

December 23, 2020

Secretary Elaine Chao
U.S. Department of Transportation
Docket Management Facility,
1200 New Jersey Ave. SE, West Building,
Ground Floor, Room W12-140,
Washington, DC 20590-0001

Re: Docket No. DOT-OST-2020-0229 (RIN 2105-AE97); Notice of Proposed Rulemaking re Procedures for considering Environmental Impacts under the National Environmental Policy Act

Dear Secretary Chao:

This letter provides comments of the Natural Resources Defense Council, Earthjustice, Bold Alliance, Center for Biological Diversity, Center for Community Action and Environmental Justice, Center for Disability Rights, Chesapeake Bay Foundation, Climate Hawks Vote, Climate Law & Policy Project, Earthworks, East Yard Communities for Environmental Justice, Environmental Justice Health Alliance for Chemical Policy Reform, Environmental Law & Policy Center, Environmental Protection Information Center, Food & Water Watch, GreenLatinos, Klamath Forest Alliance, League of Conservation Voters, League of Women Voters of the United States, Minnesota Center for Environmental Advocacy, National Trust for Historic Preservation, NH Audubon, Texas Environmental Justice Advocacy Services, The Lands Council, Union for Reform Judaism, and Western Environmental Law Center on the Department of Transportation's (DOT) Notice of Proposed Rulemaking Regarding Procedures for Considering Environmental Impacts under the National Environmental Policy Act (Proposed Rule). *See* 85 Fed. Reg. 74,640 (Nov. 23, 2020). Because the Proposed Rule purports to implement the Council on Environmental Quality's (CEQ) recently promulgated regulation implementing the National Environmental Policy Act (CEQ 2020 Rule), we attached and incorporate comments on that rule, submitted by several of the undersigned organizations. *See* Ex. A, NRDC Comments on CEQ Regulation; Ex. B, Coalition Comments on CEQ Regulation; *See also* Ex. C, WeAct Comments on CEQ Regulation. For the reasons discussed below, the Proposed Rule and the CEQ's 2020 Rule are arbitrary and capricious and undermine the core purposes of the National Environmental Policy Act (NEPA).

I. NEPA's mandate and purpose

Enacted in response to mounting crises across the nation,¹ NEPA promised to correct the blind eye that American policymakers had long turned to environmental

¹ *See* S. Rep. No. 91-296, at 4-5 (1969).

impacts of federal agency actions.² Congress recognized that “[t]raditional policies were primarily designed to enhance the production of goods and to increase the gross national product . . . [b]ut [that], as a nation, we have paid a price for our material well-being.”³ With the understanding that “the Nation cannot continue to pay the price of past abuse,”⁴ section 101 of NEPA imposes on the national government an obligation “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”⁵ The government thus had the “continuing responsibility” to, among other things, “assure for all Americans, safe, healthful, productive, and esthetically and culturally pleasing surroundings.”⁶

NEPA also looked to the future: Congress committed the federal government to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”⁷ Prior to NEPA, federal policymaking did not systematically consider long-term environmental degradation. Instead, the “pursuit of narrower, more immediate goals” had fostered increasing “threats to the environment and the Nation’s life support system.”⁸ NEPA was enacted as a change in course, forcing policymakers to consider “the long-range implications of many of the critical environmental problems” facing the nation.⁹

Congress recognized that meeting NEPA’s environmental goals is not only consistent with but necessary to economic well-being. Economic and environmental well-being need not be traded off. Rather, Congress understood that “[p]ast neglect and carelessness are now costing us dearly, not merely in opportunities forgone, in impairment of health, and in discomfort and inconvenience, but also in a demand upon

² See *id.* at 5 (“As a result of this failure to formulate a comprehensive national policy, environmental decisionmaking largely continues to proceed as it has in the past. Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man’s future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.”).

³ *Id.*

⁴ *Id.*

⁵ NEPA § 101(a), *codified at* 42 U.S.C. § 4331(a).

⁶ NEPA § 101(b)(2).

⁷ NEPA § 101(b)(1).

⁸ See S. Rep. No. 91-296, at 8-9 (“The challenge of environmental management is, in essence, a challenge of modern man to himself. The principal threats to the environment and the Nation’s life support system are those that man has himself induced in the pursuit of material wealth, greater productivity, and other important values. These threats – whether in the form of pollution, crowding, ugliness, or in some other form – were not achieved intentionally. They were the spinoff, the fallout, and the unanticipated consequences which resulted from the pursuit of narrower, more immediate goals.”).

⁹ See *id.* at 8.

tax dollars, upon personal incomes, and upon corporate earnings.”¹⁰ “Economic good sense,” the Senate Committee reported, “requires the declaration of a policy and the establishment of a comprehensive environmental quality program now.”¹¹ Congress thus enacted NEPA with the understanding that environmental well-being is compatible with, and a component of, short-term and long-term economic well-being.¹²

To fulfill its promises, NEPA mandated that federal agencies consider the environmental impacts of their decisions.¹³ Congress directed federal agencies to meet three goals: First, federal decisions must be informed by detailed environmental analyses. Second, decisionmakers must develop, study, and consider alternative courses of actions,¹⁴ allowing a comparison of the potential environmental impacts of such alternatives. And third, agencies must involve the public in this evaluation and decisionmaking process.

As Senator Jackson – one of NEPA’s architects – said shortly before final passage: “A vital requisite of environmental management is the development of adequate methodology for evaluating the full environmental impacts and the full costs – social, economic, and environmental – of Federal actions.”¹⁵ To this end, NEPA requires that the government:

utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment[.]¹⁶

Agencies must also provide a “detailed statement” on the environmental impacts of proposed decisions “significantly affecting the quality of the human environment” (known as an environmental impact statement or EIS).¹⁷ Within that detailed statement, agencies must disclose “any” unavoidable adverse environmental effects of the decision.¹⁸ And they must disclose “any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.”¹⁹

¹⁰ *Id.* at 16.

¹¹ *Id.* at 17.

¹² *See id.* at 17 (“Today we have the option of channeling some of our wealth into the protection of our future. If we fail to do this in an adequate and timely manner, we may find ourselves confronted, even in this generation, with an environmental catastrophe that could render our wealth meaningless and which no amount of money could ever cure.”).

¹³ NEPA § 102.

