

**Comments on the U.S. Department of Transportation's
"Procedures for Considering Environmental Impacts"
85 FR 74640 (November 23, 2020)**

Docket ID No. DOT-OST-2020-0229

American Coke and Coal Chemicals Institute
American Road & Transportation Builders Association
American Trucking Associations
Associated Builders and Contractors
Associated General Contractors of America
Association of Equipment Manufacturers
National Asphalt Pavement Association
National Lime Association
National Stone, Sand & Gravel Association
Portland Cement Association
The Fertilizer Institute
The Hardwood Federation
U.S. Chamber of Commerce

December 23, 2020

**Comments on the U.S. Department of Transportation’s Proposed Rulemaking,
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The American Coke and Coal Chemicals Institute; American Road & Transportation Builders Association; American Trucking Associations; Associated Builders and Contractors; Associated General Contractors of America; Association of Equipment Manufacturers; National Asphalt Pavement Association; National Lime Association; National Stone, Sand & Gravel Association; Portland Cement Association; The Fertilizer Institute; The Hardwood Federation; and the U.S. Chamber of Commerce appreciate the Department of Transportation’s (DOT) efforts to modernize its implementing procedures for the National Environmental Policy Act (NEPA). Our associations offer the following comments in support of DOT’s proposed revisions to its regulations implementing the procedural provisions of NEPA (“Proposed Rule”).¹ Updating the DOT NEPA procedures to reflect recent legislation and modernize the environmental review process will help improve DOT’s NEPA review efficiency; provide enhanced customer service to stakeholders while ensuring meaningful public involvement. We strongly support DOT’s efforts and the goal of increasing infrastructure investment and project development in a manner that strengthens our economy and enhances environmental stewardship.

Our organizations represent a broad range of companies in the transportation sector and supply chain that build and maintain America’s highways, railways, and waterways that move the people and goods across the country. We fully support the fundamental goals of NEPA to appropriately consider the potential environmental impacts of federal actions. However, in the 35 years since DOT last issued its Order 5610.1C “Procedures for Considering Environmental Impacts,” the length, complexity, and delays associated with project reviews have steadily grown. These delays negatively affect economic growth, public safety and welfare, national security, and the environment.

Congress has long recognized the negative impacts of these delays and passed three pieces of bipartisan legislation since the DOT Order was last updated in order to help expedite federal environmental review and permitting decisions. In 2005, Congress enacted, “Efficient environmental reviews for project decision making,” a streamlined environmental review process for highway, transit, and multimodal transportation projects through the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU).² In 2012, Congress passed the “Moving Ahead for Progress in the 21st Century Act” (MAP–21) declaring it in the national interest to accelerate transportation project delivery, reduce costs, and ensure that transportation planning, design, and construction are completed in an efficient and effective manner.³ Then in 2015, Congress directed DOT to implement a variety of reforms

¹Procedures for Considering Environmental Impacts, 85 Fed. Reg. 74640 (Nov. 23, 2020) (“Proposed Rule”).

² 23 U.S.C. 139, Public Law 109–59, sec. 6002-6005, 6009, 2010 (2005). See <https://www.fhwa.dot.gov/safetealu/factsheets/enviroreview.htm>.

³ 23 U.S.C. 139, Public Law 112–141, sec. 1305-1309 (2012).

to streamline and accelerate its environmental review process. See Fixing America's Surface Transportation Act (FAST) Act.⁴ We support the incorporation of these legislative updates in DOT's NEPA procedures.

In today's increasingly competitive and globalized economy, the need for efficient development of American infrastructure is paramount. Reducing delays and uncertainties associated with infrastructure investment, especially now when unemployment has skyrocketed particularly in disadvantaged communities, has the potential to support more and better-paying jobs. These long term investments in infrastructure can promote equality and economic recovery with an estimated 13,000 jobs created for every \$1 billion spent. Investments in transportation projects would improve the quality of our infrastructure to help move goods in a faster, more reliable, and more resilient manner, providing both immediate and long-term economic benefits to communities across the country.

I. Section 13.1 Applicability – We Support the Revisions that Provide Clarity on Threshold Applicability Determinations

We support DOT's effort to clarify when NEPA applies to a proposed federal action in order to focus agency review on those actions that most benefit from the type of analysis contemplated by NEPA. DOT's proposed revisions recognize that not all categories of federal actions should automatically apply NEPA.⁵ Clarifying whether NEPA applies would assist the various DOT offices in conducting consistent NEPA threshold analyses and help ensure that the agency's limited resources are allocated towards NEPA analyses of appropriate actions.

