www.commongood.org/wp-content/uploads/2017/07/2YearsNot10Years.pdf>.

<sup>12</sup> *Id.* Where a supplement to an EIS is required, the annual increase in completion time rises to 110 days.

<sup>13</sup> *Id.*

<sup>14</sup> Government Accountability Office, “Highway Projects: Many Federal and State Environmental Review Requirements Are Similar, and Little Duplication of Effort Occurs,” GAO-15-71 (November 2014) (GAO Report), at 10-11. The GAO report was prepared in response to a mandate in the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21), Pub. L. No. 112-141, legislation which included provisions aimed at expediting highway project delivery, including reviews required under NEPA. See GAO Report, at 2. The GAO Report is available at: <https://www.gao.gov/assets/670/666988.pdf>.

<sup>15</sup> See National Association of Environmental Professionals, *National Environmental Policy Act (NEPA) Report for 2016*.

Information on this report is available at [https://www.naep.org/index.php?option=com\\_content&view=article&id=285:NEPA\\_2016\\_Annual\\_Report&catid=19:site-content&Itemid=241](https://www.naep.org/index.php?option=com_content&view=article&id=285:NEPA_2016_Annual_Report&catid=19:site-content&Itemid=241).

<sup>16</sup> Common Good Report, at 6.

<sup>17</sup> See “Common Good Updates the Cost of US Infrastructure Delays: Costs Have Risen \$200 Billion Over Five Years to Nearly \$3.9 Trillion,” May 2018, available at: <https://www.commongood.org/reports/common-good-updates-cost-us-infrastructure-delays/>.

efficient, timely and effective NEPA process.”<sup>18</sup> Finally, various federal agencies have already adopted streamlining efforts, which CEQ should also consider, especially given the prevalence of inconsistent agency guidelines, instructions, and implementation. This is also an excellent opportunity for CEQ to:

- address the lack of guidance related to EAs;
- clarify CEQ regulations relating to categorical exclusions;
- establish enforcement mechanisms with respect to review timelines; and
- clarify the terms “significantly” and “highly controversial” so that they are based on the extent of uncertainty regarding the degree or nature of the proposed action’s environmental effects, rather than the level of opposition that might arise to a project.

### **CEQ Regulations Should Reflect FAST-41 and FPISC Best Practices**

FAST-41<sup>19</sup> established coordination procedures for certain infrastructure “covered projects” undergoing a federal permitting process. Among other things, the statute required the development of recommended performance schedules, including intermediate and final completion dates for environmental reviews commonly required for covered projects,<sup>20</sup> along with a requirement that agency decisions on an environmental review or authorization must be issued not later than 180 days after the agency has all necessary information.<sup>21</sup> A permitting timetable is to be included in a coordinated project plan for public and agency participation in, and completion of, required federal environmental reviews and authorizations for FAST-41 covered projects. Relevant factors to be considered in establishing a permitting timetable include the size and complexity of the project, its regional or national economic significance, and the sensitivity of the natural or historic resources that the project may affect.<sup>22</sup> FAST-41 also contains important provisions for resolving disputes regarding the permitting timetable by the Director of the Office of Management and Budget, in consultation with the CEQ Executive Director.<sup>23</sup> Agencies are required, to the maximum extent practicable, to coordinate their reviews with other environmental reviews and authorizations for a covered project being conducted by other agencies.<sup>24</sup>

Various aspects of CEQ’s regulations, particularly Part 1501, address some of these topics but only at a high level of generality, and they often only “encourage” particular actions.<sup>25</sup> As a Stanford Law School project has also noted, the current rules “include hortatory calls” and “string together good language,” but are insufficiently specific and lack institutional mechanisms to compel action.<sup>26</sup> CEQ should carefully review its existing rules with an eye

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<sup>18</sup> ANPRM, 83 Fed. Reg. 28591.

<sup>19</sup> Parallel provisions in the FAST Act and WRDA also address expediting the permitting process for other types of projects.

<sup>20</sup> 42 U.S.C. § 4370m-2(c)(2)(A).

<sup>21</sup> 42 U.S.C. § 4370m-1(c)(1)(C)(ii)(II)(cc).

<sup>22</sup> 42 U.S.C. § 4370m-2(c)(2)(B).

<sup>23</sup> 42 U.S.C. § 4370m-2(c)(2)(C).

<sup>24</sup> 42 USC § 4370m-4.