¹⁴ NEPA §§ 102(2)(C)(iii), (E); *see* Pub. L. No. 94-83 (1975) (amending § 102(2) of NEPA).

¹⁵ 115 Cong. Rec. 40,420 (Dec. 20, 1969) (Senate floor statement).

¹⁶ NEPA § 102(2)(A).

¹⁷ NEPA § 102(2)(C).

¹⁸ NEPA § 102(2)(C)(ii).

¹⁹ NEPA § 102(2)(C)(v).

Moreover, NEPA does not allow agencies to ignore analytic gaps: agencies must find ways to properly weigh “unquantified environmental amenities and values.”²⁰

NEPA directs federal decisionmakers to study and consider alternatives to their decisions, allowing comparisons of the environmental impacts of such alternatives.²¹ In particular, federal agencies must “study, develop, and describe appropriate alternatives to recommended courses of action” in “any proposal which involves unresolved conflicts concerning alternative uses of available resources,” even if its impacts do not rise to the level requiring an EIS.²²

NEPA mandates inclusion and disclosure of environmental impact analyses to the public and other governmental entities. The statute broadly directs agencies to act “in cooperation” with other governmental entities and the public in the decisionmaking process.²³ Further, agencies must make available “advice and information useful in restoring, maintaining, and enhancing the quality of the environment” to “States, counties, municipalities, institutions, and individuals.”²⁴

These statutory requirements provide the standard against which any changes to the DOT regulations must be measured. Unfortunately, as explored in more detail below, many of DOT’s proposed regulatory changes conflict with this mandate. The proposal, if adopted and upheld, would lead federal agencies to make decisions with significant, and sometimes devastating, environmental impacts without ever considering those impacts in advance. It would raise barriers to public participation. And at the end of the day, it would lead to poor decisions, increased litigation, and less transparency.

II. DOT’s procedures and regulations implementing NEPA

A. DOT’s prior NEPA procedures

The proposed regulations represent DOT’s first foray into formal regulations for implementing NEPA. Currently, each operating administration within the DOT has promulgated its own regulations that provide detailed procedures and identify categorical exclusions relevant to each operating administration. *See* 23 C.F.R. Part 771.

To provide guidance to the sub-agencies on their implementation procedures, DOT adopted Order 5610.1C, “Procedures for Considering Environmental Impacts,” in 1979. Dep’t of Transp. Order 5610.1C (1979). The Order explains that it “supplements the CEQ regulations by applying them to DOT programs,” Dep’t of Transp. Order 5610.1C at 2, such that all operating administrations “shall comply with both the CEQ regulations and the provisions of this Order.”

²⁰ *See* NEPA § 102(2)(b).

²¹ *See* NEPA §§ 102(2)(C)(iii), (E) ; *see* Pub. L. No. 94-83 (1975) (amending § 102(2) of NEPA).

²² NEPA § 102(2)(E); *see* Pub. L. No. 94-83 (1975) (amending § 102(2) of NEPA).

²³ NEPA § 101(a).

²⁴ NEPA § 102(2)(G).

1. Order 5610.1C establishes key DOT policies in implementing NEPA

Order 5610.1C establishes that it is “the policy of the Department of Transportation . . . to:

- (1) Avoid or minimize adverse impacts wherever possible;
- (2) Restore or enhance environmental quality to the fullest extent practicable;
- (3) Preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites;
- (4) Preserve, restore and improve wetlands;
- (5) Improve the urban physical, social, and economic environment;
- (6) Increase access to opportunities for disadvantaged persons; and
- (7) Utilize a systematic, interdisciplinary approach in planning and decision making which may have an impact on the environment.”

Dep’t of Transp. Order 5610.1C at 2-3. Therefore, the DOT established a critical standard in 1979 that environmental impacts shall be avoided or minimized “wherever possible.” Similarly, the DOT was ahead of its time in recognizing environmental injustice that can flow from transportation projects and established a policy to “increase access to opportunities for disadvantaged persons.” *Id.* at 3.

2. Order 5610.1C requires agencies to circulate an environmental assessment prior to issuing a Finding of No Significant Impact

Order 5610.1C mandates that “a copy of the environmental assessment should be made available to the public for a period of not less than 30 days before the finding of no significant impact is made and the action is implemented” where the action is “one without precedent” or the action “is or is closely similar to one which normally requires an environmental impact statement.” Dep’t of Transp. Order 5610.1C at 6; 40 C.F.R. § 1501.4(e)(2).

3. Order 5610.1C requires documentation of compliance with Section 4(f) of the DOT Act.

Section 4(f) of the U.S. Department of Transportation Act of 1966, now codified at 49 U.S.C. § 303 and 23 U.S.C. § 138, provides for consideration of park and recreation lands, wildlife and waterfowl refuges, and historic sites during transportation project development. Order 5610.1C recognizes that any “action having more than a minimal effect on lands protected under section 4(f) of the DOT Act will normally require the preparation of an environmental [impact] statement.” Dep’t of Transp. Order 5610.1C at 14. The order also recognizes that “[i]f an environmental [impact] statement is not required, the material called for in paragraph 4 of Attachment 2 shall be set forth in a separate document, accompanied by a FONSI or a determination that the section 4(f) involvement is minimal and that the action is categorically excluded.” *Id.* at 15.

4. Order 5610.1C deemed an environmental impact statement valid for three years

Under Order 5610.1C, “the draft EIS may be assumed to be valid for a period of three years.” Dep’t of Transp. Order 5610.1C at 18. Where a draft EIS is “not submitted to the approving official within three years from the date of the draft EIS circulation, a written reevaluation of the draft shall be prepared....” *Id.* Where changes have occurred that would be significant to the proposed action, “a supplement to the draft EIS or a new draft statement shall be prepared and circulated.” *Id.* A written reevaluation should be completed, unless the EIS is being tiered, “[i]f major steps toward implementation of the proposed action ... have not commenced within three years from the date of approval of the final EIS.” Under Order 5610.1C, “the draft EIS may be assumed to be valid for a period of three years.” *Id.* at 19. Similarly, “[i]f major steps toward implementation of the proposed action have not occurred within five years from the date of approval of the final EIS ... the responsible Federal official shall prepare a written reevaluation of the adequacy, accuracy, and validity of the EIS.” *Id.*

B. DOT’s Proposed Rule

DOT’s Proposed Rule abandons more than forty years of DOT policy to avoid and minimize environmental impacts “wherever possible.” Dep’t of Transp. Order 5610.1C at 2. Instead, DOT states a new environmental review policy that focuses on “ensur[ing] the safest, most efficient and modern transportation system in the world.” 85 Fed. Reg. 74,654. The new policy deigns to “consider[] measures to avoid, minimize, or compensate for adverse environmental effects wherever practicable, consistent with other essential considerations of national policy.” *Id.* This downgrading of environmental protection by the DOT is a devastating departure from decades of DOT policy focused on protecting the environment wherever possible to now merely considering avoiding environmental harm when it is convenient and easy for the DOT and its operating agencies to do so. As stated elsewhere in these comments, DOT’s Proposed Rule stands NEPA caselaw and statutory history on its head.

