



Susan Martinovich, P.E., President  
Director, Nevada Department of Transportation

John Horsley, Executive Director

---

444 North Capitol Street NW, Suite 249, Washington, DC 20001  
(202) 624-5800 Fax: (202) 624-5806 • www.transportation.org

May 3, 2011

Nancy Sutley  
Chair  
The Council on Environmental Quality  
722 Jackson Place NW  
Washington, DC 20503

RE: Review of Existing CEQ Regulations and Guidance

Dear Chair Nancy Sutley:

The American Association of State Highway and Transportation Officials (AASHTO) welcomes the opportunity to submit these comments to the Council on Environmental Quality (CEQ) in response to the CEQ's ongoing review of its regulations. We are submitting these comments for the CEQ's consideration as it carries out the regulatory review required by the President in Executive Order 13563, "Improving Regulation and Regulatory Review."

AASHTO is a nonprofit, nonpartisan association representing highway and transportation departments in the 50 states, the District of Columbia, and Puerto Rico. It represents all five transportation modes: air, highways, public transportation, rail, and water. Its primary goal is to foster the development, operation, and maintenance of an integrated national transportation system. Our members work closely with USDOT agencies to operate, maintain, and improve the nation's transportation system.

AASHTO supports the goals set forth in Executive Order 13563, issued by the President on January 18, 2011. The Executive Order calls for all federal agencies to develop a plan for reviewing existing regulations and identifying regulations that can be made less burdensome while still achieving their statutory objectives. We urge all federal agencies to establish a plan that includes periodic review of existing regulations, not just a one-time event. We also urge federal agencies to give substantial weight to the concerns and recommendations submitted by the regulated community, including State agencies. The outcome of this review should be a plan that includes a series of rulemakings aimed at streamlining existing regulations.

In developing our recommendations, we have solicited input from our members regarding any existing federal regulations (or interpretations of regulations) that State DOTs consider to be unnecessarily burdensome. These comments summarize the primary concerns raised by our members regarding the CEQ's regulations. Individual State DOTs may submit separate comments raising additional concerns.

## 1. CEQ NEPA Regulations

The CEQ is responsible for overseeing federal agencies' implementation of the National Environmental Policy Act (NEPA), and in that capacity CEQ has issued NEPA regulations, at 40 CFR Part 1500. These regulations were issued in 1980, and have remained essentially unchanged for that last 30 years. During this period, compliance with NEPA has grown much more complex and time-consuming, as a result of case law, guidance, and changes in agency practices. The CEQ has issued occasional guidance documents, but the effect of the guidance is often to create *additional* complexity, rather than streamlining the NEPA process.

We believe it is time for the CEQ to initiate a comprehensive reassessment of its NEPA regulations. Agencies should be given the flexibility to reduce the length and complexity of their environmental documents, employ new methods of communicating with the public, and eliminate steps that add cost and delay without adding value. Specifically, we urge the CEQ to consider the following changes to its NEPA regulations:

- *Allow a single EIS followed by a ROD.* The current regulations require a Draft EIS, then a Final EIS, and then a ROD. This process was adopted in the 1970s, when public involvement practices were far more limited – and NEPA documents were far shorter – than they are today. Today, the public has more opportunities for involvement at an early stage of the NEPA process, and has greater access to information via project web sites and other sources. As a result, the Draft EIS plays a different role: rather than introducing the project to the public, the Draft EIS now represents the culmination of a years-long process. Re-printing the entire document for the Final EIS requires a major commitment of time and resources, often with little benefit. We recommend giving agencies the option of issuing an EIS followed by a ROD, with the requirement that (1) the EIS must identify a preferred alternative, (2) the ROD must include responses to comments on the EIS, and (3) a supplemental EIS must be prepared – as required under existing law – if significant new issues are raised between the EIS and the ROD.
- *Reduce duplication of effort through increased use of programmatic agreements.* The current regulations allow agencies to adopt another federal agency's EIS. Adoption is intended to streamline compliance with NEPA for projects that require approvals from two or more federal agencies. In practice, this process does not always work as well as intended. Federal agencies often disagree with one another about issues such as scope of the action, project purpose, range of alternatives, and methodologies for analyzing direct, indirect, and cumulative impacts. In some cases, Federal agencies also have their own agency-specific NEPA regulations, which may differ from one another. We recommend that the CEQ reduce inefficiencies in the NEPA process by:
  - encouraging the use of programmatic agreements among federal agencies, as a way of providing a framework under which one federal agency could more easily adopt another federal agency's NEPA document; and
  - allowing federal agencies to use Categorical Exclusions that have been issued by other federal agencies, such as FHWA, with regard to projects that require the approval of both agencies.

