



CQ591

American Association of
State Highway and
Transportation Officials

Bradley L. Mallory, President
Secretary
Pennsylvania Department
of Transportation

John Horsley
Executive Director

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CEQ NEPA Task Force
P.O. Box 221150
Salt Lake City, UT 84122

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To Whom It May Concern:

The American Association of State Highway and Transportation Officials ("AASHTO") welcomes the opportunity to submit comments to the Council on Environmental Quality ("CEQ") regarding efforts to modernize and improve the federal government's procedures for complying with the National Environmental Policy Act ("NEPA"). As an advocate for both environmental stewardship and streamlining, AASHTO strongly supports the CEQ's efforts to review and update the existing NEPA procedures. Individual AASHTO members will be submitting comments addressing specific issues raised in the CEQ request for comments. As a complement to those efforts, AASHTO submits these comments regarding the overall direction of the changes needed in the NEPA process.

A. Technology, Information Management, and Information Security.

Since the late 1970s, when the CEQ's NEPA regulations were last comprehensively revised, the world has seen dramatic advances in information technology. The personal computer, computer-aided design, geographic information systems (GIS) mapping, and the Internet have all emerged and come into mainstream use during this period.

Many of these new technologies have been incorporated into the NEPA process. For example, it is now common to establish a "project web site" that provides opportunities for two-way communication with the public throughout the NEPA process. It also is common for NEPA documents to be distributed electronically (on CD-ROM and on the Internet) as well as in print. And computer-aided design and GIS mapping are now standard tools for developing engineering drawings and environmental documents.

While these advances have brought many benefits, they also have presented new challenges for agencies preparing NEPA documents. For example, in highway projects, it is increasingly common for disputes to arise over the arcane details of the computer models used to generate forecasts of future traffic volumes. In some instances, commenting agencies or individuals stakeholders go so far as to retain their own consultants to generate their own

forecasts, which are then submitted as comments in the NEPA process. These developments reflect the natural evolution of the NEPA process in response to new technological changes. But they also highlight the potential for new technology to give rise to new forms of complexity and conflict in the NEPA process. Paradoxically, in the context of NEPA, new technological tools can actually end up creating new opportunities for delay, rather than expediting the process.

In addition, as noted in the Task Force's request for comments, the Internet has made it possible to distribute information developed in the NEPA process much more widely than ever before. At the same time, recent events have brought national security concerns into a much sharper focus. As a result, the preparers of NEPA documents now must confront issues of information security on a routine basis. Even the most mundane details - e.g., regarding the location of utility lines, the design of bridge structures, and the routes used for hazardous materials transport - all can have national security implications and may warrant limitations on public disclosure. Yet any limitation on disclosure runs counter to the basic NEPA principles of openness and can sow the seeds of distrust among key stakeholders and the public at large.

Against the backdrop of these issues and concerns, it is clear that many judgment calls will have to be made regarding the appropriate means for integrating information technology into the NEPA process. As a general principle, the responsibility for making those judgment calls resides - and should reside - with the lead agencies in the NEPA process. It is important to preserve the flexibility for lead agencies to decide, on a case-by-case basis, which technological tools to apply and how to apply them. A prescriptive, mandate-driven approach would be counterproductive and could actually impede efforts to develop better tools for utilizing information technology in the NEPA process. The better approach is to establish regulations that allow flexibility, and then disseminate best practices and technical tools for use by the lead agencies as they deem appropriate.

B. Federal and Inter-Governmental Collaboration.

Experience has shown that effective inter-agency collaboration is essential to the success of any NEPA process, both for routine projects and for more complex undertakings. Yet experience also has shown that effective inter-agency collaboration can be difficult to achieve. Differences in agency missions, cultures, and policies sometimes can create adversarial relationships, a lack of communication, and an overall atmosphere of distrust - all of which contribute to delay and impedes the effectiveness of the NEPA process.