DOT has not provided a rationale in the Proposed Rule for abandoning its long-standing approach that robustly supports environmental protection in favor of a milquetoast nod to NEPA’s purpose. Indeed, DOT’s proposed policy fails to satisfy NEPA’s charge that “it is the continuing responsibility of the Federal Government to use all practicable means ... to fulfill the responsibilities of each generation as trustee of the environment for succeeding generations” and to “attain the widest range of beneficial uses of the environment without degradation.” 42 U.S.C. § 4331(b).

Likewise, the proposed regulations abandon DOT’s decades-long commitment to “[i]ncrease access to opportunities for disadvantaged persons.” Dep’t of Transp. Order 5610.1C at 3. DOT’s proposed regulations excise the agency’s prior commitment to environmental justice communities, and the proposed regulation’s radio silence on environmental justice issues is both a poor policy choice unsupported by the record and a violation of the law. *See infra*, section IV.

III. The Proposed Rule implements the revised CEQ regulations, which are themselves arbitrary, capricious, and contrary to law

A. CEQ's revised regulations are arbitrary, capricious, and contrary to law

Until recently, NEPA implementation has been informed by regulations issued by CEQ in 1978. 43 Fed. Reg. 55,978 (Nov. 29, 1978). CEQ's 1978 regulations endured, almost unchanged, through administrations both Republican and Democratic, through times of economic downturn as well as expansion. From 1978 through 2020, CEQ's regulations reinforced NEPA's salutary goals. In July 2020, however, CEQ promulgated a new rule, 85 Fed. Reg. 43,304 (July 16, 2020), that attempts to reinterpret and revise the statute, and to eviscerate many of NEPA's well-established, judicially recognized protections.

CEQ's 2020 Rule eliminates environmental reviews for entire classes of projects. It purports to authorize federal agencies to ignore serious environmental impacts that those agencies have in the past been obliged to identify and consider. It erects barriers to public engagement and attempts to curtail judicial oversight, in direct opposition to NEPA's goal of facilitating public participation and transparent, accountable governance. CEQ's 2020 Rule causes real, foreseeable harms to people, communities, and the natural environment. It authorizes agencies to overlook cumulative or indirect impacts, with devastating consequences for health and the environment. It allows ill-considered and uninformed project approvals that will contribute to or exacerbate pollution, especially in the most vulnerable and overburdened communities. In short, CEQ's 2020 Rule authorizes federal agencies across the Executive Branch to stick their heads in the sand rather than taking a "hard look" at the health and environmental consequences of their decisions, and to obscure agency decisionmaking from public and judicial scrutiny.

B. DOT should wait to finalize its regulations until litigation regarding CEQ's 2020 regulations has concluded

CEQ's 2020 Rule is the subject of at least five lawsuits in multiple jurisdictions. *See Env't Just. Health All. v. CEQ*, No. 20-cv-6143, 2020 WL 4547942 (S.D.N.Y. Aug. 6, 2020); *Wild Virginia v. CEQ*, No. 3:20-cv-00045, 2020 WL 5494519 (W.D. Va.); *Alaska Cmty. Action on Toxics v. CEQ*, 3:20-cv-5199, 2020 WL 4368890 (N.D. Cal. Jul. 29, 2020); *California v. CEQ*, No. 4:20-cv-06057 (N.D. Cal.); *Iowa Citizens for Cmty. Improvement v. CEQ*, No. 1:20-cv-02715 (D.D.C.). Several of the undersigned commenters are plaintiffs in at least two of those cases. The cases challenging CEQ's 2020 Rule are being prosecuted by environmental organizations, environmental justice organizations, animal rights organizations, and states' attorneys general, alike. While each plaintiff group objects to different aspects of CEQ's 2020 Rule, all plaintiffs agree that it is arbitrary, capricious, and contrary to law.

Because the Proposed Rule relies on and incorporates by reference many aspects of CEQ's 2020 Rule, DOT should wait until litigation challenging CEQ's 2020 Rule is

complete before proceeding with its own rulemaking. Any other course would be an inefficient waste of resources.

C. The Proposed Rule offers insufficient clarity on its terms and justification

In issuing its Proposed Rule, DOT purports to incorporate CEQ's 2020 Regulations implementing NEPA, largely by cross-referencing the definitions section under that rule. However, in doing so, DOT fails to provide sufficient specificity about which part of CEQ's 2020 Regulations it seeks to adopt. Nor does DOT specify which aspects of CEQ's justification for its regulation DOT seeks to advance in support of its own rule. This absence of clarity leaves the public without a complete or adequate understanding of the terms of DOT's Proposed Rule, much less an understanding of DOT's justification for the substantial changes it seeks to make. This absence of reasoning is the very essence of arbitrary decisionmaking.

IV. The Proposed Rule violates Executive Order 12,898 and would have disproportionate impacts on communities facing environmental injustices

A. DOT's projects share a legacy of discriminatory activity

Transportation infrastructure projects have the potential to completely reorganize the social and physical fabric of the human environment by shaping the material conditions in which people live. The activities administered by DOT have overwhelmingly contributed to disproportionate adverse impacts on the human and natural environment of communities predominantly composed of people of color and low-income residents.