To maximize the potential benefits associated with these revisions, DOT should finalize the proposed threshold applicability criteria and provide the appropriate supporting analysis. We agree that NEPA should not apply if the proposed action is ministerial in nature; if the DOT lacks discretion to consider the environmental impacts in making a decision; or if DOT does not have responsibility for, or cannot control the outcome. We support excluding research activities from NEPA review where those activities would not be expected to have environmental impacts. We also support the identification of activities or decisions by the various DOT offices responsible for carrying out NEPA in their own implementing procedures. Once codified, the agency will not need to conduct further determinations for these types of actions on an individual basis.

By implementing an appropriate threshold applicability analysis, DOT may avoid the time and costs that would otherwise be associated with a NEPA analysis of these activities that are not meaningful or beneficial to the agency. Ensuring agency determinations are codified in the agency's NEPA procedures, and are sufficiently and adequately documented, would support more durable applicability determinations and create a clear record for a reviewing court to consider if a determination is challenged.

⁴ See e.g., 23 U.S.C. 168, 169, Public Law 114–94 sec. 1304 (2015).

⁵ See Proposed Rule, 85 Fed. Reg. at 74643 (Proposed § 13.1).

II. Section 13.13 – General Principles for the NEPA Review Process - We Support DOT’s Revisions that Restore Agency Focus to the Analysis of Information that Is Meaningful and Significant

Restoring DOT’s NEPA reviews to the original intent of the NEPA statute would provide meaningful insight to DOT and the public on those environmental impacts that are truly significant. CEQ’s final regulations from 1978 state that “NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.”⁶

NEPA’s purpose is to establish a framework by which DOT can understand the environmental impacts of its decisions, allowing it to consider actions that might mitigate such impacts. Agencies can only achieve this purpose if the information considered meaningfully informs the agency’s action. An analysis is only meaningful if the information is relevant to the DOT’s decision-making discretion within the bounds of the action statute. The action statute authorizes the major federal action that triggers the NEPA review.

The action statute prescribes the parameters for DOT decision-making and thus limits the agency’s discretion to act. NEPA “imposes only procedural requirements” to ensure that DOT is well informed under the action statute.⁷ NEPA does not expand the parameters of the agency’s decision-making beyond consideration of information on which DOT has the discretion to act on.

III. Section 13.19(c) Environmental Assessments and Section 13.23(f) Environmental Impact Statements - We Support the Presumptive Page Limit Proposal to Restore the Original Intent of NEPA Analyses to be “Concise, Clear, and to the Point”

NEPA provides important safeguards to ensure that major federal actions and approvals carefully consider environmental impacts. However, the scope of NEPA analysis should be focused on information specifically related or consequential to the federal action at hand, as opposed to an overly broad and exhaustive analysis of all issues, without regard to significance.

We support DOT’s presumptive page limit proposal, which is consistent with CEQ’s final regulations promulgated in 1978 that stated “Environmental Impact Statements shall be concise, clear, and to the point...”⁸ The 1978 CEQ regulations go on further to state that “NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action.”⁹ Moreover, they direct agencies to “us[e] the scoping process, not only to

⁶ 40 C.F.R. § 1500.1(b)

⁷ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 756 (2004) (citing 42 U.S.C. § 4321) (NEPA “was intended to reduce or eliminate environmental damage and to promote ‘the understanding of the ecological systems and natural resources important to’ the United States.”).

⁸ 40 C.F.R. § 1500.2(b)

⁹ 40 C.F.R. § 1500.1(c)

identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the EIS process accordingly.”¹⁰

According to CEQ’s page count report issued earlier this year, DOT’s final environmental impact statement (EIS) reports were close to 700 pages in length on average and included an additional 2,400 pages on average of analysis in appendices.¹¹ For the 158 final EIS’s analyzed by CEQ, DOT produced more than 240,000 pages of analysis including the appendices. These high page counts support the need for the presumptive page limits, which would help align the agency with one of the foundational NEPA principles to be concise and make the process accessible to the public.

Further supporting CEQ’s original intent for agencies to produce concise NEPA documents is a CEQ question and answer guidance document originally issued in 1981 and then amended in 1986 that stated “the Council has generally advised agencies to keep the length of EAs to not more than approximately 10-15 pages. Some agencies expressly provide page guidelines (e.g., 10-15 pages in the case of the Army Corps).”¹² These page count goals, established 15 years after NEPA was signed into law, focused on limiting the analysis to what was necessary for Federal decision-making. The 1986 guidance’s page count limit make DOT’s proposal for agencies to limit their EAs to 75 pages seem expansive.

In addition to making the documents accessible to the public, another reason to keep them focused and concise is to reduce the costs on reviewing agencies and also on project developers. The Texas Department of Transportation in conjunction with the Federal Highway Administration estimated that for transportation projects ranging from \$10.6-85.2 million, the cost attributed to project delays during project pre-construction stages was between \$87,000-\$1,300,000 for every month of delay.¹³ These are significant cost burdens that are passed on to taxpayers. In 2017, the American Action Forum assessed 148 projects and estimated that the costs of the review process were almost \$230 billion.¹⁴

For these reasons, we support DOT’s effort to focus the NEPA analysis on the significant effects in a concise and clear manner. This will help elevate public participation by making the NEPA analysis more accessible, especially for complex projects that are often reviewed by multiple federal agencies.

