

United States Senate

WASHINGTON, DC 20510

March 10, 2020

The Honorable Mary B. Neumayr
Chairman
The Council on Environmental Quality
730 Jackson Place, NW
Washington, D.C. 20503

RE: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, Docket ID: CEQ-2019-0003

Dear Ms. Neumayr:

We write to express our opposition to the Council on Environmental Quality's (CEQ) proposed rule to revise the implementing procedures for the National Environmental Policy Act (NEPA). While this sweeping revision of existing regulations threatens to undermine government decision-making in a variety of policy areas, we wish to call your attention in this letter to the potential damage the rule inflicts on transportation infrastructure decisions in particular.

Our nation's transportation infrastructure urgently requires new investment and a renewed commitment from the federal government. That is why we as Senate Democratic leaders of the committees of jurisdiction have embarked on a surface transportation reauthorization of programs to significantly reduce emissions, improve resilience, enhance safety, and build a more equitable and affordable transportation system for all users. There is much we can do to improve the process by which we deliver transportation infrastructure projects—to make processes less costly and to reduce unnecessary delays for meritorious projects. Nevertheless, under the banner of “modernizing” the NEPA process, your proposed rule would dispense with many of the substantive strengths of NEPA, while doing little to improve the process.

Your proposed rule includes three particularly egregious attacks on existing NEPA regulations that are important for transportation. First, it eliminates consideration of cumulative impacts and omits indirect effects in the proposed regulations. Second, it diminishes the rigor with which project alternatives are considered. And, third, it weakens public engagement in the decision-making process.

First, a critical component of the existing NEPA process is the consideration of a project's cumulative impact. The current NEPA regulations recognize that such an impact “can result from individually minor but collectively significant actions taking place over a period of time” (40 CFR § 1508.7). This definition and the corresponding requirement for agencies to consider cumulative impacts within the scope of environmental assessments and environmental impact statements are critical to successful, thoughtful transportation decision-making, but your proposed rule eliminates both.

The construction of a new road clearly has direct and immediate impacts on the surrounding environment—from soil erosion and loss of vegetation to the air pollution generated by construction activities, not to mention the emissions from the vehicles that use the road once it is built; however, excluding cumulative impacts and indirect effects from consideration in

environmental reviews, as the proposed rule would allow, ignores the fundamental ways transportation infrastructure shapes the environment in which we live.

Consider, for example, the construction of a new highway project expected to increase impermeable surfaces in an area or create other conditions that affect stormwater runoff to nearby streams. Such impacts may, individually, result in minor quality impacts. However, project impacts to water quality may be cumulatively significant, when considered among the incremental impacts of other past, present, and reasonably anticipated future projects in that same area. Cumulative impact analysis can enable project redesign and corrective action that allow transportation benefits -- as well as public health and safety objectives -- to be met.

NEPA reviews are also one of the primary ways that the federal government considers the frequently disproportionate environmental, economic, and public health impacts that siting large-scale, highly disruptive infrastructure projects and facilities have on people of color, indigenous people, low-income, immigrant, and rural populations. Central to an analysis on disproportionate impacts is the consideration of cumulative impacts which result from past, present, and reasonably foreseeable future actions in a project area.

Second, your proposed rule weakens NEPA's existing provisions for the consideration of alternatives to a proposed action. The current implementing regulations require government agencies to consider alternatives to a proposed action with sufficient rigor and objectivity; however, your proposal would undermine this (including by striking the words "rigorously" and "objectively" from 40 CFR § 1502.14).

Even more egregiously, the proposed rule drops a requirement to consider "reasonable alternatives not within the jurisdiction of the lead agency." This requirement is especially crucial for transportation projects. For example, this could mean that taxpayers are asked to pay for an unnecessary highway widening project, despite the purpose and need of the project being more appropriate for a transit or rail option instead. The inherent goals of most transportation projects are to improve the mobility and safety of individuals, along with the economic competitiveness of a region. Solutions to that goal may be found in multiple modes; therefore, alternatives to a proposed project may fall under the auspices of a different agency.

Construction of new highway capacity will result in a very different set of environmental outcomes than a new transit corridor, yet both alternatives could be proposed as solutions to the same goal of improving commute times within a region. Congress has reaffirmed this by providing for extensive flexibility for States to transfer their Federal Highway program apportionments to transit projects. Should the Federal Highway Administration be allowed to eliminate all transit or multi-modal alternatives from its consideration of a highway proposal because these modes fall under the Federal Transit Administration or other agencies? Or should the U.S. Department of Transportation, encompassing multiple modal agencies, be deemed to be the lead agency? The lack of clarity in the proposed rule would leave key aspects of transportation decision-making vulnerable to the political objectives of individual officials and deprive the public of valuable information on an appropriate range of alternatives.