Since its beginning, DOT's project siting decisions have been a primary driver of discriminatory practices used to decimate, displace, and deny low-income and communities of color access to a healthy, safe, and robust community under the ruse of "slum clearance."²⁵ Freeway projects were frequently used to facilitate discriminatory practices that rendered more subtle redlining practices into concrete form, solidifying racially segregated living conditions spatially and in many instances cleaving culturally significant Black and Brown neighborhoods, like the Tremé neighborhood in New Orleans where some of the most famous jazz musicians in American history were born.²⁶ Because these communities did not have the political leverage to effectively enjoin these activities, the Federal Highway Administration seized on the opportunity

²⁵ Robert Caro, *Power Broker: Robert Moses and the Fall of New York*, 848 (1975); Joseph F.C. DiMento and Cliff Eliss, *Changing Lanes: Visions and Histories of Urban Freeways*, 80 (2013); Alana Samuels, *The Atlantic*, The Role of Highways in American Poverty (Mar. 8, 2016).

²⁶ Beverly H. Wright, "New Orleans Neighborhoods Under Siege," in *Just Transportation: Dismantling Race and Class Barriers to Mobility*, 120-44 (ed. Robert D. Bullard & Glenn S. Johnson) (Gabriola Island, BC; Stony Creek, CT: New Society Publishers, 1997); Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, 127 (2017).

to place controversial road projects in these neighborhoods, forcing them to endure a disproportionate share of environmental pollutants caused by increased road expansions. DOT must analyze the environmental justice impacts of its decision to perpetuate disproportionate impacts on communities that face environmental injustice.

B. NEPA advances environmental justice

Guided by CEQ's 1978 regulations, NEPA became a crucial tool for public engagement and better governmental decisionmaking in the fight against environmental racism. NEPA and the 1978 regulations promote environmental justice by requiring federal agencies to include a proposed project's potential environmental, economic, and public-health impacts on low-income communities, communities of color, and rural communities. One of NEPA's visionary elements was its creation of broad opportunities for public participation in government decisions that affect communities and their environment.

In 1994, President Clinton issued Executive Order 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. Exec. Order No. 12,898, *codified at* 3 C.F.R. § 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (1998). Executive Order 12,898 directs federal agencies to make environmental justice part of their missions, and to identify and address the disproportionate environmental and health effects of their activities on communities of color and low-income populations. The Executive Order also requires agencies to ensure effective public participation and access to information.

The Presidential Memorandum accompanying Executive Order 12,898 directs all agencies to utilize NEPA to analyze environmental, health, economic, and social effects of federal actions, including effects on communities of color and low-income communities; to develop mitigation measures that address the significant effects of actions on communities of color and low-income communities; and to provide opportunities for public input in decisionmaking. Most importantly, agencies must provide opportunities for effective community participation in the NEPA process.

Executive Order 12,898 recognized the importance of gathering data and conducting research to identify and address disproportionate and adverse health, environmental, social, and economic effects of federal agency programs and policies on communities of color and low-income communities. The corresponding Presidential Memorandum reiterates that any NEPA document should "address significant and adverse environmental effects of proposed federal actions on minority populations, low-income populations, and Indian Tribes." And public participation is an integral part of addressing environmental justice concerns. Each federal agency must provide opportunities for effective community participation in the NEPA process through consultation with affected communities and improving the accessibility of public meetings, crucial documents, and notices.

C. The Proposed Rule violates Executive Order 12,898

DOT violated Executive Order 12,898 by failing to consider the environmental justice impacts of its Proposed Rule implementing NEPA. Under the Executive Order, “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.” Exec. Order No. 12,898, 59 Fed. Reg. 7,629, 7,629 (Feb. 11, 1994). In 2012, DOT issued procedures under Order 5610.2(a) committing to “fully considering environmental justice principles throughout planning and decisionmaking processes.” Dep’t of Transp. Order 5610.2(a)(4)(a). This Order requires that “future rulemaking activities undertaken pursuant to DOT Order 2100.5 ... that affect human health or the environment[] shall address compliance with Executive Order 12898 and this Order, as appropriate.” DOT Order 5610.2(a)(5)(2)(b). DOT’s Proposed Rule fails to identify and address disproportionate impacts on “environmental justice” communities in violation of the law under E.O. 12,898 and its own agency Order. The Proposed Rule does not evaluate the impacts on environmental justice communities and is therefore illegal.

D. The Proposed Rule has disproportionate impacts on communities facing environmental injustices

1. Removal of disadvantaged groups in policy section

The DOT’s removal of policy language addressing consideration of “disadvantaged groups” is a direct rebuke to DOT’s commitment to Environmental Justice principles. *See supra* Section II.A. This will have disproportionate impacts on environmental justice communities. DOT’s policy provision governs what environmental impacts should be considered by agencies. 85 Fed. Reg. 74,640, 74,645 (Nov. 23, 2020). DOT’s erasure of policy language that directs agencies to consider impacts on “disadvantaged groups” weakens its current guidance. *Id.* Through this omission, DOT implicitly authorizes its agencies to ignore these impacts. According to DOT’s sub-agency, the Federal Highway Administration, “transportation practitioners struggle with identifying and assessing environmental justice impacts as part of project reviews conducted under the National Environmental Policy Act (NEPA)” despite existing policy guidance. Fed. Highway Admin., *Environmental Justice and NEPA in the Transportation Arena: Project Highlights* (2013). Removing this explicit policy language does not lessen this “struggle.” Rather, this omission makes it even more difficult for DOT’s agencies to develop a consistent practice that incorporates environmental justice principles into NEPA review.

2. The Proposed Rule reduces opportunities for public participation

The DOT’s rule will reduce public participation and limit input from communities most affected by DOT’s decisions. NEPA proponents emphasize the importance of public involvement in the decisionmaking process as a tool to ensure environmental justice impacts are considered. As the Federal Highway Administration

recognizes, “[e]nhanced public involvement to ensure meaningful participation of low-income and minority populations in the environmental review process informs every aspect of the environmental justice analysis, from identifying populations and understanding what is important to communities, to characterizing impacts and developing appropriate mitigation measures.” Fed. Highway Admin., Environmental Justice and NEPA in the Transportation Area: Project Highlights at 35 (2015) (effective practices from Fed. Highway Admin. case studies). Nothing in the Proposed Rule addresses the need to conduct targeted outreach to ensure these communities participate in the decisionmaking process; without extensive outreach, information flow into and feedback from such communities may well be wholly inadequate.

