



BIPARTISAN POLICY CENTER

March 10, 2020

Edward A. Boling, Associate Director for the National Environmental Policy Act
Viktoria Z. Seale, Chief of Staff and General Counsel
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Notice of Proposed Rulemaking – Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (January 10, 2020)
Docket ID No. CEQ-2019-0003

Dear Associate Director Boling and Chief of Staff Seale:

The Bipartisan Policy Center (“BPC”) appreciates the opportunity to comment on the Council on Environmental Quality’s (“CEQ”) proposed rule to update its National Environmental Policy Act (“NEPA”) regulations. Founded in 2007 by former U.S. Senate Majority Leaders Howard Baker, Tom Daschle, Bob Dole, and George Mitchell, BPC is a non-profit organization that combines the best ideas from both political parties to promote health, security, and opportunity for all Americans. BPC has written extensively on the need to make the NEPA process timelier and more efficient, while enhancing environmental stewardship, including in comments submitted on CEQ’s advanced notice of proposed rulemaking.¹

Background

BPC’s Executive Council on Infrastructure, a working group of CEOs and business leaders with a bipartisan advisory council of former political leaders, was first launched in 2015. In its report, *Bridging the Gap Together: A New Model to Modernize U.S. Infrastructure*, the council documented how the complicated and oftentimes lengthy process for environmental reviews and permit approvals can hold up economically critical projects, become costly, and act as a key barrier to private investment in U.S. infrastructure.²

BPC is also increasingly concerned that the current NEPA review and permitting process limits our country’s ability to effectively combat climate change.³ Absent meaningful improvements to the NEPA and permitting process, it is hard to imagine the United States dramatically revamping its energy and transportation in time to avoid the worst effects of climate change or strengthening our resilience against the climate-driven risks that are already unavoidable.

When NEPA became law 50 years ago, it had a simple purpose: make sure federal officials understand the impacts of their actions on the human environment and give the public a meaningful opportunity to engage. However, the law did not contemplate how best to solve differences between federal agencies—or levels of government—acting out potentially conflicting missions. Nor did it provide for transparency and predictability in the review process. These oversights have resulted in significant and costly inefficiencies that policymakers have been trying to fix ever since.

In Congress, there has been strong bipartisan support for incremental and common-sense NEPA process improvements for years. For example, such measures were folded into transportation reauthorization bills passed in 1998, 2005, 2012, and 2015.⁴ Moreover, administrations led by different political parties have also authored guidance documents, issued executive orders, and launched other initiatives similarly designed to improve the NEPA process.⁵

It will be a noteworthy accomplishment if CEQ can continue in the same tradition. As outlined in the notice of proposed rulemaking (“NPRM”), CEQ’s intentions are to modernize, simplify, and accelerate the NEPA process; clarify the terms, application, and scope of NEPA reviews; enhance coordination with states, tribes, and localities; and reduce unnecessary burdens and delays. In our view, these stated goals are consistent with many prior, bipartisan efforts to improve the NEPA process.

However, CEQ’s proposal has also been met with controversy and resistance by environmental advocates, Democrats, and other key stakeholders. In particular, the rule’s constructive proposals have been colored by the administration’s irresponsible position on climate change. Yet with meaningful outreach and added safeguards, we are hopeful that CEQ’s final rulemaking will go a long way toward improving a process that too often increases the length and costs of project development without improving the environment. Reviewing NEPA regulations and seeking to make the process work better could save time and money, attract private investment, and are increasingly critical in helping our country transition to a low carbon economy.

Key Elements of CEQ’s Proposed Rule

In our previous comments, BPC recommended that CEQ institutionalize process reforms that empower key decision-makers to resolve interagency and intragovernmental disputes, increase data collection and transparency, make simultaneous agency reviews the norm, and provide for more predictable and coordinated schedules.⁶ Many elements of the proposed rule would advance these aims, while others may overreach, spurring prolonged litigation and making it politically challenging for Congress to reform NEPA on a bipartisan basis in the future. The following comments are in response to key elements of the proposed rule.

Time limits for the completion of environmental assessments (“EAs”) and environmental impact statements (“EISs”).

Unnecessary delays in the permitting process are costly for both the public and private sectors. Direct costs can go up if the costs of materials, supplies, and labor rise during a delay. There is also a public cost to delaying needed infrastructure improvements, including the adverse effects of prolonged inefficiencies, such as the unnecessary pollution generated from existing, outdated infrastructure. As such, we recommend that CEQ retain presumptive time limits for the completion of NEPA reviews in its final rule (e.g., as proposed in §1501.10). A feature of the review process in other countries, including Canada, time limits can help to limit costly delays and provide more certainty of process (the latter being critically needed to attract private investment in infrastructure), though agencies and project sponsors should have the flexibility to set longer timetables when needed or preferable.