Obviously, any reform of the NEPA process itself will not resolve the underlying policy differences among the various participants in that process. However, it is possible to structure the NEPA process in a way that better supports effective decision-making. In particular, it is important to recognize that - at least for highway projects - efforts to encourage collaborative decision-making have had the consequence of eroding lead agencies' decision-making authority. The result, in some cases, has been a tendency for the NEPA process to become bogged down in a search for complete consensus. Effective decision-making certainly requires extensive coordination, but it also requires a willingness by the lead agencies in the NEPA process to take responsibility for making difficult decisions at key milestones. Therefore, in revising NEPA

procedures, it is important for the CEQ to consider opportunities to clarify and perhaps strengthen the role of the lead agencies.

Another factor to consider is the interaction between NEPA and related statutory requirements – e.g., Section 404 of the Clean Water Act, Section 106 of the National Historic Preservation Act, Section 7 of the Endangered Species Act, and (in the case of transportation projects) Section 4(f) of the Department of Transportation Act. The NEPA process should serve as an “umbrella” under which all agencies consider competing concerns and arrive at a single decision that serves the overall public interest. Yet in many cases, decisions made in the NEPA process are driven by the mandates of specific permitting requirements. The tension between NEPA and these other laws underlies much of the tension between NEPA lead agencies (e.g., FHWA) and the agencies responsible for specific permitting requirements. It is critical for this underlying tension to be taken into account when seeking ways to improve inter-agency collaboration in the NEPA process.

With respect to the issue of joint-lead and cooperating agencies, it is important to recognize that “collaborative agreements” among agencies can be beneficial, but rarely can they bridge fundamental policy differences regarding a project. Thus, an agreement should be viewed as a useful tool for ensuring proper communication and a clear understanding of the respective roles of each agency. It should not, however, be viewed as a panacea for conflict among agencies involved in the NEPA process.

Lastly, it also should be noted that the role of “cooperating agency,” as defined in existing CEQ regulations, is appropriate only for a limited sub-set of agencies – i.e., those with a permitting role or “special expertise.” In practice, it is important for lead agencies to determine, early in the NEPA process, the full set of agencies that will be involved. There have been various efforts to identify those agencies and classify them according to their role. It may be appropriate for CEQ to consider defining a term such as “participating agency,” which would apply to all agencies that are actively involved in a NEPA process.

C. Programmatic Analysis and Tiering

By law, Federal actions related to transportation plans and programs (at both the statewide and metropolitan levels) are exempt from NEPA requirements. As a result, it is unnecessary for NEPA documents to be prepared for transportation plans and programs; for highways, NEPA documents generally are prepared only at the project-specific level.

In the past, it was widely assumed that there would be little benefit to preparing a programmatic or tiered NEPA document for a single, specific project. However, in recent years, there have been several new tiered or programmatic EISs initiated for major highway projects. These new documents have encouraged a re-examination of the possibility of using tiering on a more widespread basis for highway projects, and have provided new models to follow for future tiered EISs.

The recent experiences with tiering have revealed the need for additional guidance and possibly regulatory changes in some areas. One particular area of concern involves the

integration of a tiered NEPA process with regulatory requirements under other laws, such as Section 7 of the Endangered Species Act. Recent experience has shown that regulatory agencies involved in a “Tier 1” or programmatic NEPA process sometimes require the same level of detail that is typically provided in a conventional NEPA process – thus undermining the benefits of tiering. It would be helpful to have additional guidance on how to integrate a tiered NEPA process with Section 7 consultation and other regulatory requirements, so that tiered approaches can be used while also assuring compliance with those other laws.

In this context, AASHTO supports efforts to maintain the high degree of flexibility that exists under the current CEQ tiering regulations, while also doing more to disseminate guidance and best practices regarding methodologies for completing a tiered NEPA process.

