

DEPARTMENT OF TRANSPORTATION

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*Making Conservation
a California Way of Life.*

August 20, 2018

Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Dear Council on Environmental Quality,

The California Department of Transportation (Caltrans) respectfully submits the enclosed comments on the Council on Environmental Quality's (CEQ) Advance Notice of Proposed Rulemaking—Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act Docket Identification No. CEQ–2018–0001.

Your consideration of these comments is greatly appreciated. For additional information, please contact Giles Giovinazzi, Chief of Staff & Federal Transportation Liaison, Caltrans at (916) 214-6144 or by email sent to giles.giovinazzi@dot.ca.gov.

Sincerely,

A handwritten signature in blue ink that reads "Laurie Berman".

LAURIE BERMAN
Director

Enclosure

**California Department of Transportation's Comments on the
Council on Environmental Quality Advanced Notice of Proposed Rulemaking
on an Update to the Regulations for Implementing the Procedural Provisions
of the National Environmental Policy Act**

August 20, 2018

The California Department of Transportation (Caltrans) has reduced the regulatory burden on thousands of road projects because of the U.S. Department of Transportation's (U.S. DOT) willingness to assign to the state reviews required under National Environmental Policy Act (NEPA). Based on our experience as the lead federal agency for NEPA review for the largest state in the nation, Caltrans recently proposed additional improvements to 23 U.S.C. §§ 326 State assumption of responsibility for categorical exclusion ("CE Assignment") and 327 Surface Transportation Project Delivery Program ("NEPA Assignment").ⁱ Therefore, we welcome the opportunity to again provide comments to the Administration for improving the NEPA process.

Caltrans does not recommend significant revisions to Council on Environmental Quality (CEQs) NEPA regulations at 40 CFR parts 1500-1508, which have been revised only once since their promulgation in 1978. In general, the existing CEQ guidelines are clear, concise, and do not impose an undue regulatory burden on federal lead agencies. At the same time, Caltrans believes that efficiencies can be gained through additional recommended actions under the related August 2017 Executive Order 13807 on *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure*ⁱⁱ, the April 2018 *Memorandum of Understanding Implementing One Federal Decision under Executive Order 13807* ("*One Federal Decision MOU*"), as well as amendments to the NEPA Assignment statute.ⁱⁱⁱ

1. Caltrans recommends that the Administration take steps to clarify that states delegated CE and NEPA assignment responsibilities are acting as the NEPA federal lead agency. As the NEPA federal lead agency, Caltrans currently assumes the U.S. DOT's responsibility for completing technical studies, conducting consultation with federal permitting agencies, managing stakeholder and public outreach, and ultimately drafting and approving environmental documents. However, Caltrans has encountered some instances in which other federal agencies are not acknowledging Caltrans as the NEPA federal lead agency, which can delay Caltrans' completion of a NEPA document. In some instances, federal permitting agencies are refusing to accept Caltrans' NEPA approval, opting instead to produce their own documents, which can delay issuance of federal permits required to move projects forward.

2. Caltrans has reviewed both the President's August 2017 Executive Order 13807 as well as the April 2018 One Federal Decision MOU. To implement our recommendation, Caltrans believes that the Administration should include states with NEPA Assignment authority as signatories to the One Federal Decision MOU.