¹⁰ 40 C.F.R. § 1500.4(g)

¹¹ Length of Environmental Impact Statements (2013-2018), Council on Environmental Quality, July 12, 2020, <https://ceq.doe.gov/nepa-practice/eis-length.html>

¹² “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” Council on Environmental Quality Memorandum to Agencies, 1986, <https://www.energy.gov/sites/prod/files/2018/06/f53/G-CEQ-40Questions.pdf>

¹³ Assessing the Costs Attributed to Project Delays During Project Pre-Construction Stages, Curtis Beaty, David Ellis, Brianne Glover, and Bill Stockton, Texas Department of Transportation and Federal Highway Administration, March 2016. <https://static.tti.tamu.edu/tti.tamu.edu/documents/0-6806-FY15-WR3.pdf>

¹⁴ Regulatory Burdens and the Supply of Infrastructure Projects, Curtis Arndt, American Action Forum, <https://www.americanactionforum.org/research/infrastructure-regulatory-burdens/>

IV. Section 13.19(d) Environmental Assessments and Section 13.23(g) Environmental Impact Statements - We Support the Presumptive Time Limit Proposal to Synchronize NEPA and other Federal Environmental Requirements and Drive Timely Decision Making

Since DOT last updated its NEPA procedures, the time it takes to complete environmental reviews has increased significantly. We support the presumptive time limit proposal to synchronize NEPA and other Federal environmental requirements to help drive timely decision making.

According to CEQ, of the 185 projects that were reviewed by DOT from 2010 to 2018 that required an EIS, the average took close to seven years to complete.¹⁵ The length of these environmental reviews take up the entire transportation funding cycle, which is typically six years, making it difficult for states and private sector investors to plan large-scale transportation projects. These permitting process delays directly translate to delays in constructing important transportation projects and realizing the associated environmental and safety benefits as well as the reduced congestion that more efficient infrastructure can deliver. When it takes longer to complete the federal approval process than it does to actually build a project, it is an indication that the NEPA process is broken.

The Basnight Bridge project in North Carolina connecting Hatteras Island and Bodie Island is a good example of the unreasonable delay of an important infrastructure project due to NEPA. The environmental review took 25 years to complete under NEPA, but only three years to build the 2.8 mile bridge. The need for the bridge was unquestioned as it was going to replace a 56 year old, crumbling bridge that moved an estimated 2 million tourists a year between the islands. The new design was also safer for travelers and more resilient to the corrosive sea environment and severe storms.

In addition to bridges, our railways, airways, waterways, energy and industrial facilities, telecommunications networks, and other public assets are equally vital to economic activity and our quality of life. The failure to secure timely approval for such projects and for land management decisions is also hampering economic growth. All too often, investment and development in these sectors is negatively affected by NEPA reviews.

The current delays, such as those caused by excessive and duplicative environmental reviews drive up construction costs, take away jobs from a variety of industries, and inject uncertainty that discourages private investment.

- Construction costs have continued to rise about 3% each year. This implies that a \$1 billion dollar project that is held up for a year by excessive reviews is likely to cost \$30

¹⁵ Environmental Impact Statement Timelines (2010-2018), Council on Environmental Quality, June 12, 2020, https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf

million more -- or be scaled back by that much -- if the budget for the project will not accommodate the increased cost.¹⁶

- Reducing costs and uncertainties associated with infrastructure investment and related projects has the potential to support more and better-paying jobs throughout the country. Various private and public organizations estimate the creation of up to 13,000 jobs for every \$1 billion spent on infrastructure. In addition to providing jobs, these projects also provide more local tax revenue, supporting local communities.¹⁷
- Delays inject uncertainty that discourages private investment. Construction spending totaled \$1.4 trillion in 2020, including roughly \$300 billion of public construction and \$600 billion of private residential plus \$500 billion of nonresidential projects. Delaying just one project can lead investors to postpone or cancel billions of dollars of additional construction.¹⁸

We support the proposed NEPA updates to increase transparency and predictability as well as improve coordination between federal agencies to eliminate unnecessary barriers that prevent or delay the implementation of critical projects. Improved regulatory predictability would allow businesses to plan and invest with confidence while enhancing economic productivity and efficiency. Such process improvements would also encourage many states and localities to follow federal leadership on approving infrastructure projects and land management activities.