The Proposed Rule’s emphasis on accelerating review timelines and abbreviating content in the environmental review process diminishes opportunities for meaningful participation. These measures reduce publicly available information regarding the project, preventing the public from having crucial data it needs to effectively engage in the review process. The Proposed Rule’s shortening of page limits for EAs, for example, will require agencies to omit relevant analysis in the public document that may aid communities in determining what the environmental impacts of a project are. Mechanisms to expedite the review process, such as the collapsing of the FEIS and ROD, will reduce the windows of opportunity for public input during the review process, lessening opportunities for the public to engage and provide feedback. As a consequence, the agency will not be as accountable to the needs of the community.

Denying these communities a seat at the table in their own home environment will lead to poorly informed decisionmaking that has disproportionate adverse effects on communities confronting environmental injustices. Without community involvement, DOT will not be able to adequately identify affected communities and their leaders nor be cognizant of culturally responsive outreach methods. DOT will not receive input on what is important to these communities. DOT will also not be able to successfully characterize impacts or propose effective mitigation. DOT’s NEPA analysis will be fundamentally flawed without an affirmative and rigorous approach to soliciting and incorporating feedback from communities that confront environmental injustice into the review process and final project selection.

3. The Proposed Rule imposes limitations on the range of alternatives

DOT’s Proposed Rule limits the range of alternatives it will consider in an EA and lessens the agency’s burden to explain why other alternatives were rejected. The range of alternatives discussion is an opportunity for environmental justice communities to play a notable role in shaping project development. Limiting the range of alternatives effectively limits choice and information. Providing cursory explanations does not promote transparency in government decisionmaking nor does it empower residents to actively and meaningfully participate in the decisionmaking process. By withholding information from the public, communities facing environmental injustices

cannot effectively advocate for their preferred alternative. DOT's Proposed Rule also fails to account for how the following regulatory changes impact communities facing environmental injustice.

4. The Proposed Rule restricts the analysis of cumulative effects

Environmental justice addresses the disproportionate impact of pollution and environmental degradation on people of color and low-income communities. Cumulative impact analysis is essential to identifying whether and how low-income and frontline communities of color may be overburdened by the additive environmental impacts of proposed federal actions over time, particularly actions that contribute air, land, and water pollution to the environment. By eliminating cumulative impact review, the Proposed Rule allows agencies to sidestep considering environmental justice impacts.

E. The Proposed Rule unlawfully incorporates the revised CEQ Regulations because those regulations also failed to comply with Executive Order 12,898

Several organizations have sued the CEQ because it failed to comply with Executive Order 12,898 when finalizing the new NEPA regulations. 85 Fed. Reg. 43,304 (July 16, 2020) ("Final CEQ Rule"); *see Alaska Comm. Action on Toxics v. Council on Env'tl. Quality*, No. 3:20-cv-5199 (N.D. Cal. filed July 29, 2020); *Env't Just. Health All. v. CEQ*, No. 20-cv-6143, 2020 WL 4547942 (S.D.N.Y. filed Aug. 6, 2020). In the Final CEQ Rule, CEQ acknowledged that it was required to analyze the effect of its proposal on Executive Order 12,898, and asserted that it "analyzed this final rule and determined that it would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income populations." 85 Fed. Reg. at 43,356. CEQ failed to provide factual support for this assertion.

Nothing in the Final CEQ Rule provides rational reasons for departing from CEQ's longstanding policy and practice of fully analyzing the environmental justice impacts of its actions through a NEPA review. Many provisions in the Final Rule will have a disparate and adverse impact on communities of color and low-income communities. As noted above, these provisions include but are not limited to imposing arbitrary page limits, redefining "major federal action," striking required cumulative impact analysis, authorizing the imposition of a bond requirement to participate in the NEPA process, and allowing collective responses to public comments.

NEPA has been an essential mechanism for ensuring that disenfranchised and underrepresented communities have voice in major federal actions. The sweeping changes in the Final CEQ Rule will fundamentally alter nearly every step of the NEPA review process, and yet because CEQ did not engage in a NEPA analysis of the Final CEQ Rule, there is no explanation or analysis of: how the development and implementation of the Final CEQ Rule will affect implementation of Executive Order 12,898; whether the Final CEQ Rule is consistent with CEQ's 1997 environmental justice guidance; or how the Final CEQ Rule will affect environmental justice communities

themselves. CEQ acknowledged that commenters raised these issues, 85 Fed. Reg. at 43,356, but insisted that the Final CEQ Rule would not result in any adverse environmental impacts. *Final Rule Response to Comments* at 34 (June 30, 2020). CEQ's decision to adopt the Final CEQ Rule without analyzing how the rule and its implementation would affect the environmental justice mandates in Executive Order 12,898, how the Final CEQ Rule complies with CEQ's 1997 environmental justice guidance, or how the Final CEQ Rule will affect environmental justice communities themselves is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of NEPA and the APA, 5 U.S.C. § 706(2). Because CEQ's Final Rule is invalid, DOT may not wholesale adopt those regulations into its own without also violating the law.

F. DOT should incorporate Executive Order 12,898 into the Proposed Rule

To remedy its past misdeeds and prevent future harms to communities facing environmental injustice, DOT should explicitly incorporate E.O. 12,898 into the Proposed Rule. DOT in its own Order implementing the E.O. mandates that "future rulemaking activities undertaken pursuant to DOT Order 2100.5 ... that affect human health or the environment[] shall address compliance with Executive Order 12898 and this Order, as appropriate." DOT Order 5610.2(a)(5)(2)(b).

DOT is in a prime position to give this commitment the weight of the law. Along with the EPA, DOT served as co-chair on the committee of the Federal Interagency Working Group on Environmental Justice and NEPA. In 2016, the working group published "Promising Practices for EJ Methodologies in NEPA Reviews," a report analyzing and discussing the interaction of environmental justice and NEPA. *See* EPA Report: Promising Practices for EJ Methodologies in NEPA Reviews (2016) [Exhibit D]. In 2019, the group issued an updated report. *See* Federal Interagency Working Group on Environmental Justice and NEPA Committee, Community Guide to Environmental Justice and NEPA Methods (2019) [Exhibit E]. In addition, the Department and its agencies have individually produced numerous agency orders, policy guidance, and case studies identifying best practices for addressing environmental justice considerations in the review process. *See* Dep't of Transp. 5610.2(a) (May 2, 2012); FHWA Order 6640.23A (June 14, 2012); FTA Circular 4703.1 (Aug. 15, 2012); FAA Order 1050.1F (July 16, 2015); Dep't of Transp., Env. Strategy (2016) [Exhibit F]; FHWA Case Study: Freeways [Exhibit G]; FHWA Case Study: Pedestrian Bridges [Exhibit H]; FHWA Case Study: Highway Improvements [Exhibit I]; FHWA Environmental Justice Reference Guide (2015) [Exhibit J]. Enshrining E.O. 12,898 in DOT's Proposed Rule is the logical next step to give this Order its full legal effect.

