

November 27, 2017

U.S. Department of Transportation
Dockets Management Facility
Room W12-140
1200 New Jersey Avenue SE
Washington, DC 20590

Subject: Comments on Notice of Proposed Rulemaking on Program for Eliminating Duplication of Environmental Reviews (Docket No. FHWA-2016-0037)

To the Federal Highway Administration, Federal Transit Administration, and Federal Railroad Administration:

The American Association of State Highway and Transportation Officials (AASHTO) welcomes the opportunity to submit these comments on the notice of proposed rulemaking (NPRM) for the Program for Eliminating Duplication of Environmental Reviews. The NPRM was published jointly by the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and Federal Railroad Administration (FRA) on September 28, 2017. (82 Fed. Reg. 45220).

AASHTO is a nonprofit, nonpartisan association representing the State 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.

With this NPRM, the FHWA, FTA and FRA ("Agencies") propose to issue regulations implementing the program established in the Section 1309 of the Fixing America's Surface Transportation Act (FAST Act), 23 U.S.C. 330. Under this program, a State may request to substitute one or more State laws for the National Environmental Policy Act (NEPA), the environmental review process in 23 U.S.C. 139 (Section 139), and implementing regulations. A State may participate in this program only if the Secretary of Transportation, with concurrence of the Chair of Council on Environmental Quality (CEQ), determines that the State law or regulation is "at least as stringent" as the corresponding federal law or regulation. 23 U.S.C. 330(d)(1)(A). The Chair of CEQ is directed to establish the criteria to be used for determining whether this stringency requirement is met. FAST Act, Sec. 1309(c).

Overall, AASHTO supports the proposal to issue regulations implementing this program. The proposed regulations are generally consistent with the statutory requirements for the program. In these comments, we identify a few areas in the regulations where additional flexibility or clarification would be helpful in the final rule.

1. Flexibility in Applying Stringency Criteria

As required by the statute, the proposed regulations identify criteria for determining whether the State law is “at least as stringent” as the corresponding federal law. See proposed 23 CFR 778.109. In general, the criteria appear to be appropriate, as they reflect existing requirements under NEPA and Section 139. However, we are concerned that the requirement to satisfy 14 distinct criteria as a “minimum” requirement could end up disqualifying States from participating in this program even where the State law is equally as stringent or more stringent than NEPA overall.

Our concern arises from the fact that even a State law with extremely stringent requirements, such as the California Environmental Quality Act (CEQA) may require a lower level of detail than NEPA in some specific areas. For example, the CEQ’s handbook on NEPA-CEQA integration noted that “the NEPA standard of ‘devoting substantial treatment’ to each alternative tends to result in a more detailed look at alternatives” than under CEQA and concluded that an environmental impact statement under NEPA “may contain the analysis of fewer alternatives but in more detail” than an environmental impact report under CEQA.¹ The handbook also noted that “the cumulative impact analysis [under NEPA] may need more detail than California agencies typically provide under CEQA.”²

If such differences were disqualifying, it would be impossible as a practical matter for any State to take advantage of the NEPA substitution program. To avoid that result, we urge the Agencies to include language in the final rule stating that the Agencies will base the stringency determination on an assessment of the State law *as a whole*, so that minor differences in the level of detail required on specific issues does not prevent the stringency requirement from being met.

2. Addressing NEPA and Section 139 Together

The regulations include a single set of criteria for assessing consistency with both NEPA and Section 139. This approach recognizes that, as a practical matter, NEPA and Section 139 requirements are interwoven. In other words, for projects subject to Section 139, the NEPA process inherently *includes* compliance with Section 139 as well as NEPA requirements. Therefore, the stringency criteria properly assume that the Agencies would undertake a single assessment of consistency with both NEPA and Section 139 requirements.

In contrast, the application requirements in the proposed regulations call for the applicant to provide a “detailed explanation of how the State environmental law and regulation intended to substitute for a Federal environmental requirement is at least as stringent as the Federal requirement.” See proposed 23 CFR 778.105(4). The wording of this regulation implies that the State must separately demonstrate consistency with each Federal requirement. It is more practical, and more consistent with the way the stringency criteria are defined, to allow the application to address consistency with NEPA and Section 139 requirements *together* by addressing each of the stringency criteria listed in the regulations. We believe this approach is what the Agencies’ intended in the proposed regulations; if so, we simply recommend clarifying this point in the final rule.

¹ CEQ and State of California, *NEPA and CEQA: Integrating Federal and State Environmental Reviews* (2014) (“NEPA-CEQA Handbook,”), p. 28.

² NEPA-CEQA Handbook, p. 34.

3. Clarifying Applicability of 2-Year Statute of Limitations

The statute authorizing the substitution program establishes a 2-year statute of limitations for any claims challenging actions taken by a State under this program. This period is different from the 150-day period that otherwise would apply to claims challenging actions taken by State agencies approving a highway or transit project under the NEPA assignment program in 23 U.S.C. 327.³ The disparity between these two statutes of limitations means that a lawsuit challenging a single State decision approving a highway or transit project could be subject to two different limitations periods: a 2-year period for any challenges to the State's actions under the State-law equivalent of NEPA, and a 150-day period for any challenges to the State's actions under federal laws that are not covered by the substitution program but have been assigned to the State, such as Section 4(f) of the U.S. Department of Transportation Act. The 150-day period also would apply to other federal approvals issued for the project, such as a Clean Water Act permit issued by the U.S. Army Corps of Engineers.

To provide clarity for applicants and for States participating in the substitution program, we recommend that the Agencies include a section in the regulations specifically addressing the issuance of statute-of-limitations notices under the substitution program. The regulations should confirm, in particular, that the State can still issue a 150-day statute of limitations notice for all actions taken by the State or other federal agencies under other federal laws.

Thank you for the opportunity to submit comments. If you would like additional input, please contact Shannon Eggleston at (202) 624-3649 or seggleston@aaashto.org.

Sincerely,



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³ The two-year period also may be longer than the statute of limitations that would apply to actions filed in State court challenging a State's compliance with a State environmental law. For example, the time period to challenge a California state agency's compliance with CEQA ranges from 30 to 180 days. See CEQA-NEPA Handbook, p. 42.