January 10, 2017

The Honorable Anthony R. Foxx
Secretary
United States Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Re: Docket Number DOT-OST- 2016-0239

Dear Secretary Foxx:

The Associated General Contractors of America (AGC) is a national organization representing 26,000 businesses involved in every aspect of construction activity in all 50 states, Puerto Rico and Washington, D.C. AGC members perform contracts for the Federal Highway Administration (FHWA), state departments of transportation (DOTs), local transit agencies and other entities that receive funding through the Federal-aid highway and other USDOT programs and are therefore impacted by USDOT’s policy proposal for implementing the National Environmental Policy Act.

Executive Summary

AGC believes that the proposed “Update to USDOT NEPA Implementing Procedures, DOT Order 5610.1D: Procedures for Considering Environmental Impacts,” published in the Federal Register on December 20, 2016, (Docket Number DOT-OST- 2016-0239) is a major rule making that will have significant impact on the environmental review process for transportation projects. Therefore, USDOT should allow time to fully vet the proposal and for the submission of substantive comments. AGC’s expedited review of the proposed NEPA Order indicates that it adds an additional layer of procedural review into an already lengthy and cumbersome process. As such, this proposed Order is in complete defiance of congressional intent based on statutory directives to expedite the NEPA process. The procedures add new requirements for consideration of factors that have never before been part of the environmental review process. In addition, the proposed Order undermines the use of categorical exclusions, again, in complete defiance of congressional intent.

Time Extension Requested

AGC reiterates its request for an extension of the deadline for submitting comments on the NEPA Order. The 21 day public comment period established by USDOT in this notice is an insufficient amount of time to provide meaningful comments on such an important set of procedures. The fact that USDOT posted the notice to its website without notification to all stakeholders does not absolve the agency from its responsibility to allow full, public participation. AGC again requests that the comment deadline be extended to Monday, February 20, 2017, to allow for a full 60 day comment period.

As articulated in President Obama’s Executive Order 13563 on Improving Regulation and Regulatory Review:

• “[Our regulatory system] must allow for public participation and an open exchange of ideas.”
• "[E]ach agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."

The scope and complexity of this proposal requires more than a 21 day review period. To allow for meaningful participation by the public, an extension of the public comment period is warranted.

Revised Procedures Undermine Streamlining

The NEPA review process has a significant impact on the timely delivery of vitaly needed transportation infrastructure projects. Protecting the primary objective of NEPA while making the review process work more efficiently and cost effectively was a primary concern of Congress when it enacted the three most recent transportation authorization statutes: SAFETEA-LU, MAP-21, and the FAST Act. USDOT’s proposed NEPA Order undermines these legislative initiatives by adding an unnecessary layer of review and coordination requirements on top of those already developed by each Operating Administration (OA). The programs administered by each of the OAs have their own unique set of implementation procedures, which are based on specific statutory requirements that apply to them. In addition each OA is required to incorporate the Council on Environmental Quality (CEQ) overriding guidance for NEPA review. Each OA has developed procedures over time that are carefully crafted to fulfill both of these requirements meeting their unique circumstances and yet deliver final review in a timely fashion. These procedures are generally understood by the federal-aid transportation funding recipients.

A major issue of concern with the existing NEPA review process is the coordination between the numerous federal agencies that have a role in the process. The proposed NEPA Order increases the need for coordination by including more USDOT offices in the review. AGC believes that adding this additional level of requirements undermines rather than enhances the process and therefore needs to be withdrawn and reconsidered with more extensive input from state and local transportation agencies as well as the stakeholder community.

Limits Use of Categorical Exclusions

Both MAP-21 and the FAST Act expanded the use of Categorical Exclusions (CEs) to allow states a more expedited review process for infrastructure projects that—on their face—are expected to have limited environmental impact. The proposed NEPA Order acts contrary to this initiative by limiting the use of CEs. New Section 10 b) has been added to the NEPA Order which undermines the whole concept of making CEs available for expediting reviews. Section 10 b) creates a list of additional circumstances that must be taken onto consideration before a state can apply a CE to an individual project. This change would limit the applicability of CEs on hundreds of thousands of individual highway projects every year. This new language would give project opponents increased legal opportunities to challenge the applicability of specific projects. As such, AGC recommends that USDOT eliminate Section 10 b) in the final order.