V. Section 13.17 Categorical Exclusions – We Support DOT’s Proposed Application of Categorical Exclusions that Will Focus Agency Resources on those Federal Actions with Potentially Significant Impacts

We support DOT’s regulatory clarifications that ensure the application of categorical exclusions across the agency and ensure that use of such exclusions complies with and advances the purpose and goals of NEPA. DOT’s proposed application of categorical exclusions is consistent with CEQ’s long standing recognition that excluding categories of federal actions that normally do not have significant effects from detailed NEPA review and will further promote the goals of NEPA: “[t]he use of categorical exclusions can reduce paperwork and delay, so that [Environmental Assessments (“EA”)] and [Environmental Impact Statements (“EIS”)] are targeted toward proposed actions that truly have the potential to cause significant environmental effects.”¹⁹

¹⁶ Bureau of Labor Statistics, producer price index for new nonresidential construction, <https://www.bls.gov/ppi/>.

¹⁷ A modal prepared by the University of Colorado, Boulder, finds that a one-year delay for a \$1 billion investment in nonresidential construction results in the loss of roughly 12,000 jobs throughout the economy. Associated General Contractors of America, <https://www.agc.org/agc-construction-impact-model>.

¹⁸ U.S. Census Bureau, Construction Spending Historical Data, www.census.gov/constructionspending.

¹⁹ COUNCIL ON ENVIRONMENTAL QUALITY, FINAL GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON ESTABLISHING, APPLYING, AND REVISING CATEGORICAL EXCLUSIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (“Categorical Exclusion Guidance”), 75 Fed. Reg. 75,628 (Dec. 6, 2010) (emphasis added). When an agency establishes new categorical exclusions or revises existing categorical exclusions, there are significant resources that can be saved and used in other more meaningful ways. For example, in support of proposed revisions to its NEPA regulations, the Farm Service Agency

In the application of categorical exclusions, DOT has recognized that certainty regarding the absence of potential significant impacts of a federal action can be a difficult test to satisfy and, if so required, would preclude the use of the categorical exclusion.²⁰ DOT's Proposed Rule carries forward the current premise that a categorical exclusion applies to an activity that "normally" does not have significant effects.²¹

The Proposed Rule also maintains the requirement that DOT procedures shall provide for extraordinary circumstances in which normally excluded actions may have significant environmental effects. The Proposed Rule builds on this concept by providing descriptions of instances where extraordinary circumstances are present, and if they are, whether the significant effects can be avoided. In those circumstances, the Proposed Rule offers the ability to mitigate significant impacts, rely on the categorical exclusion, and ensure the agency's resources are better focused on those actions requiring an EA or EIS. We support this clear approach, which would have the added benefit of encouraging projects to avoid impacts in order to facilitate and expedite agency review.

VI. Section 13.19(b) Environmental Assessments and 13.23(e) Environmental Impact Statements - We Support the Proposed Revisions that Would Clarify the Statement of Purpose and Need and the Scope of the Alternatives Analysis

We support DOT's proposal to clarify the scope of the alternatives analysis and to tailor the analysis to the purpose and need of the proposal before the agency. In anticipation of potential litigation, agencies often conduct alternatives analyses that have become untethered from the purpose of NEPA, which is to better inform agency decision-making.²² The breadth and depth of the analyses have increased to analyze an unreasonable number of alternatives that can be unnecessarily detailed as well as far afield from the project proponent's intentions or the relevant agency action. Inappropriate consideration of alternatives can lead to an analysis of information that is not meaningful to the agency's decision-making process, can frustrate lawful private sector efforts, and can result in agency resources being diverted from understanding relevant and feasible alternatives.

DOT's proposed revision would appropriately focus the purpose and need of the federal action on the agency's relevant statutory authority and, where a non-federal project proponent is seeking an approval or authorization, to the goals of the applicant.²³ This revision would facilitate more effective NEPA review by more closely aligning the definition of the purpose and need statement with the actual purpose of the agency action.

(FSA) estimated that the revisions to categorical exclusions alone would eliminate 314 EAs per year, at an aggregate annual cost savings of \$345,000. 79 Fed. Reg. 52,239, 52,246 (Sep. 3, 2014).

²⁰ See, e.g., 40 C.F.R. 1508.4; Categorical Exclusion Guidance, 75 Fed. Reg. at 75,628 ("A categorical exclusion is a category of actions that a Federal agency determines does not *normally* result in individually or cumulatively significant environmental effects.") (emphasis added).

²¹ See Proposed Rule, 85 Fed. Reg. at 74647 (Proposed § 13.17).

²² *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768-69 (2004).

²³ See Proposed Rule, 85 Fed. Reg. at 74659 (Proposed § 13.23(d)(2)).