<sup>25</sup> See, e.g., 40 C.F.R. § 1501.8 (“Federal agencies are encouraged to set time limits appropriate to individual actions . . .”).

<sup>26</sup> David J. Hayes et al., *Comments and Recommendations on NEPA Reform for the White House Council on Environmental Quality* (June 15, 2014) (Stanford Study), at 10, available at <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/04/NEPA-Submittal-to-CEQ-FINAL-5.pdf>.

toward incorporating FAST-41 mechanisms regarding the timing of environmental reviews; provisions for early consultation; and requirements for interagency coordination of required reviews, lead and cooperating/participating agency responsibilities, and dispute resolution in its generally applicable NEPA procedural regulations.<sup>27</sup>

FAST-41 also required the FPISC to issue annual recommendations on best practices for federal permitting programs in areas including enhancing early stakeholder involvement; ensuring timely decisions; improving coordination between federal and non-federal governmental entities; increasing transparency; and reducing administrative burdens.<sup>28</sup> FPISC's FY 2018 Best Practices Report offers specific recommendations in eight categories, many of which are in use by federal agencies today and that may be legally required for certain projects. The report further notes that FAST-41 seeks to "pilot best practices to improve the permitting processes for eventual use in non-Fast-41 covered projects."<sup>29</sup> Notably, Executive Order 13807 calls on agencies to implement the best practices identified by the FPISC.<sup>30</sup>

To support this objective, the CEQ NEPA procedural regulations should incorporate appropriate FPISC recommendations for best practices, as well as already-adopted streamlining efforts implemented by various federal agencies.

**CEQ Should Modernize its Regulations to Reflect the Important Reforms Contained in Executive Order No. 13807 and the One Federal Decision MOU**

Executive Order No. 13807 was intended to build upon the permitting reforms of the FAST Act, FAST-41, and WRDA. The proceeding in this docket to review the existing CEQ NEPA procedural regulations is an element of CEQ's response to the Executive Order.<sup>31</sup>

The Executive Order calls for environmental reviews and authorization decisions for new "major infrastructure projects"<sup>32</sup> to be conducted in a "coordinated, consistent, predictable and timely manner." To achieve this, the Executive Order calls for the environmental reviews and authorizations to be completed within 2 years through use of the One Federal Decision mechanism.<sup>33</sup> The Executive Order also provides for CEQ to mediate interagency disputes arising from the environmental review process.

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<sup>27</sup> The Stanford Study predated FAST-41, but specifically encouraged the creation of an Interagency Permitting and Review Council. *Id.* at 14-16.

<sup>28</sup> 42 U.S.C. § 4370m-1(c)(2)(B).

<sup>29</sup> Best Practices Report, p. 2. The Report continues: "The goal is for effective best practices to be institutionalized within and across the Agencies and appropriately applied to all infrastructure projects. Agencies that are not involved in the environmental review or authorizations in current FAST-41 covered projects can apply these recommended best practices to the environmental review and authorization of other infrastructure projects, and those projects will benefit from increased transparency, predictability, and improved environmental and community outcomes."

<sup>30</sup> Executive Order 13807, Sec. 4(b)(iii).

<sup>31</sup> CEQ's initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process for Infrastructure Projects developed as required in Sec. 5(e) of Executive Order 13807 was published at 82 Fed. Reg. 43226 (Sept. 14, 2017).

<sup>32</sup> A "major infrastructure project" is defined as one requiring multiple authorizations from federal agencies, for which an EIS has been determined by the lead agency to be required, and for which the funding to complete the project has been identified. Executive Order 13807, Sec. 3(e).

<sup>33</sup> Executive Order 13807, Sec. 5(b).

Like FAST-41, the One Federal Decision approach under the Executive Order imposes on a lead federal agency responsibility for navigating a project through the federal environmental review and authorization process, and it requires the multiple federal agencies required to authorize a major infrastructure project to agree to a permitting timetable, and to produce a single record of decision (ROD). Federal authorizations are to be completed within 90 days of the issuance of the single ROD.

The One Federal Decision MOU represents the commitment of all the major federal permitting agencies to a common framework for streamlining environmental permitting. The MOU implements the reforms announced in the Executive Order and in so doing provides greater clarity as to how these reforms are intended to work. Pursuant to the MOU, designated lead agencies will establish coordinated permitting timetables and develop a single EIS and ROD for major infrastructure projects. In addition to requiring concurrent reviews by affected agencies, the MOU contains important provisions establishing an effective process for resolving interagency disputes, including steps to identify concerns earlier in the process. As part of this early coordination, already complete technical studies, programmatic agreements, and agency determinations should be shared among agencies for incorporation into the permitting process to eliminate the burden of unnecessary duplication of effort by applicants and agencies.

