

April 9, 2010

The Council on Environmental Quality
Attn: Ted Boling
722 Jackson Place, NW
Washington, DC 20503

Re: National Environmental Policy Act (NEPA) Draft Guidance, Establishing, Applying and Revising Categorical Exclusions Under the National Environmental Policy Act

On behalf of the 5,000 members of the American Road and Transportation Builders Association (ARTBA), I respectfully offer comments on the Council on Environmental Quality's (CEQ's) notice regarding NEPA draft guidance, establishing, applying and revising Categorical Exclusions (CEs) published in the February 23 *Federal Register*.

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than \$200 billion annually in U.S. economic activity and sustains more than 2.2 million American jobs.

Because of the nature of their businesses, ARTBA members undertake a variety of activities that are directly impacted by NEPA. ARTBA's public sector members adopt, approve, or fund transportation plans, programs, or projects which are all subject to NEPA's requirements. ARTBA's private sector members plan, design, construct and provide supplies for these federal transportation improvement projects. This document represents the collective views of our 5,000 member companies and organizations.

The guidance proposed by CEQ aims to assist other federal agencies in their administration of CEs. It does this by proposing a method for agencies to develop new CEs in consultation with CEQ. Further, the guidance also suggests public involvement in the CE development process through publication of proposed CEs in the *Federal Register* as well as solicitation of public comment.

ARTBA shares CEQ's goal of protecting the environment and minimizing the impacts of development. ARTBA also supports NEPA and realizes it is an integral component of the transportation planning process. Many, if not all, of the significant environmental achievements of the transportation community and ARTBA members would not be possible without NEPA. The transportation planning process allows projects which neither individually nor cumulatively have a significant environmental impact, to be treated as a CE. State agencies must provide FHWA with sufficient information on a case-by-case basis to demonstrate the environmental impacts associated with a project will not rise above the CE threshold. CEs are typically used for



projects where no real alternatives analysis is necessary, such as road rehabilitation or bridge replacement projects.

The CE process should be improved by focusing on methods to reduce delay. According to a report by the U.S. Government Accountability Office (GAO), as many as 200 major steps are involved in developing a transportation project from the identification of the project need to the start of construction. The same report also shows it typically takes between nine and 19 years to plan, gain approval of, and construct a new major federally-funded highway project. This process involves dozens of overlapping state and federal laws, including: NEPA; state NEPA equivalents; wetland permits; endangered species implementation; and clean air conformity. Currently, other environmental statutes, such as the Endangered Species Act (ESA) and Clean Water Act (CWA) require additional analysis not required by a CE. The CE process should be extended to these areas in order to reduce unnecessary statutory hurdles where impacts to the environment are truly minimal.

FHWA data reveals that CEs are required for 90.6 percent of federally-funded transportation projects. A report conducted by the National Cooperative Highway Research Program (NCHRP) notes:

“[D]elays in completing [environmental assessment (EA) and CE] reviews are encountered frequently despite the minimal environmental impacts associated with such projects. Even if such project-level delays are individually small, their cumulative impact may be significant because most transportation projects are processed as CEs or EAs.”

The report goes on to show 63 percent of all state DOTs responding to the survey reported environmental process delays with preparation of CEs. These delays triple average environmental review times for CEs — from about eight months to just under two years. FHWA data also shows it now took almost as long to complete a CE in 2006 (just under two years) as it did to complete an entire environmental impact statement (EIS) in 1970 (2.2 years).

In determining guidelines for the establishment of new categories of activities to qualify as CEs, a focus should be placed on flexibility. Agencies should be given the flexibility to use their specialized knowledge in different areas to determine when an activity should qualify for CE status. It is more important to establish a flexible process for determining when CEs should be used than to establish an actual list of activities. Focus should be placed on the process rather than defining new activities to classify as CEs. It is for this reason that ARTBA’s recommendations focus on structural changes to the CE process itself, such as deadlines for completion and guidelines on when CEs should be used.

Providing set time limits for the completion of CEs would go a long way towards reducing the delay inherent in the current NEPA review process. However, ARTBA recognizes that a uniform deadline may not work for every project. In setting deadlines for CEs, discussions involving the lead agency and project sponsor should take place in order to determine a realistic deadline for the project. As such, ARTBA recommends project sponsors and regulatory agencies agree on individualized CE deadlines in the beginning stages of the development process. Any changes to the CE process should allow for project-specific flexibility in the setting of deadlines.

In its current state, NEPA is ambiguous on whether a CE or EA would be required for a specific project. This can and often does cause project sponsors to opt for the more time consuming EA in order to avoid potential litigation at a later time. For this reason, ARTBA also strongly supports the creation of unambiguous environmental review criteria that would favor the CE process (over a far more time consuming EA or EIS) where environmental impacts are clearly minimal unless there is “compelling” evidence warranting a different course of action. Ensuring project planners know when it is appropriate to use a CE without fear of possible legal recourse would help reduce delay in the NEPA process. Creation of specific criteria would allow planners to know what type of review is most appropriate for their project. Such criteria would also reduce the threat of litigation by groups pressing for a more comprehensive review regardless of whether or not it is needed.

NEPA was never meant to be a statute enabling delay, but rather a vehicle to promote balance. While the centerpiece of such a balancing is the environmental impacts of a project, other factors must be considered as well, such as the economic, safety, and mobility needs of the affected area and how a transportation project or any identified alternative will affect those needs. Modifying the CE process will help NEPA to achieve this balance.

Sincerely,

A handwritten signature in black ink that reads "T. Peter Ruane". The signature is written in a cursive style with a large, stylized initial "T".

T. Peter Ruane
President & C.E.O