

March 4, 2020

Edward A. Boling
Associate Director for the National Environmental Policy Act
Council on Environmental Quality
730 Jackson Place NW
Washington DC 20503

RE: AASHTO Comments on Proposed Rulemaking – Update to the Regulations for
Implementing the Procedural Provisions of the National Environmental Policy Act
(Docket No. CEQ 2019-0003)

Dear Associate Director Boling:

The American Association of State Highway and Transportation Officials (AASHTO) appreciates the opportunity to comment on the Council on Environmental Quality's (CEQ) Notice of Proposed Rulemaking (NPRM) issued January 10, 2020, regarding revisions to the implementing regulations for the procedural provisions of the National Environmental Policy Act (NEPA).

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

AASHTO supports CEQ's goal of expediting the delivery of transportation and other infrastructure projects while protecting the environment. As the CEQ NEPA regulations have not been comprehensively updated in over 40 years and the environmental review process has grown increasingly complicated and lengthy, AASHTO supports updating CEQ's NEPA regulations to reflect current technologies and agency practices, encourage brevity, readability, and quality writing in NEPA materials, and promote better decision-making. AASHTO and the State DOTs have successfully partnered with US DOT and its modal administrations to implement the NEPA environmental review process updates included in several recent pieces of legislation reauthorizing the Nation's transportation programs, and look forward to continuing this partnership to further increase the efficiency and effectiveness of NEPA reviews.

Overall, lead agencies need flexibility to conduct environmental reviews in a way that minimizes the financial and administrative burdens, informs public decisions, protects the environment, and avoids unintended consequences such as public or agency uncertainty or increased litigation risk. The following are more specific comments.

Electronic Communications (1502.21, 1503.1, 1506.6, 1508.1)

AASHTO supports CEQ's proposal to clarify and reinforce the authority of agencies to use the most modern and efficient forms of communications technology to support government decision-making in NEPA reviews. We caution, however, that NEPA procedures should recognize the reality of the "digital divide" affecting many different communities that are stakeholders in agency decision-making. The communications modes and procedures used by agencies should not exacerbate the communications challenges that some communities may face in the NEPA process, including some Indian Tribal communities, rural residents, impoverished areas, and areas without robust, affordable internet service. Innovation in NEPA-related communications should expand and strengthen information flow between the public and decision-makers, such that efficiency and quality improve hand-in-hand. In some cases, the best form of communication may not be the most modern, and agencies should have discretion to match modes of communication to the particular circumstances of different constituencies.

NEPA Compliance (1500.3)

AASHTO supports federal agency procedures to implement the CEQ regulations not imposing additional procedures or requirements beyond the regulations. AASHTO also supports the regulations being read together with section 102(2) of NEPA "as a whole to comply with the law." We recommend that CEQ NEPA implementing regulations also be read together with section 101(b) of NEPA.

Categorical Exclusions (1501.4, 1506.3, preamble C.4)

AASHTO supports CEQ's proposal to encourage agencies to adopt categorical exclusions (CE) initially developed by other agencies where there is commonality among the factual, legal and other considerations relevant to decision-making by multiple agencies. We also encourage development of regional and location-specific CEs.

Findings of No Significant Impact (1501.6)

AASHTO supports encouraging agency recognition of and reliance on mitigated findings of no significant impacts when deciding whether NEPA compliance requires preparation of an Environmental Assessment or Environmental Impact Statement. This proposed change would acknowledge current practice.

AASHTO does not support requiring FONSIIs to include the "means of and authority for mitigation, as well as monitoring or enforcement." This information is often not available at the time of FONSI approval. For example, projects that require waterway permits do not have the permit in place at the time of NEPA approval- appropriate mitigation is determined through the permitting process. Requiring this new information in the FONSI is adding new unnecessary requirements and is contrary to streamlining efforts.

Scoping (1501.9, 1500.3)

AASHTO supports providing lead agencies the flexibility to consider environmental factors in the planning process and to conduct early scoping. However, these activities should not be required. Also, AASHTO does not support the greatly enhanced level of information and detail proposed to be included in the Notice of Intent (NOI). If significant pre-scoping is not conducted, the information proposed to be included in the NOI would not be available or sufficiently developed enough to be included in the NOI. Because the multiple layers of statutes/rules/laws at various levels of government often create unique local or regional intricacies with respect to timing, lead agencies must have flexibility in determining what, if any, activities will be conducted prior to issuing a NOI and the information to be included in the NOI.