DOT's supplemental Order already provides a fairly robust review process that can flesh out the exact procedures under the Executive Order. Dep't of Transp. Order 5610.2(a)(5)(b). To "assure ... nondiscrimination" and to "prevent[] disproportionately high and adverse effects," the Department of Transportation commits to comply with NEPA in a way to "identify, early in the development of the ... activity, the risk of

discrimination and disproportionately high and adverse effects so that positive corrective action can be taken.” Dep’t of Transp. Order 5610.2(a)(7)(b).

Under the Order, the Department of Transportation commits to “identifying and evaluating environmental, public health, and interrelated social and economic effects of DOT ... activities;” to “proposing measures to avoid, minimize and/or mitigate disproportionately high and adverse environmental and public health effects and interrelated social and economic effects, and providing offsetting benefits and opportunities to enhance communities, neighborhoods, and individuals affected by DOT ... activities;” and to “considering alternatives” that “would result in avoiding and/or minimizing disproportionately high and adverse human health or environmental impacts.” Dep’t of Transp. Order 5610.2(a)(7)(c).

DOT’s Federal Highway Administration’s Environmental Justice Order can deepen this framework to clarify the adverse effects the agency should consider for transportation projects. Under the Administration’s implementing Order 6640.23A(6)(b), the agency defines “adverse effects” as “the totality of significant individual or cumulative human health or environmental effects, including interrelated social and economic effects.” These include “bodily impairment, ... illness, or death; air, noise, and water pollution and soil contamination”; “destruction or disruption of community cohesion or a community’s economic vitality; destruction or disruption of the availability of public and private facilities and services”; and “isolation, ... exclusion or separation of minority or low-income individuals within a given community or from the broader community.” Fed. Highway Admin. Order 6640.23A(5)(f). These features would allow the DOT to address environmental justice impacts.

As part of this process, DOT should also solicit input from community and field experts. The DOT should consult with EPA’s National Environmental Justice Advisory Council prior to adoption of this rule so that the advisory board can provide further expertise on this issue. These resources will ensure that DOT’s practices are based on sound advice and information from those most equipped to address environmental justice considerations.

Through the Executive Order’s adoption in the Proposed Rule, DOT would further the purpose of NEPA. Compliance with the Order would compel the agencies to follow a consistent practice of collecting and evaluating information related to impacts on communities confronting environmental injustices, thus ensuring that agencies fully consider pertinent information. Its adoption would also facilitate NEPA’s secondary aim which is to promote informed and meaningful public participation in the decisionmaking process. 40 C.F.R. § 1500.1(a). The inclusion of the Executive Order into the Proposed Rule will be a significant achievement that allows DOT to fully realize its commitment to environmental justice.

V. The Proposed Rule encourages fewer, less informative, less thorough, and unlawfully incomplete environmental analyses

“Congress’ aim” in enacting section 102(2)(C) of NEPA was “to force federal agencies to consider environmental concerns early in the decisionmaking process so as to prevent any unnecessary despoiling of the environment.”²⁷ Congress therefore required each agency to prepare a “detailed statement by the responsible official”²⁸ regarding the project’s environmental impacts, with the goal that each agency “reach a decision only upon which it is fully informed and only after the decision has been well-considered.”²⁹ This “detailed statement” “helps a reviewing court to decide whether an agency has met that objective,” and serves “as an environmental full disclosure law so that the public can weigh a project’s benefits against its environmental costs.”³⁰ And, “[p]erhaps most important, the detailed statement insures the integrity of the agency process by forcing it to face those stubborn, difficult-to-answer objections without ignoring them or sweeping them under the rug.”³¹

The changes that DOT proposes to the scope and substantive content of environmental documentation conflict with these congressional goals and, as elaborated below, are arbitrary, capricious, and otherwise unlawful.

A. The Proposed Rule would unlawfully exclude analysis of cumulative and indirect effects

The Proposed Rule makes clear that, if the Rule goes into effect, DOT would apply the definitions set forth in the 2020 CEQ Rule, including the CEQ Rule’s revised definition of “effects.” *See* 85 Fed. Reg. at 74,644. Importantly, the 2020 CEQ Rule eliminate the words “cumulative” and “indirect” from the definition of “effects.”

NEPA requires “in every recommendation or report on ... major Federal actions significantly affecting the quality of the human environment,” that the responsible agency provide a detailed statement that discusses a number of elements including the “environmental impact of the proposed action,” “[a]ny adverse environmental effects which cannot be avoided should the proposal be implemented,” and “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity.”³² Agencies cannot satisfy these statutory requirements without considering cumulative and indirect effects.

²⁷ *Sierra Club v. U.S. Army Corps of Eng’rs*, 772 F.2d 1043, 1049 (2d Cir. 1985).

²⁸ NEPA § 102(C), codified at 42 U.S.C. § 4332(2)(C).

²⁹ *Sierra Club*, 772 F.2d at 1049 (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)).

³⁰ *Id.*

³¹ *Id.* (citing *Silva v. Lynn*, 482 F.2d 1282, 1284–85 (1st Cir. 1973)).

³² NEPA § 102(2)(C), codified at 42 U.S.C. § 4332(2)(C).