3. Additionally, in order to fully implement the One Federal Decision MOU called for under Executive Order 13807, the CEQ Regulations should be revised to specifically allow one federal agency to utilize, at least in part, the implementing regulations of another agency. Currently, 40 CFR § 1506.3 allows an agency, such as a cooperating agency, to adopt an environmental impact statement prepared by a lead agency. While beneficial, even more significant time savings would be achieved if a cooperating agency could also adopt a categorical exclusion (CE) prepared by the lead agency. Currently, each federal agency has its own implementing regulations under NEPA, including a list of actions that qualify for a CE under NEPA. These lists necessarily differ by agency and are not currently interchangeable. As an example, a federal lead agency may prepare a CE for a routine action performed by that agency. However, if a permit or other approval is needed from a cooperating agency, that cooperating agency is often unable to utilize the lead agency's categorical exclusion and must either prepare a higher-level document for their approval or request that the lead agency do so.
4. Another suggested revision to the CEQ regulations concerns programmatic mitigation. Caltrans is authorized under 23 CFR 450.214 to develop programmatic mitigation plans as part of the statewide transportation planning process. In order to provide authority to cooperating agencies to participate in the development of programmatic mitigation plans, Caltrans suggests that Section 1501.6 of the CEQ Guidelines be amended to recognize programmatic mitigation plans developed in advance of specific projects and to authorize the participation of cooperating agencies in the development of these plans.
5. Caltrans also recommends that states with NEPA Assignment authority be allowed to participate earlier in the drafting of U.S. DOT NEPA-related federal rulemakings. State departments of transportation that are delegated NEPA responsibilities are invested with federal authority and have accumulated practical experience implementing NEPA and carrying out the federal environmental review process. U.S. DOT would benefit from allowing states with NEPA assignment authority to help shape policy in this area prior to the publication of proposed rulemakings.
6. Caltrans notes that on September 14, 2017, the CEQ published a notice in the Federal Register announcing an initial list of actions it will take to enhance and modernize the federal environmental review and authorization process for infrastructure projects, which included the following item: "Form and lead an interagency working group to review regulations and policies to identify impediments to the efficient and effective processing of environmental reviews and permitting decisions".^{iv} To implement our recommendation, Caltrans believes the Administration should include states with NEPA Assignment authority as part of the lead and interagency working group to review regulations and policies.
7. Caltrans believes that the term of years for CE and NEPA assignment authority agreements with U.S. DOT should be lengthened for states with a successful track record in review and compliance with these programs. Under current law, the statutory term of years for CE Assignment agreements is three years,^v and five years for NEPA Assignment agreements.^{vi} In 2016, Caltrans successfully renegotiated its CE and NEPA

assignment agreements; the process of renegotiating these agreements with U.S. DOT took approximately one year and two and a half years, respectively, and required the state to enact legislation extending its waiver of sovereign immunity.

8. Caltrans believes that the term of years for these agreements should be extended to ten years for states that have participated in the CE and NEPA assignment programs for a minimum of ten years and satisfactorily complied with the requisite annual auditing and monitoring requirements. Lengthening the assignment agreement terms will reduce the workload on federal and state staff and mitigate the risk of these agreements lapsing before assignment authority can be renewed. Should Caltrans' CE and NEPA assignment agreements with U.S. DOT lapse, reapplying for these programs and renegotiating these agreements would likely be very time-consuming; in the interim, it would add time and cost to the delivery of projects. Additionally, the federal workforce would have to grow to perform this reassigned workload.
9. While Caltrans understands term of years for these agreements must be amended statutorily, not through regulation, we would appreciate the Administration's support for this recommendation as it works with Congress to improve the NEPA process.

ⁱ Caltrans Comments on the U.S. DOT Draft Strategic Plan for FY 2018-2022 and Letter Dated July 14, 2017 from Caltrans Director Malcolm Dougherty to U.S. DOT Secretary Elaine L. Chao: http://www.dot.ca.gov/hq/transprog/map21/implementation/ct-comment-usdot2018-2022-strategic_plan_signed.pdf

ⁱⁱ Executive Order 13807 on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure: <https://www.federalregister.gov/documents/2017/08/24/2017-18134/establishing-discipline-and-accountability-in-the-environmental-review-and-permitting-process-for>

ⁱⁱⁱ Memorandum of Understanding Implementing One Federal Decision under Executive Order 13807 ("One Federal Decision MOU"): <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-establishing-discipline-accountability-environmental-review-permitting-process-infrastructure/>

^{iv} Initial List of Actions To Enhance and Modernize the Federal Environmental Review and Authorization Process: <https://www.federalregister.gov/documents/2017/09/14/2017-19425/initial-list-of-actions-to-enhance-and-modernize-the-federal-environmental-review-and-authorization>

^v 23 U.S.C. § 326(c)(3)(A).

^{vi} 23 U.S.C. § 327 (c)(5).