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1 AGC opposes the CEQ Guidance on NEPA and its incorporation within any federal agency. However, AGC understands that USDOT is under executive mandate through President Obama’s CEQ to implement this guidance. Given this fact, AGC recommends that USDOT allow the OAs to do so on an agency by agency basis, rather than adding a completely new layer of procedure atop the existing OA procedures. Ultimately, AGC will work with the Trump administration to rescind this CEQ Guidance and any such implementation procedures put forth under it by USDOT and other federal agencies. Given the truncated notice and comment period provided by USDOT in this instance, a legal case against USDOT may also be considered ripe.
**Limits Use of Environmental Assessments**

The proposed NEPA order gives examples of the types of projects for which an Environmental Assessment (EA) or Environmental Impact Statement (EIS) normally should be prepared. These examples are more restrictive than is the current practice and therefore limits the use of EAs. In most cases current practice by each OA varies for reasons specific to their programs. Again, this points out why any agency-wide NEPA order is counterproductive. AGC recommends that USDOT eliminate those examples from the final order.

**Inclusion of Climate Change**

The proposed NEPA order directs that climate change be considered as part of the implementation of NEPA. The Council on Environmental Quality (CEQ) last year issued guidance for consideration of greenhouse gas (GHG) emissions and climate change in NEPA reviews. Even with this guidance, it is unclear how determinations on the impact of individual projects on global climate change can be made. AGC and others in the business community have serious concerns with the guidance, which puts too much emphasis on “causal” impacts and blurs the line between the necessary mitigation assessments and mitigation requirements. Indeed, the status of CEQ’s GHG guidance in the new administration is tentative at best. DOT should hold any climate change review requirements by OAs until the administrations have had the chance to review the CEQ’s GHG guidance and develop a framework of applicability and actions specific to their missions and, hopefully, incorporate public comment.

**Federal Flood Risk Management Standard**

The proposed order also incorporates yet provides little to no guidance on the 2015 Federal Flood Risk Management Standard (FFRMS). The Federal Emergency Management Agency (FEMA) recently became the first agency to issue a rulemaking to implement the standard. The U.S. Army Corps of Engineers is now accepting public comment on a draft engineering circular to implement the Standard. To AGC’s knowledge, no other agencies including USDOT have released proposed rulemakings or draft orders for public review and comment. AGC recommends that USDOT should finalize its guidance on implementation of the FFRMS before directing that this standard become part of each OA’s NEPA implementation. To do otherwise invites confusion not only among the OAs, but also the regulated community that must plan accordingly.

**Desk Reference**

DOT indicates in this notice that it intends to release a “Desk Reference” to provide “more specific Guidance on particular provisions of the updated NEPA Order.” The Desk Reference will no doubt include further guidance on implementing the proposed order and further procedural guidance. In addition, DOT would not be required to update the Order when it updates the Desk Reference, which establishes a path forward to essentially “regulate through guidance” with little obligation to consider public input. Because of the potential impact of the Desk Reference on NEPA implementation, the DOT should not move forward in implementing this proposed NEPA order. AGC recommends that adequate time for public review and scrutiny of the proposed Desk Reference must be provided before it becomes part of each OA’s operating procedures.

**Conclusion**

AGC believes that this effort to develop agency-wide overarching guidance on NEPA implementation is counterproductive and should be abandoned. Existing CEQ guidance coupled with current OA NEPA operating procedures are sufficient, given the current state of administrations. USDOT would better fulfill its role in
advancing transportation infrastructure by working with the various OAs to update their NEPA operating procedures to ensure that the environmental review process can be achieved in a fashion that will achieve the complimentary goals of providing the nation with necessary transportation improvements that are achieved in an environmentally sound fashion.

Sincerely,

Brian Deery
Senior Director
Highway and Transportation Division