Extensions beyond these time limits should come with public explanations for the delay. There continues to be a need for additional transparency in tracking schedule adherence so that both federal agencies and project sponsors may be held accountable. We have a long way to go to increase the

broader understanding of what can hold up a project and should be collecting the data necessary to identify chokepoints and inform future reform efforts.

Page limits for EAs and EISs.

Requiring clear, concise, and accessible documents does not have to be at odds with rigorous analyses of potential environmental impacts. The current length and complexity of many NEPA documents work to exclude the public from accessing and understanding them. As such, we recommend that CEQ retain measures in its proposed rule to limit the length and complexity of NEPA reviews, such as the page limit requirements outlined in §1501.5 and §1502.7. Yet CEQ could reassess the proposed rule and consider how to expand, facilitate, and promote the use of visual, interactive, and virtual information given the potential of such technological developments to better and more cost effectively communicate the significant effects of proposed government actions to the public.

Enhanced coordination in multiagency reviews.

BPC has previously recommended the use of simultaneous rather than sequential reviews—a time-consuming process where differing agencies review projects and issue their respective permits one after the other—to significantly increase the speed with which decisions are made and projects can move forward. Developing a single EIS and record of decision, using coordinated timetables, and empowering key decision-makers to resolve disputes also help to speed up a complex and lengthy process. To that end, we support proposed changes, such as:

- Mandating that the lead agency, in cooperation with coordinating agencies, issue one set of decisions for a project in §1501.7(g);
- Requiring a lead agency to develop and adhere to a schedule in §1501.7(i); and
- Raising issues that might limit schedule adherence early in the process in §1501.8(b)(6).

Clarifications on the use of categorical exclusions (“CEs”).

We have found bipartisan support for maximizing the use of CEs to exempt projects from review only when a proposed action has no new or significant environmental impact, a proposed action has foreseeable impacts that can be mitigated without additional review given previous study in the area, or another agency has made the determination that specific activities should qualify as CEs given their expertise and experience. CEs are critically important in ensuring that such projects can move more quickly through the NEPA process.

Treatment of indirect and cumulative effects.

Under the proposed rule, cumulative and indirect effects would not be used to determine a proposed action’s threshold of significance and such effects would no longer be analyzed in EAs or EISs. In taking away decades of established guidance on how such analyses should work and upending longstanding NEPA practice, we believe these revisions risk exacerbating the litigation cycle CEQ intended to cure and could take years to work out.

Cost Tracking.

§1502.11 would require estimated costs to prepare an EIS be included on EIS covers. Though such a measure would add an administrative task in tracking this information, it is important for policymakers

to understand the costs of EIS preparation costs and NEPA’s overall contribution to project development costs. Little understanding exists now regarding this information and more, which makes it difficult to recommend productive and cost-effective changes to policy.

Conclusion

Thank you for your attention to this important issue and for the opportunity to comment on the proposed rule and its potential impact. Please contact Andy Winkler at (202) 204-2400 or awinkler@bipartisanpolicy.org for additional information or assistance.

Sincerely,

Andy Winkler
Associate Director
Bipartisan Policy Center

Endnotes

¹ Michele Nellenbach, Bipartisan Policy Center, “BPC Comment Letter on CEQ NEPA Implementing Regulations,” August 2018. Available at: <https://www.regulations.gov/document?D=CEQ-2018-0001-12494>.

² Bipartisan Policy Center, “Bridging the Gap Together: A New Model to Modernize U.S. Infrastructure,” May 2016. Available at: <https://bipartisanpolicy.org/report/modernize-infrastructure/>. Andy Winkler, Bipartisan Policy Center, “More Room for Improvement in the Permitting Process,” April 2019. Available at: <https://bipartisanpolicy.org/blog/more-room-for-improvement-in-the-permitting-process/>.

³ Sasha Mackler and Michele Nellenbach, Bipartisan Policy Center, “America’s National Climate Strategy Starts with NEPA,” January 2020. Available at: <https://bipartisanpolicy.org/blog/americas-national-climate-strategy-starts-with-nepa/>.

⁴ See, the Transportation Equity Act for the 21st Century of 1998, Pub. L. No. 105-178; the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005, Pub. L. No. 109-59; the Moving Ahead for Progress in the 21st Century Act of 2012, Pub. L. No. 112-141; and the Fixing America’s Surface Transportation Act of 2015, Pub. L. No. 114-94.

⁵ Council on Environmental Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1685-1687 (January 10, 2010).

⁶ *Ibid* at 1