By more clearly defining the “purpose and need” of a proposed federal action, DOT would be better positioned to conduct an appropriate alternatives analysis.²⁴ We support DOT’s proposed revision to § 13.23 to clarify the scope of the alternatives analysis. Analyses that consider alternatives that do not meet the purpose and need of an action are not meaningful to the agency’s decision-making process nor do they meaningfully inform the public. Thus, a correct formulation of the “purpose and need” statement would appropriately limit the number of alternatives that must be considered.²⁵

Alternatives that do not meet the purpose and need of an action may yield information that is not relevant to the decision before the agency or even feasible within the agency’s statutory authority. We agree with DOT’s proposed description of “reasonable alternatives,” which reflects that reasonable alternatives must be tailored to the purpose and need of the federal action.²⁶ Consistent with the statutory principles of NEPA, the definition also appropriately reflects that reasonable alternatives should be limited to alternatives that are technically and economically feasible.²⁷ Again, this clarification is consistent with longstanding case law recognizing that a rule of reason applies to the type of alternatives that must be considered in order to serve the purpose and need of the proposed action.²⁸

DOT’s proposed revisions would guide the agency in selecting appropriate alternatives by focusing on the specific purpose and need of the federal action and by limiting the number of alternatives to those that would most meaningfully inform the agency’s decision-making.

VII. Section 13.15 Determination of the Level of NEPA Review - We Support the Definition of “Effects” Consistent with Supreme Court Precedent

The identification of potential effects related to a federal action is the core of NEPA analysis. As CEQ recognized in its final rulemaking, the current framework of considering direct, indirect, and cumulative effects was not required by the statute,²⁹ and was instead CEQ’s interpretation of the general statutory directive to consider “environmental impacts.”³⁰

²⁴ See *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 869 (D.C. Cir. 1999) (stating that “a reasonable alternative is defined by reference to a project’s objectives.”) (internal quotation marks omitted).

²⁵ See *Slater*, 198 F.3d at 867 (an agency is required only to consider alternatives that “bring about the ends of the federal action.”) (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991)).

²⁶ See Proposed Rule, 85 Fed. Reg. at 74659 (Proposed § 13.23(d)(2)).

²⁷ See 42 § 4331(b) (“In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to **use all practicable means**, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources”) (emphasis added); see also *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (scope of NEPA inquiries must remain manageable to meet NEPA’s goal of informing agency’s fully informed and well considered decision).

²⁸ See *League of Wilderness Def.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F. 3d 1060 (9th Cir. 2012) (alternative of exempting large trees from removal did not meet need for fire suppression); *Rivers Unlimited v. U.S. Dep’t of Transportation*, 533 F. Supp. 2d 1 (D.D.C. 2008) (agency need not consider expansion of existing river crossing because it did not meet need to build new bridge).

²⁹ See Final Rule, 85 Fed. Reg. at 43343-43344.

³⁰ 42 U.S.C. 4332(C). The U.S. Supreme Court has long recognized the ambiguity in the terms of NEPA and that NEPA does not apply to all effects of a federal action. See *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S.

DOT's proposed definition would provide additional clarity around the boundaries of the agency's "effects" analysis.³¹ DOT's authority to revise the definition of "effects" cannot be seriously disputed.³² The revised definition of "effects" shifts the focus from the type of effect—direct, indirect, or cumulative—to the causal relationship of the effect with the federal action. This change in emphasis would help the government and private entities engaged in the NEPA process focus more productively on identifying and considering meaningful environmental impacts, rather than attempting to fill each of the current three buckets with a long list of items that may not be meaningful in the context of the action at issue.

DOT's regulatory definition does not break new ground. Instead, it relies on Supreme Court precedent that "NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause."³³ Importantly, as was codified in the regulatory definition under CEQ's final NEPA regulations, "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA."³⁴ DOT's Proposed Rule would provide much needed regulatory direction to improve application of the causation requirement in a consistent and predictable manner.

VIII. Section 13.9 Planning and Early Coordination and Section 13.11 Lead, Cooperating, and Participating Agencies - We Support DOT's Revisions to Increase Intra- and Interagency Coordination and to Support More Effective and Predictable NEPA Reviews

We support DOT's effort to increase intra- and interagency coordination in support of more effective and predictable NEPA reviews. Proposed §§ 13.9 and 13.11 would clarify the roles of lead and coordinating agencies to facilitate greater coordination among federal agencies in implementing NEPA processes.³⁵ The proposed revisions would also codify important principles of the "One Federal Decision" framework included in Executive Order 13807 and in the March 20, 2018, interagency Memorandum of Understanding.³⁶ We support DOT provisions that would require the development of a joint schedule and identification of

766, 773 (1983) ("To determine whether § 102 requires consideration of a particular effect, we must look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue.").

³¹ See Proposed Rule, 85 Fed. Reg. 74657.

³² See *Andrus*, 442 U.S. at 358 (1979) ("substantial deference" afforded to CEQ's interpretation of NEPA); see also *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124-25 (2016) (recognizing an agency's authority to change a longstanding interpretation of an ambiguous statute).

³³ *Pub. Citizen*, 541 U.S. at 767.