D. Adaptive Management Plans

In essence, adaptive management places an emphasis on post-decision monitoring and adjustment, rather than pre-decision analyses and predictions. AASHTO recognizes that this technique may be useful as a tool for managing situations in which potential outcomes are highly uncertain. AASHTO supports further research efforts to assess the potential to apply adaptive management techniques to highway projects.

At the same time, it is important not to under-estimate the challenges of applying adaptive management techniques to highway projects. For highway projects, many of the potential impacts associated with the project result from the very existence of a new highway and/or additional lanes. For example, the direct impacts on the natural and human environment occur as a result of the initial construction of a highway. Once construction has occurred, there often is little that can be done to “un-do” the project’s physical impacts. Thus, it is important to be realistic about the extent to which adaptive management plans can be applied to highway projects.

If adaptive management techniques are used, the issue of whether to re-open the NEPA process will inevitably follow. As a general matter, it should be possible to implement adaptive management techniques *without* first re-opening the NEPA process. However, each time an adaptive management requirement is triggered, arguments could be made that the NEPA process should be re-opened. In fact, some suggestions have been made in the academic literature that commitments to adaptive management should explicitly provide for re-opening the NEPA process if environmental impacts are greater or different than was anticipated.

In sum, while AASHTO recognizes the value associated with adaptive management techniques, AASHTO cautions that these techniques may not be widely applicable to highway projects. In addition, AASHTO has strong concerns about any adaptive-management approaches that call for the re-opening of a completed NEPA process. Re-opening a completed process has the potential to undermine the public’s confidence in the effectiveness of the process, while also creating the potential for interminable delays. Thus, to the greatest extent possible the CEQ NEPA Task Force should allow for adaptive management, but should avoid creating new procedures that could cause the NEPA process to be re-opened unnecessarily.

E. Categorical Exclusions

The categorical exclusions (“CEs”) for highway projects are listed in the FHWA regulations in two categories. Projects listed in the first category – known as subparagraph (c) – are approved automatically, without the need for any project-specific review by FHWA. Projects listed in the second paragraph – known as subparagraph (d) – can be approved only after documentation has been submitted to FHWA demonstrating that the project has no significant impacts, *except* that projects listed in the second category can be approved without project-specific review if FHWA issues a “programmatic approval” – known as a “programmatic CE.”

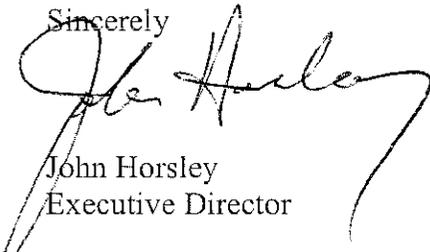
In this context, AASHTO supports the continued expansion of the use of CEs as a tool for streamlining the completion of the NEPA process. In particular, AASHTO supports the expanded use of automatic CEs under the FHWA regulations as well as the expanded use of programmatic CEs. AASHTO also supports development, if appropriate, of a national programmatic approval for certain CEs, as a means of eliminating the need for individual, State-specific programmatic CEs.

Finally, AASHTO supports efforts to ensure that other federal agencies accept the CE list contained in FHWA’s regulations, so that *all* federal agency decisions would be covered by a single list of CEs. This approach could be implemented consensually through programmatic agreements or other non-regulatory changes; it also could be implemented as a legal requirement through federal legislation.

F. Additional Areas for Consideration (EAs)

AASHTO supports the usage of environmental assessments (“EAs”) as a tool for managing the NEPA process for large-scale highway projects. Furthermore, while AASHTO recognizes that there is broad variation among EAs, both across and within agencies; AASHTO emphasizes that in many cases the variation in the documents – in terms of organization and content – reflects underlying differences in the projects being studied. While the dissemination of best practices and guidance is desirable, it is equally important to preserve discretion for individual lead agencies to decide how best to prepare EAs for individual projects.

Thank you for the opportunity to submit these comments. We would welcome the opportunity to answer any questions or engage in further dialogue regarding the issues addressed in these comments.

Sincerely

John Horsley
Executive Director