



White House Council on Environmental Quality (CEQ)
Virtual Public Meeting – September 11, 2023
AGC of America Extended Remarks

Submitted via Regulations.gov at <https://www.regulations.gov/commenton/CEQ-2023-0003-0001>.

**Re: Notice of Proposed Rulemaking: National Environmental Policy Act
Implementing Regulations Revisions Phase 2 (88 Fed. Reg. 49924, July 31, 2023)**

Good morning. I am Leah Pilconis, general counsel at the Associated General Contractors of America. AGC represents more than 27,000 construction companies, suppliers, and service providers nationwide. We value this opportunity to provide feedback.

AGC supports NEPA’s original goals of informing federal decisions and public understanding of environmental impacts.

However, we are concerned that these revisions go well beyond NEPA’s original intent and could complicate and prolong infrastructure projects---jeopardizing the potential benefits of recent legislative acts. Delays can increase project costs and even lead to project abandonment.

Efficiency is essential for timely community benefits, resilience, and economic strength.

Now, let's dive into our specific concerns and recommendations.

First, the proposal must align with the Fiscal Responsibility Act of 2023’s aim for less complexity and unpredictability in the federal review process.

Instead, the proposal adds requirements and complexity to an agency’s ability to use another agency’s categorical exclusions, expands the definition of “major federal action” (compared to FRA and particularly for federal financial assistance), and misses opportunities to further simplify the process ... such as allowing applicant-prepared environmental documents, clarity on page and time limits, and adherence to FRA provisions.

Second, the proposal drives policy outcomes which hinders the efficiency and fairness of the environmental review process.

CEQ's proposal appears to dictate requirements aimed at achieving specific policy outcomes – potentially sidelining other critical considerations. This is contrary to NEPA, as interpreted by

longstanding case law, which is designed to be a procedural statute for informed decision-making, rather than for forcing specific outcomes.

For instance, the proposal introduces the concept of an "environmentally preferable alternative"--- potentially favoring certain projects and creating hurdles for others--- that could complicate agency processes and increase the risk of litigation.

Furthermore, it creates duplicative layers of requirements for considerations like climate, environmental justice, and Tribal interests throughout the regulations, potentially favoring certain projects and creating hurdles for others.

In addition, CEQ's proposal to make mitigation plans enforceable could have unintended consequences, discouraging voluntary mitigation efforts and adding complexity to the NEPA process.

Notably, AGC disagrees with the proposed rule's deletion of language from the regulations describing NEPA as a procedural statute.

Third, we urge the CEQ to retain key process improvements from prior regulations ensuring a focus on “reasonably foreseeable effects” rather than all possible effects, as intended by Congress.

Additional Recommendations:

1. Return to 2020 Rule's Articulation of Purpose and Need:
 - CEQ should bring back language that requires agencies to base the purpose and need of a project on the goals of the applicant and the agency's authority.
2. Retain the Participation Requirement:
 - CEQ should keep the requirement that public participants raise objections and comments during the public engagement process to maintain clarity and predictability.
3. Retain the Statement of Intention for Expedious Review:
 - CEQ should retain the statement that NEPA disputes should be resolved as expeditiously as possible to prevent unnecessary delays and litigation.
4. Recognize That Other Environmental Reviews May Fulfill NEPA's Purpose:
 - CEQ should acknowledge that other environmental reviews under different statutes can fulfill the purpose and function of NEPA, rather than mandating duplicative processes.
5. Retain Language on Cooperating Agencies' Jurisdiction:
 - CEQ should keep language instructing cooperating agencies to focus on matters within their jurisdiction or special expertise, avoiding potential overreach.

6. Keep the Requirement for Public Disclosure of NEPA Costs:
 - CEQ should retain the requirement for agencies to disclose the costs incurred in preparing NEPA documents to enhance transparency and accountability.
7. Retain Language About Not Requiring New Scientific Research:
 - CEQ should keep the language stating that agencies are not required to undertake new scientific and technical research but can rely on existing resources.
8. Maintain Specificity of Comments:
 - CEQ should retain the requirement that comments on submitted alternatives and analyses should be as specific as possible to streamline the review process.

Finally, AGC is concerned that CEQ's proposed revision includes numerous elements that would make reviews more complex. Climate impacts should not be addressed explicitly in the regulation. And CEQ's proposal for "innovative approaches" may result in uncertainty, litigation, and delays, potentially undermining NEPA's purpose.

In conclusion, our goal is to strike a balance between environmental considerations and the need for timely and efficient infrastructure development in line with the FRA. We appreciate your attention to these concerns and recommendations as we work towards achieving this balance.

If CEQ proceeds with the proposed rule, it is vital that the Council makes it clear that agencies should not pause or hinder NEPA reviews during the development of new NEPA procedures. It's crucial to keep assessing project proposals without unnecessary delays caused by the agencies creating their own implementing regulations.

Thank you.

Leah Pilconis
 General Counsel
The Associated General Contractors of America
 2300 Wilson Blvd Ste 300, Arlington, VA 22201
 703.837.5332 | leah.pilconis@agc.org