³⁴ *Id.*

³⁵ See Proposed Rule, 85 Fed. Reg. at 74655-74656 (Proposed §§ 13.9 Planning and early coordination and 13.11 Lead, cooperating, and participating agencies).

³⁶ See Exec. Order. No. 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, 82 Fed. Reg. 40,463 (Aug. 24, 2017); Memorandum from Mick Mulvaney, Director, Office of Management and Budget and Mary Neumayr, Chief of Staff, Council on Environmental Quality for Heads of Federal Departments and Agencies, M-18-13, (Mar. 20, 2018).

milestones for environmental reviews to create a more transparent NEPA process and to facilitate more efficient NEPA reviews.

We also support requiring cooperating agencies to consult with the lead agency, meet the joint schedule, and identify issues that may affect the agency's ability to meet the joint schedule. We observe that this process may benefit from the involvement of project management experts at each agency who can smooth the integration of multiple agencies. These efforts are critical. We have observed that some agencies have struggled with the One Federal Decision mandate when it comes to creating an efficient joint process. These revisions would not only benefit interagency processes, but would provide greater transparency and predictability to non-federal project proponents that seek government authorizations requiring NEPA review. We also support applying this cooperation for EAs as well as EISs to realize the efficiency gains for both types of environmental documents.

We support the revision to require the lead and cooperating agencies to evaluate the proposed federal action in a single EIS (or EA) and to issue a joint record of decision (or joint Finding of No Significant Impact ("FONSI")) when practicable.³⁷ By creating a presumption that agencies shall prepare joint NEPA and decisional documents, the Proposed Rule would encourage agency collaboration and help ensure more consistent outcomes. The proposal also appropriately requires this joint action only if it would be practicable. By limiting joint action to circumstances in which it would be practicable, the Proposed Rule would focus the NEPA process on meaningfully informing agency decision-making and would not force the requirement of a joint action where doing so could cause delay or other inefficiencies.

IX. Section 13.19(g) Environmental Assessments: Independent Evaluation – We Suggest DOT More Explicitly Support Applicants Being Allowed to Prepare NEPA Documents

We support continuing to allow third parties to prepare NEPA documents, with the agency maintaining the decision-making and independently reviewing the content of the NEPA documents.³⁸ In particular, the agency should add language in the EIS sections §§ 13.23, 13.25, 13.27 that is similar to that found at §§ 13.19 (g), allowing for applicants to prepare NEPA documents.

While the nature of the practice varies by agency, it is currently common for applicants to support the preparation of EAs and EISs by funding a third-party contractor or otherwise providing contractor support to produce appropriate environmental reviews. Under these scenarios, an agency directs the efforts and is ultimately responsible for ensuring that the analysis fully complies with NEPA and fulfills the agency's needs.

The final rule should codify this practice and clarify that it does not amount to an agency avoiding its own NEPA responsibilities, but increases efficiency by leveraging private sector resources. Because NEPA is a federal responsibility, the Proposed Rule clarifies that the

³⁷ See Proposed Rule, 85 Fed. Reg. at 74650 (Proposed § 13.27).

³⁸ See Proposed Rule, 85 Fed. Reg. at 74658, (Proposed § 13.19(g)).

involvement of an applicant does not shift the agency's responsibility for ensuring the scope and content of the NEPA review. This regulatory direction would help reduce delays due to resource constraints while ensuring that there is no confusion regarding the fact that the NEPA analysis must present the agency's own assessment of the issues.

It is critical that DOT have its own capacity to comply with NEPA and its implementing regulations. This includes staff with expertise to independently evaluate environmental documents, including those prepared by applicants and contractors. To this end, DOT's final rule should make clear that senior agency officials are responsible for enforcing page and time limits and addressing/resolving disputes and other issues that may cause delays in the schedule for the environmental review.

Per CEQ's final NEPA regulations (*Identifying cost of preparation—§ 1502.11*) DOT must include the estimated cost of preparing its draft and final EISs on the final EIS cover page. This estimated cost must include costs for any agency full-time equivalent personnel hours, contractor costs and any other direct costs related to environmental review. Also, where practicable, the estimate should include the costs incurred by cooperating and participating agencies, applicants, and contractors. This should be clearly communicated in DOT's updated NEPA procedures.

X. We Suggest DOT Clarify that the Department's Operating Administrations Should Not Predetermine the Outcome of the NEPA Analysis Before It Is Complete

NEPA requires that agencies take a "hard look" at [the] environmental consequences" of their actions.³⁹ Implicit in this requirement is that agencies should undertake this inquiry in good faith, and should not predetermine the NEPA analysis by committing themselves to an outcome before completing their analysis.⁴⁰ Courts have held that an agency predetermines the outcome when the agency "irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, before the agency has completed that environmental analysis."⁴¹

Over time, the scope of activities allowed to proceed has shrunk as courts have continued to expand the scope of the "proposal" beyond the scope of the federal agency's authorization.⁴² DOT should clarify the types of activities that can proceed during the NEPA process.⁴³ We encourage DOT to clarify further that the scope of the "proposal" is limited to that project over which the agency has authorization and that activities outside of this scope, for example facilities related to the project but over which the agency has no authority and the staging of materials needed for eventual construction of a project, are part of this proposal. Indeed, given that NEPA does not expand an agency's underlying statutory authority, DOT

³⁹ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (quoting *Morton*, 458 F.2d at 838).