- *Lead agency and cooperating agency roles.* The current regulations provide for the designation of lead and cooperating agencies in the NEPA process, but provide little direction about the relationship between these agencies. In correspondence with the USDOT in 2003, the CEQ recognized two importance principles: (1) that USDOT should be the lead agency for transportation projects requiring USDOT's approval, and (2) that other federal agencies should show substantial deference to USDOT's determinations regarding purpose and need and range of alternatives for those projects.<sup>1</sup> In practice, those principles are not always followed. We recommend that CEQ amend its regulations to clarify that (1) the lead agency should be the federal agency funding or carrying out the proposed action, and (2) the cooperating agencies (as well as any other non-lead agencies involved in the process) should show substantial deference to the lead agency's determinations on matters involving purpose and need, range of alternatives. In addition, to the extent that the agencies have different NEPA procedures, the project should be required to comply only with the lead agency's procedures.
- *Adoption of State documents.* Several States, including California, are required to comply with State "mini-NEPA" laws, which in many ways parallel the requirements of NEPA. Because the federal and state requirements are separate, State DOTs are required to prepare a single document that satisfies both the State requirements and the federal requirements, or must prepare two separate documents. Compliance with NEPA in addition to the State mini-NEPA law creates an additional procedural burden. We recommend amending the CEQ regulations to create a framework under which federal agencies can more easily adopt State-level environmental documents.

## 2. CEQ Guidance Documents

While the CEQ regulations have remained essentially unchanged since 1980, the CEQ has frequently issued guidance documents, handbooks, memoranda, and other materials covering a range of topics.<sup>2</sup> While they are legally non-binding, these materials often have considerable influence on agency's practice and on courts' interpretations of NEPA – so, over time, they can come to have legally binding effect.

Within the past year, CEQ has issued major new guidance on mitigation and monitoring and on the use of categorical exclusions, and the CEQ has issued draft guidance on considering greenhouse gas emissions in NEPA documents.<sup>3</sup> We have submitted comments on each of the draft guidance documents, and in each case we have expressed concern that CEQ's approach will add unnecessary additional documentation requirements and will increase the risk of delay, while creating new avenues for litigation. We are concerned that CEQ's approach to NEPA guidance does not give sufficient weight to the need for streamlining. Rather than creating additional procedures, CEQ should be using its authority to promote greater flexibility, faster review times, and less voluminous documentation.

---

<sup>1</sup> This correspondence is available here: <http://ceq.hss.doe.gov/nepa/regs/CEQPurpose2.pdf>

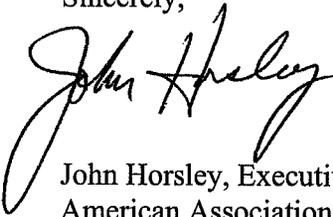
<sup>2</sup> The guidance is available here: [http://ceq.hss.doe.gov/ceq\\_regulations/guidance.html](http://ceq.hss.doe.gov/ceq_regulations/guidance.html)

<sup>3</sup> The new guidance is available here: [http://ceq.hss.doe.gov/current\\_developments/new\\_ceq\\_nepa\\_guidance.html](http://ceq.hss.doe.gov/current_developments/new_ceq_nepa_guidance.html)

Finally, we are encouraged by CEQ's recent call for proposals for a NEPA Pilot Program.<sup>4</sup> We support the four goals of the pilot program: (1) simplifying NEPA implementation practices; (2) reducing the time and cost involved in preparing NEPA reviews; (3) utilizing information technology to improve the efficiency of NEPA implementation for a particular project, or when adopted program-wide; and (4) improving the effectiveness of public engagement. We encourage you to include a project sponsored by a State DOT in this pilot program.

We thank you for considering these comments. If you would like to discuss any of these comments, please contact Shannon Eggleston, AASHTO's Program Director for the Environment at (202) 624-3649 or [seggleston@aaashto.org](mailto:seggleston@aaashto.org).

Sincerely,



John Horsley, Executive Director  
American Association of State Highway and Transportation Officials

---

<sup>4</sup> The pilot program announcement is here: <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/nepa-pilot-project>.