Finally, the proposed rule severely erodes NEPA's provisions to ensure ample public involvement as well as relevant input from other agencies on transportation infrastructure decisions. In fact, in certain instances, public input will not only be limited; it will be eliminated entirely. The largest threat to public engagement in transportation projects, or any other project,

is narrowing the scope of review. That is why we are strenuously opposed to redefining a “major Federal action” to both require that the action is “subject to Federal control and responsibility” and does not include projects with “minimal Federal funding”. This ambiguous and arbitrary proposal, for instance, could allow a \$1 billion project that is predominantly funded by a State to evade NEPA requirements entirely. The color of funds often bears no relationship with how that action affects the quality of the human environment and how the public should engage on a project.

In addition, CEQ proposes deleting the requirement that an environmental impact statement has to be available for at least 15 days prior to a public hearing on it.^[3] In theory, this means that an EIS could be published on Monday, and the hearing could be scheduled on Tuesday. The point of the 15 days, of course, is to make sure the public has sufficient time to review an EIS before a hearing. As to providing comments, the government could also claim that public comments are not “specific” enough or do not include reference to data sources and scientific methodologies and therefore are “forfeited.”^[4] We are concerned that this revision is intended to stifle input from the very people that will be most impacted by transportation infrastructure projects in their community.

Comments that are not submitted within the agency’s strictly imposed time limits would also not be considered.^[5] We question whether CEQ has considered how this revision might impact analysis that can only be accomplished seasonally, for instance, and outside of an arbitrary time limit. Then, if aggrieved communities or individuals want to challenge an inadequate NEPA analysis in court, they may be precluded from doing so if they did not meet these proposed requirements.^[6]

Additionally, your proposal weakens the integration of planning and environmental reviews, which has been an effective way to accelerate project delivery while ensuring that agencies collaborate early enough in the project development process to enable transportation planning documents and decisions to be integrated into the NEPA review. In fact, Congress affirmed the integration of planning and NEPA as a tool to accelerate project delivery in section 1310 of MAP-21. Yet, your proposed rule would encourage agencies to integrate the NEPA process into planning at “the earliest reasonable time” rather than requiring them to do so at “the earliest possible time” (40 CFR § 1501.2). This revision, though seemingly minor and innocuous at first glance, lowers the standards for compliance by introducing greater ambiguity into the regulations, sending a signal to agencies to prioritize NEPA less and to take outreach and engagement less seriously. It also could reduce efficiency by reducing the integration of planning and NEPA.

Diminishing the requirements for public engagement is presented as part of an effort to make the NEPA process go faster. In fact, a rigorous public engagement process provides greater certainty for proposed projects by identifying issues and potential conflicts early.

As the leading source of greenhouse gas emissions in the United States, transportation affects the health and security of future generations of Americans through its contribution to climate change. Transportation infrastructure also enables the mobility and connectivity that is intimately

^[3] 40 CFR § 1506.6(c).

^[4] 40 CFR §§ 1500.3(b), 1503.3(a), 1503.4.

^[5] 40 CFR §§ 1500.3(b), 1501.10, 1503.3(b), 1503.4.

^[6] 40 CFR §§ 1500.3(b)-(c).

ted to Americans' quality of daily life, impacting how much time they spend stuck in traffic or waiting for a train, and how much of their paycheck they must devote to getting to and from work. It is critical, therefore, that the public has a robust opportunity to engage with their local and federal government leaders when decisions about transportation infrastructure are being made, and that a rigorous, thorough NEPA process provides the public with the information necessary to inform their input and the opportunity to engage. This is the only way to ensure that the environmental implications of these decisions are considered in a meaningful way.

We request that this letter be added to Docket ID: CEQ-2019-0003.

Thank you for your consideration of these concerns.

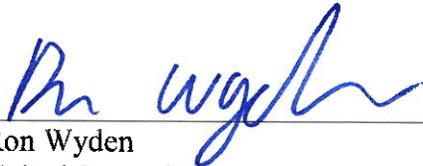
Sincerely,



Benjamin L. Cardin
United States Senator



Thomas R. Carper
United States Senator



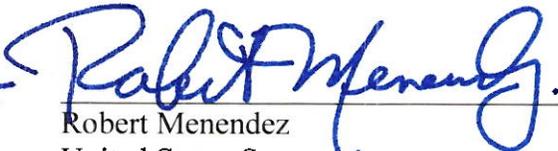
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