Page limits, Time Limits (1500.4, 1500.5, 1501.5, 1501.10, 1502.7)

AASHTO supports CEQ's continuing effort to encourage brevity, readability, and good writing in all materials prepared in connection with NEPA compliance. AASHTO also supports encouraging agencies to use appendices for supporting technical information and other material that is voluminous or highly-detailed, provided that the information is fairly presented in synthesized or summarized form in the main body of the NEPA review.

AASHTO does not support CEQ's proposal to require that an agency obtain written approval from a "senior agency official" to exceed page and time limits. Page and time limits are appropriate as benchmarks. However, agency decision-makers should have flexibility to shape the breadth and depth of NEPA reviews as needed to properly inform the decisions entrusted to them, including flexibility to exceed limits at their discretion. The additional procedural step is an unnecessary administrative burden and will cause project delay.

Our perspective on this topic reflects the practical experience of State DOTs. The reviews required under NEPA often require information on resources that require collection over two or more years. For example, archaeological resources may require a Phase 1 study that leads to a Phase 2 study, that lead to the coordination and development of a Memorandum of Agreement (MOA). The coordination with landowners and designers for the Phase 1 and Phase 2 studies and then the coordination with agencies and interested parties for the MOA can easily take 2 years. It would be inefficient to require agency decision-makers to secure approval from a senior agency official to conduct NEPA reviews on schedules inextricably set by seasonal or year-to-year variables. Also, many State DOTs conduct the NEPA environmental review process concurrently with the analyses required by State laws, a practice specifically encouraged by Section 1506.4 of CEQ's current regulations. Concurrent reviews provide for valuable efficiency and collaboration, but frequently require more documentation and time than the proposed rule would allow. AASHTO is concerned that the proposed procedural step to obtain approval from a senior federal official to exceed page and time limits could impair Federal-State collaboration in the context of concurrent reviews.

Time Limits on Public and Agency Comments (1503.1, 1503.2, 1503.3)

AASHTO supports time limits for commenting on NEPA documents, conditional on lead agencies having the discretion to extend comment periods and to consider and address substantive comments submitted after the comment period. Such discretion is needed because "late" information may be relevant or helpful to agency decision-making. State DOTs maintain

important, ongoing relationships with diverse stakeholders, including local, Tribal, State, and Federal agencies, non-governmental institutions, and others. Scheduling flexibility is a valuable asset in maintaining these relationships over time and across many decision-making processes.

NEPA Threshold Applicability Analysis (1501.1)

AASHTO's review of this proposed change to CEQ's regulations was limited by the generality and vagueness of the language. It is not clear how the Section would apply in most cases. The language can be read to be quite expansive, such that many federal decisions would no longer be supported by the analytical and public involvement features of NEPA. AASHTO assumes that CEQ's intention is not so broad as to include new restrictions on the ability of lead agencies to inform and influence Federal decisions potentially impacting transportation infrastructure or its stakeholders. If so, CEQ should, at a minimum, revise the proposal to provide a representative range of concrete examples of the Federal agency decisions that would no longer be subject to NEPA review.

Environmental Impact Statement (1502.17, 1502.18, 1500.3, 1503.1)

AASHTO does not support the proposed new section to the draft and final EIS to "include a summary of all alternatives, information, and analyses submitted by public commenters..." This requirement is unnecessary as public involvement is summarized elsewhere in the EIS. Also, AASHTO does not support the new requirement that the lead agency invite public comment on the completeness of the summary in the DEIS and the requirement that lead agencies "certify" in the ROD that the agency has considered all alternatives, information and analyses submitted by the public. As the lead agency is already inviting comment on a draft EIS, there is no need to also invite comment on a particular section of the EIS. Also, signing the overall EIS is sufficient certification, without a separate certification on one specific item in the EIS. These requirements would add unnecessary procedural steps and substantive obligations to the NEPA process and, as such, are counterproductive to the stated intent of CEQ's proposal, to make the NEPA process more efficient and timelier.

In addition, the proposal should include allowing the lead agency to combine the Final Impact Statement and the ROD, as is currently allowable under FHWA requirements.