⁴⁰ *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712 (10th Cir. 2010).

⁴¹ *Id.* 714.

⁴² See e.g., *Maryland Conservation Council v. Gilchrist*, 808 F.2d 1039 (4th Cir. 1986) (finding an entire proposed highway as a "federal action" for NEPA purposes because of a single confirmed crossing of federal land).

⁴³ See Proposed Rule, 85 Fed. Reg. at 1724 (Proposed § 1506.1).

should clarify that an agency cannot prevent private activity that it does not have the authority to regulate, even during the pendency of NEPA review.

XI. We Suggest DOT Clarify that NEPA Does Not Require Mitigation

The courts have made clear that it “is now well settled that NEPA itself does not mandate particular results, but simply describes the necessary process.”⁴⁴ The role of mitigation under NEPA is subject to these procedural constraints; that is, NEPA itself does not require mitigation, but agencies can, and may be required to, consider mitigation. For example, the statute requires discussion of “any adverse environmental effects which cannot be avoided.”⁴⁵ Early on in the implementation of NEPA, the Supreme Court recognized the value of mitigation under NEPA, but cautioned that requirements that a mitigation plan actually be developed and implemented would be inconsistent with the procedural limitations of NEPA.⁴⁶ We suggest DOT provide regulatory clarity on the role of mitigation under NEPA versus an action statute that may have independent requirements for mitigation.

Although not required by NEPA, the mitigation of environmental impacts can assist agencies and applicants in the regulatory process and should remain an important element of agency analyses. For example, the consideration of mitigation measures to lessen or avoid potentially significant environmental effects of proposed actions that would otherwise need to be analyzed by an EIS⁴⁷ may allow an agency to proceed based on an EA or a categorical exclusion. DOT should require an explanation of the means of and authority for any mitigation in order to preserve this important tool while protecting against potential misuse. The final rule should recognize that NEPA itself cannot provide the authority for required mitigation and that an action statute must provide that authority for an agency to impose mitigation requirements.

However, because of the value that mitigation can provide in lessening any potentially significant environmental effects, we encourage DOT to clarify that NEPA itself does not prohibit mitigation and that a project applicant can offer and agree to mitigation measures not required by any action statute for consideration under NEPA.

XII. We Support DOT’s Efforts to Update the Agency’s NEPA Procedures and Increase Transportation Efficiency and the Distribution of Goods and Services

While we have actively engaged with White House and Congressional leaders on infrastructure legislation, reforming our outdated permitting process is just as essential. NEPA has become unacceptably burdensome, delaying infrastructure projects that would benefit Americans every single day with faster commutes, reduced vehicle maintenance due to upgraded roadways, and more efficient delivery of goods and services. In addition, a modern,

⁴⁴ *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 350.

⁴⁵ 42 U.S.C. § 4332(2)(C); *Robertson*, 490 U.S. at 332.

⁴⁶ *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352.

⁴⁷ COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT, A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS (Jan. 1997) (noting that “mitigated FONSI’s” are on the rise).

efficient highway system would deliver environmental benefits with reduced emissions associated with less idling in congestion and more infrastructure resiliency.

For instance, the I-70 expansion project in Colorado was delayed more than 13 years because of NEPA review. The 10-mile stretch of road to be upgraded, which connects Denver International Airport to the surrounding region, is home to 1,200 businesses and carries up to 200,000 vehicles per day. The \$1.2 billion project will not only provide immediate construction jobs, but also will improve public safety with a widened shoulder, reduce congestion to cut down on delivery delays, and feature a four-acre park to connect communities separated by a viaduct built in the 1960s.