1. The legislative history of NEPA makes clear that Congress intended for agencies to analyze and disclose the full effects of their actions

NEPA's legislative history demonstrates that Congress intended the detailed statement mandated in section 102(2)(C) to require agencies to analyze and disclose to the public the wide-ranging consequences of their actions on the environment, including direct, indirect, and cumulative effects. The Senate Report on NEPA framed the problem this way:

As a result of th[e] failure to formulate a comprehensive national policy, environmental decisionmaking largely continues to proceed as it has in the past. Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.³³

The Senate Report describes the unintended environmental consequences of prior federal policies and actions, including the "proliferation of pesticides and other chemicals"; "indiscriminate siting" of heavy industry; "pollution of the Nation's rivers, bays, lakes, and estuaries"; loss of public lands; and "rising levels of air pollution."³⁴ NEPA is "designed to deal with the long-range implications of many of the[se] critical environmental problems," in part by ensuring that federal agencies undertake actions with "adequate consideration of, or knowledge about, their impact on the environment."³⁵ This goal is unattainable if federal agencies do not analyze and disclose to decisionmakers and the public the full suite of the effects of their actions on the environment, including indirect and cumulative effects.

And the House Report makes clear that the federal government must properly analyze long-term environmental consequences.³⁶ The Report acknowledges that the country faces "two types of [environmental] issues": short-term, local "brushfire crises," and "long-term methodical concerns about the environment."³⁷ "The latter is by far the most difficult. It is the least spectacular, yet by far the most significant."³⁸ According to the House Report, "[a]n independent review of the interrelated problems associated

³³ S. Rep. No. 91-296, at 5 (1969).

³⁴ *Id.* at 8.

³⁵ *Id.* at 8-9.

³⁶ H. Rep. No. 91-378 (July 11, 1969).

³⁷ H. Rep. No. 91-378, at 5-6 (quoting testimony of Dr. David M. Gates, Chairman of the Board of Advisors to the Ad Hoc Committee on the Environment).

³⁸ *Id.* at 6 (quoting testimony of Dr. Gates).

with environmental quality is of critical importance if we are to reverse what seems to be a clear and intensifying trend toward environmental degradation.”³⁹

2. Judicial precedent makes clear that NEPA requires agencies to consider indirect and cumulative effects

In the years following NEPA’s passage, courts interpreted NEPA to require federal agencies to include in their environmental analyses the indirect and cumulative effects of their proposed actions.

For instance, in *City of Davis v. Coleman*, the court of appeals held that the Federal Highway Administration and its California counterpart were required to prepare an environmental impact statement under NEPA for construction of a portion of a federal highway because of the significant “secondary” or indirect environmental effects that could result from the project.⁴⁰ The court explained that the “growth-inducing effects” of the highway construction “are its *raison d’être*,” and “with growth will come growth’s problems: increased population, increased traffic, increased pollution, and increased demand for services such as utilities, education, police and fire protection, and recreational facilities.”⁴¹ The agencies argued that these effects did not need to be considered under NEPA because they were “‘secondary’ environmental effects.”⁴² The court disagreed, explaining that “this is precisely the kind of situation Congress had in mind when it enacted NEPA: substantial questions have been raised about the environmental consequences of federal action, and the responsible agencies should not be allowed to proceed with the proposed action in ignorance of what those consequences will be.”⁴³

Similarly, in *Minnesota Public Interest Research Group v. Butz*, the Eighth Circuit held that the U.S. Forest Service was required to complete an environmental impact statement for proposed additional logging activity in the Boundary Waters Canoe Area to assess the indirect effects associated with the logging permits.⁴⁴ The court observed that “[l]ogging creates excess nutrient run-off which causes algal growth in the lakes and streams, affecting water purity. Logging roads may cause erosion and water pollution and remain visible for as long as 100 years; this affects the rustic, natural beauty of the BWCA, recognized as unique by the Forest Service itself. Logging destroys virgin forest, not only for recreational use, but for scientific and educational purposes as well. All these are significant impacts on the human environment.”⁴⁵ Again, the court of appeals rejected the agencies’ argument that these and other effects were too remote to be considered under NEPA: “We think NEPA is concerned with

³⁹ *Id.* at 3.

⁴⁰ 521 F.2d 661, 666, 676-77 (9th Cir. 1975).

⁴¹ *Id.* at 675.

⁴² *Id.* at 676.

⁴³ *Id.* at 675-76.

⁴⁴ 498 F.2d 1314, 1323 (8th Cir. 1974).

⁴⁵ *Id.* at 1322 (footnote omitted).

indirect effects as well as direct effects. There has been increasing recognition that man and all other life on this earth may be significantly affected by actions which on the surface appear insignificant.”⁴⁶

During this same period, courts also held that NEPA required agencies to consider the cumulative effects of their actions in environmental analyses. For instance, in *Kleppe v. Sierra Club*, the Supreme Court interpreted section 102(2)(C) of NEPA to require that when multiple proposals for related actions “that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.”⁴⁷ “Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.”⁴⁸ The Supreme Court has subsequently reiterated this understanding of the statute: “NEPA requires an EIS to disclose the significant health, socioeconomic and *cumulative consequences* of the environmental impact of a proposed action.”⁴⁹

Consistent with this binding authority, the Second Circuit has repeatedly found agency environmental analyses insufficient under NEPA for their failures to consider cumulative impacts. For instance, in *Natural Resources Defense Council v. Callaway*, the court held that an EIS prepared by the Navy for the proposed dumping of polluted soil at a containment site was inadequate because it failed to consider the cumulative impact of additional dumping at the site from other future similar actions.⁵⁰ The court rejected the Navy’s treatment of the project “as an isolated ‘single-shot’ venture in the face of persuasive evidence that it is but one of several substantially similar operations, each of which will have the same polluting effect in the same area.”⁵¹ The *Callaway* court explained that Congress plainly intended such impacts to be considered:

As was recognized by Congress at the time of passage of NEPA, a good deal of our present air and water pollution has resulted from the accumulation of small amounts of pollutants added to the air and water by a great number of individual, unrelated sources. “Important decisions concerning the use and the shape of man’s future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.” S. Rep. No. 91-296, 91 Cong., 1st Sess. 5 (1969). NEPA was, in large measure, an attempt by Congress to instill in the environmental

⁴⁶ *Id.*

⁴⁷ 427 U.S. 390, 410 (1976).

⁴⁸ *Id.* In *Kleppe*, the Court determined that no such multiple proposals existed, and therefore a regional analysis of the cumulative impacts of a proposed mining operation was not required – particularly when the agency had separately prepared a program-wide EIS for all of its coal-related activities. *Id.* at 398-400.

⁴⁹ *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 106-07 (1983) (emphasis added).