In a very real sense, therefore, Executive Order 13807 and the work leading up to the One Federal Decision MOU have already laid much of the groundwork for CEQ, including the difficult interagency coordination. The next step is for CEQ to update its NEPA procedural regulations to effectively codify the process outlined in the Executive Order generally and in the One Federal Decision MOU and to make it specifically applicable to *all* projects requiring environmental reviews in connection with federal authorizations.

**CEQ Should Clarify its Definition of “Significantly” and Its Use of the Term “Highly Controversial” to Ensure that They Are Based on an Analysis of Environmental Effects**

Section 102(2)(C) of NEPA requires an analysis and documentation of “major Federal actions significantly affecting the quality of the human environment.” CEQ regulations defining the term “significantly”<sup>34</sup> “[require] considerations of both context and intensity” and include as one of the factors whether the effect on the quality of the human environment of a proposed action is “likely to be highly controversial.”<sup>35</sup> Unfortunately, in practice, the term “highly controversial” has become untethered from the fundamental purpose of NEPA, which is the question of the environmental effect associated with a proposed action. CEQ should take this opportunity to either delete the “highly controversial” factor under the definition of “significantly” or revise its regulations to clarify that the term “highly controversial” must be based on the extent of uncertainty regarding the degree, extent, or nature of the proposed action’s environmental effects, not the level of opposition to a project.

**Specific Recommendations**

Business Roundtable recommends that the CEQ NEPA regulations:

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<sup>34</sup> 40 C.F.R. § 1508.27.

<sup>35</sup> 40 C.F.R. § 1508.27(b)(4).

- Establish a goal for completion of permitting for projects requiring EIS within 2 years;
- Require agencies to adopt the best practices identified by the FPISC;
- Clearly define the responsibilities of lead, cooperating, and participating federal agencies to establish coordinated permitting timetables;
- Require the lead federal agency to develop a single EIS and issue a single Record of Decision;
- Establish a goal of completing federal authorizations within 90 days of issuance of the single ROD;
- Require federal agencies to conduct their review processes concurrently;
- Establish guidance on the use and incorporation of environmental studies and analyses;
- Establish guidance on format and style of EIS and EA, including for supplemental NEPA documents, to increase efficient document production and streamline agency reviews;
- Consider a series of overarching Categorical Exclusions that apply across all federal agencies;
- Establish consistent timing for the length of noticing and public review requirements and time periods for NEPA documents (both EIS and EA);
- Establish a process for expeditiously resolving interagency issues and disputes;
- Require written concurrence from other agencies (including state permitting agencies) at key points in the process to identify and resolve disputes earlier—including both stand-alone and tiered environmental processes; and
- Clarify that its definition of “significantly” and the use of the term “highly controversial” are based on the question of environmental effect, not opposition to a proposed action.

CEQ also should complete the List of Actions issued in September 2017 to enhance and modernize the federal environmental review and authorization process for infrastructure projects.

### **Conclusion**

CEQ should incorporate the key initiatives in the FAST Act, FAST-41, WRDA, Executive Order 13807 and the One Federal Decision MOU into updated NEPA procedural regulations. Codification of important process reforms in CEQ’s implementing regulations, and the regulations adopted by individual agencies to implement the CEQ rules, will improve accountability, timeliness and ultimately drive significant permitting process reforms throughout federal agencies. In particular, adding requirements for completion of permitting for projects requiring an EIS within two years, establishment of coordinated permitting timelines and meaningful authority for lead agencies to drive the environmental review process forward, use of concurrent review processes and prompt issuance of final authorizations after the issuance of the Record of Decision will give teeth to the requirements in the CEQ’s current regulations. The current NEPA rules do acknowledge the importance of interagency

cooperation and concurrent reviews, but those rules have proved inadequate to avoiding costly delays in the permitting of needed U.S. infrastructure projects.<sup>36</sup>

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<sup>36</sup> As the Stanford Study concluded (at 6), “the NEPA framework can and should be modified to account for both the experiences of the past forty years and recent innovations and updated technologies.”