Indeed, it can take longer to obtain government approvals under NEPA than it takes to construct a project. As discussed in Section IV above, the NEPA review of the Basnight Bridge project in the Outer Banks of NC took 25 years to be approved while the bridge itself was built in three years. The Basnight Bridge that replaced the 56 year-old Bonner Bridge is an example of these types of unnecessary delays that must stop.⁴⁸

XIII. We Support DOT's Efforts to Reduce NEPA Delays to More Quickly Deliver Environmental Benefits to the Public

Further, delays caused by current NEPA regulations hinder the development of more efficient roadways, airways, and waterways that would help reduce emissions. The American Trucking Association stated in their February 25, 2020 testimony at CEQ's NEPA public hearing that, "[e]very minute that a truck sits in traffic adds \$1.20 to the cost of that truck's operation. Industry-wide, that adds up to \$75 billion a year. And that wasted time sitting in traffic has environmental consequences as well. Congestion caused the trucking industry to consume an additional 7 billion gallons of fuel in 2016, representing 13% of the industry's fuel consumption, and resulting in 67 million metric tons of excess carbon dioxide emissions."⁴⁹

Modern roads and bridges will deliver environmental benefits from their new designs, but environmental benefits can also be obtained from reducing NEPA delays for mass transit projects. The purple line transit system in Maryland was formally proposed in 2003 and not approved for 14 years. The light rail line is a 16-mile project would connect New Carrollton and Bethesda, Maryland, providing environmentally-friendly transit for an estimated 70,000 daily riders and leading to a 17,000 fewer vehicles on local roads. Not only would it help reduce

⁴⁸ The Bonner Bridge Replacement Timeline: A Look at the Many Obstacles Along the Way, Joy Crist, Island Free Press, February 11, 2019, <https://islandfreepress.org/hatteras-island-features/the-bonner-bridge-replacement-timeline-a-look-at-the-many-obstacles-along-the-way/>

⁴⁹ Transcript-DC Public Hearing 02.25.2020, Posted by the Council on Environmental Quality on Mar 13, 2020. <https://beta.regulations.gov/document/CEQ-2019-0003-172655>

emissions associated with fewer cars and reduce congestion, it will also bring thousands of jobs to the region.⁵⁰

Since the release of CEQ's proposed regulations in January 2020, numerous stakeholders have detailed the importance of NEPA reforms to addressing important environmental challenges. For example, the Bipartisan Policy Center's blog regarding the CEQ proposed rulemaking stated, "[w]e must reconcile the imperative for a massive clean energy transition with an inefficient environmental review and permitting process—one regularly used to gin up public opposition, lay down bureaucratic roadblocks, and litigate everything from bike lanes to powerlines. These same hurdles await first-of-a-kind facilities that sequester carbon underground, store massive amounts of clean power or employ advanced nuclear technologies..."⁵¹ It went on further to say that "...[e]veryone that appreciates the essential steps that must be taken to transition to a low carbon economy should champion any effort to review NEPA regulations and seek to make the process work better."⁵²

Reducing the delays of critical infrastructure projects in the transportation sector, as well as in other sectors, would benefit both the environment and the economy by delivering these benefits sooner.

XIV. We Support DOT's Efforts to Modernize their NEPA Procedures Recognizing Multiple Administrations Have Appropriately Emphasized the Importance of Timely NEPA Decisions for Critical Infrastructure Projects

Multiple Administrations have recognized the importance of timely federal permitting decisions for critical infrastructure projects by issuing multiple executive orders, presidential memorandums, and Congress has authorized legislation to expedite federal decision-making. President Obama's 2012 executive order recognized the need to improve the performance of federal permitting and the review of infrastructure projects.⁵³ In 2001, President Bush issued an executive order to expedite the review of transportation infrastructure⁵⁴ and energy-related permits⁵⁵ while emphasizing the need to maintain safety, public health, and environmental protection.

Updating DOT's NEPA procedures consistent with NEPA's missions would accelerate projects that deliver benefits from modern and resilient transportation infrastructure. For example, updated roadways and bridges would improve the efficiency of our transportation

⁵⁰ Governor O'Malley Announces Purple Line Receives Federal Environmental Approval, Maryland Transit Administration, March 20, 2014, <https://www.purplelinemd.com/component/jdownloads/send/20-record-of-decision/69-record-of-decision-press-release>

⁵¹ America's National Climate Strategy Starts with NEPA, Sasha Macker and Michele Nellenbach, January 8, 2020. <https://bipartisanpolicy.org/blog/americas-national-climate-strategy-starts-with-nepa/>

⁵² *Ibid*

⁵³ Executive Order 13604, 77 FR 18885 (2012)

⁵⁴ Executive Order 13274, 67 FR 59449 (2002)

⁵⁵ Executive Order 13337, 69 FR 25299 (2004)

and distribution systems, thereby reducing traffic congestion and associated emissions. NEPA updates would also serve to promote public safety through new highway, railway, and airway designs.

These are just a few of the potential benefits of modernizing DOT's NEPA implementing regulations. Increasing investor certainty for these projects would unlock investment in America infrastructure across the economy and put more Americans to work.

XV. Conclusion

We appreciate the opportunity to provide comments on this significant proposal and support DOT's proposal to increase the efficiency and transparency of the NEPA review process while protecting the environment. This proposal will enhance DOT decision-making on critical transportation infrastructure projects driving investment in our communities during a time when there is great need. We commend the Administration for advancing a proposal that respects and strengthens NEPA while bringing DOT's NEPA procedures into the modern era.