EIS Cover (1502.11)

AASHTO does not support requiring the EIS cover to include an estimated total cost of preparing the EIS. This is an administrative task that is not appropriate to include in the NEPA implementing rules. Also, it is not meaningful to isolate the costs of NEPA review from the other costs associated with project development. This information will not contribute to the NEPA decision-making process.

Alternatives and Environmental Consequences (1502.14 and 1502.16)

AASHTO does not agree that the alternatives section of an EIS "should present the environmental impacts of the proposed action and the alternatives in comparative form." This is unnecessary and duplicative of the Summary (1502.12) and Environmental Consequences (1502.16) sections of an EIS.

Specificity of Comments and Information (1503.3)

AASHTO requests clarification that the lead agency has the flexibility to determine that comments are substantive even if the comments do not “explain why the issue raised is significant to the consideration of potential environmental impacts and alternatives to the proposed action, as well as economic and employment impacts...” This flexibility is needed because despite the phrasing of the comments, the information in the comments may be relevant or helpful to agency decision-making.

Limitation on Actions during NEPA Process (1506.1)

AASHTO supports the allowance of acquisition of interest in land, purchase of long lead time equipment, and purchase options prior to completion of the environmental review process. Existing authority for early acquisition of right of way have greatly streamlined the project delivery process. AASHTO recommends expanding these early action allowances to include “long lead time materials” as well as “utility relocations.” Utility relocations are a common source of delay in project schedules because they often require regulatory approvals and property acquisition outside the transportation right-of-way. Early acquisition in land and early action utility relocations should include appropriate limitations to ensure the integrity of the NEPA process. Such limitations should include allowing these early actions to occur only after a preferred alternative has been identified and prohibiting an early action to be considered as a factor in approving an alternative. Inclusion of these additional early action items will streamline project delivery.

Effective Date (1506.13)

Although the proposed new rules would become effective upon adoption of the final rule, AASHTO requests clarification that existing rules would remain in place until federal agencies finalize their own NEPA rules and implementing guidance.

CEQ Question on Presumptive Maximum Number of Alternatives

AASHTO does not support establishing a presumptive maximum number of alternatives for consideration in the environmental review process. The process of establishing alternatives is extremely complex and iterative, involves a comprehensive review of impacts, law, regulation and other requirements, and is inclusive of multiple stakeholders with sometimes conflicting agendas. The current environmental review process incentivizes reducing the number of alternatives to be examined in the environmental review process. As such, lead agencies need flexibility in determining the appropriate number of alternatives.

Please note that although this proposal is focused on updating the NEPA process, there are other delay factors that are outside of NEPA. These include lack of consistent funding, public controversy, and other approvals. Many state DOTs report that a key source of delay in the delivery of transportation projects lies in the requirements of key environmental laws, such as the Endangered Species Act, Clean Water Act and Clean Air Act. We recommend CEQ work with the Federal resource agencies and Congress to modernize these substantive laws and their implementing regulations. In addition, the regulatory agencies are commonly challenged by limited resources to the extent the state DOT’s sometimes fund positions at these agencies to assist in getting a timely response. AASHTO and the State DOTs stand ready to work with CEQ to identify means to improve the timeliness and predictability of the processes by which the

Federal resource agencies fulfill their missions under those substantive environmental laws. AASHTO believes that with improved procedures, especially concurrent, coordinated decision-making, we can greatly expedite project delivery without reducing environmental protections.

Also, AASHTO commented on CEQ's 2018 Advance Notice of Proposed Rulemaking (ANPRM) on the agency's NEPA regulations. These comments emphasized then that AASHTO supports efforts to update the regulations as needed "to reflect changes in technologies...legal requirements... and evolving practices for environmental impact analysis, public involvement, and agency coordination." AASHTO continues strongly to support changes in the regulations directed toward those purposes. We greatly appreciate your consideration of these comments and ask that you review them together with our attached July 20, 2018 comments on CEQ's ANPRM.

Thank you for the opportunity to provide comments on the changes CEQ is proposing for its NEPA regulations. Please note that this correspondence reflects the consensus among AASHTO's membership and that individual state DOTs will be submitting comments on this proposal. If you have any questions or would like additional information, please contact Shannon Eggleston, Program Director for Environment, at (202) 624-3649.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Tymon". The signature is fluid and cursive, with the first name "Jim" and last name "Tymon" clearly distinguishable.

Jim Tymon
Executive Director, American Association of State Highway and Transportation Officials