⁵⁰ 524 F.2d 79, 87-90 (2d Cir. 1975).

⁵¹ *Id.* at 88.

decisionmaking process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration.⁵²

Similarly, in *Hanly v. Kleindienst*, the Second Circuit remanded an EA for reconsideration of the project's environmental effects on the basis that section 102(2)(C) of NEPA requires agencies to consider "the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area."⁵³ In *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, the Second Circuit affirmed a district court's finding that an EIS for the proposed construction of a segment of a federal highway had to assess the "cumulative environmental impact" that would result from the construction of the entire highway.⁵⁴ And in *City of Rochester v. U.S. Postal Service*, the Second Circuit explained that "[t]he cases in this circuit and elsewhere have consistently held that NEPA mandates comprehensive consideration of the effects of all federal actions. ... To permit noncomprehensive consideration of the effects of all federal actions into smaller parts, each of which taken alone does not have a significant impact but which taken as a whole has cumulative significant impact would provide a clear loophole in NEPA."⁵⁵

3. Agency precedent confirms that analysis of indirect and cumulative effects is required by NEPA

For decades – dating back to CEQ's proposed guidelines in 1971, shortly after NEPA's passage – CEQ's guidance and regulations have consistently and repeatedly said that agencies must consider the indirect and cumulative effects of their actions. A review of these guidelines and regulations makes clear that: (1) the environmental effects of projects can be individually insignificant but cumulatively significant; (2) analysis of the indirect and cumulative impacts of an agency action is necessary to determine whether significant effects exist under NEPA; (3) indirect and cumulative impacts must be considered as part of a scientifically based effects analysis; (4) indirect and cumulative impacts must be considered at multiple stages of the NEPA process, including when determining whether a category of projects is likely to be categorically exempt from NEPA, during scoping, and before developing a reasonable range of alternatives and mitigation measures; and (5) analysis and disclosure of both indirect and cumulative impacts are necessary to inform the public and decisionmakers.

⁵² *Id.*

⁵³ 471 F.2d 823, 830-31, 836 (2d Cir. 1972).

⁵⁴ 508 F.2d 927, 934-36 (2d Cir. 1974), *judgment vacated and remanded on other grounds*, 423 U.S. 809 (1975).

⁵⁵ 541 F.2d 967, 972 (2d Cir. 1976) (citing *Scientists' Inst. for Pub. Information v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086-87 (D.C. Cir. 1973)).

For instance, in its first publication in the Federal Register in 1971, CEQ acknowledged that section 102(2)(C) of NEPA requires agencies to include the following information in their environmental statements:

[t]he probable impact of the proposed action on the environment, including impact on ecological systems such as wildlife, fish, and marine life. Both primary and secondary significant consequences for the environment should be included in the analysis. For example, the implications, if any, of the action for population distribution or concentration should be estimated and an assessment made of the effect of any possible change in population patterns upon the resource base, including land use, water, and public services, of the area in question;

and:

[t]he relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. This in essence requires the agency to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.

Two years later, CEQ reiterated its determination that section 102(2)(C) "is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated."⁵⁶ "[A]gencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action."⁵⁷

Consistent with this understanding, CEQ's 1973 guidelines required agencies to include in their environmental statements "[s]econdary or indirect, as well as primary or direct, consequences for the environment" from their actions, alongside the "interrelationships and cumulative environmental impacts of the proposed action and other related Federal projects."⁵⁸

When CEQ issued its first regulations in 1978, it made indirect and cumulative effects the organizing principle behind NEPA reviews. CEQ stated that section 102(2)(C) of NEPA requires agencies to consider the environmental consequences of

⁵⁶ 38 Fed. Reg. 20,550, 20,551 (Aug. 1, 1973)

⁵⁷ *Id.*

⁵⁸ *Id.* at 20,553.

their actions, including direct, indirect, and cumulative effects.⁵⁹ It separately defined “indirect effects” to include those effects that are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable,” and “cumulative impacts” to include those impacts “which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”⁶⁰ It further specified that an action cannot qualify for a categorical exclusion if it has a cumulatively significant effect on the environment. Finally, CEQ emphasized that the significance of an effect, as stated in section 102(2)(C), depends on whether “the action is related to other actions with individually insignificant but cumulatively significant impacts.”⁶¹

Over the next few decades, CEQ issued guidance both clarifying and emphasizing the importance of indirect and cumulative effects analyses to NEPA. In 1981, CEQ reiterated that the “environmental consequences” section of an EIS “should be devoted largely to a scientific analysis of the direct and indirect environmental effects of the proposed action and of each of the alternatives.”⁶² Agencies cannot avoid this analysis by claiming a lack of information: “The EIS must identify all the indirect effects that are known, and make a good faith effort to explain the effects that are not known but are ‘reasonably foreseeable.’”⁶³

In 1993, CEQ chastised agencies for failing to properly consider the cumulative impacts of their actions, resulting in a threat to biodiversity inconsistent with NEPA’s aims. CEQ explained that many EISs and environmental assessments improperly addressed “only . . . project-specific considerations.” CEQ, *Incorporating Biodiversity Considerations Into Environmental Impact Analysis Under the National Environmental Policy Act* 18 (1993). Important environmental considerations like biodiversity can only be adequately assessed on an “ecosystem or regional scale,” taking into account cumulative effects.” *Id.* “Avoidance or mitigation of impacts at the project level . . . has been, and will continue to be, critically important in minimizing biodiversity losses. Yet, in the absence of protection at the larger scale, ecosystem patterns and processes so important to biodiversity will not be sustained over the long term.” *Id.* CEQ instructed agencies that “[e]ven for small projects, it should always be the objective of the environmental document to analyze impacts at the largest relevant scale, based on the affected resources and expected impacts.” *Id.* at 21.

⁵⁹ 43 Fed. Reg. at 55,996; see also *id.* at 56,005 (defining the scope of actions required to be considered in an EIS to include direct, indirect, and cumulative impacts).

⁶⁰ *Id.* at 56,004.

⁶¹ *Id.* at 56,006.

⁶² CEQ, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,028 (Mar. 23, 1981).

⁶³ *Id.* at 18,031.

In 1997, CEQ issued an entire guidance document emphasizing the importance of considering cumulative effects under NEPA.⁶⁴ CEQ explained that “[e]vidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time.”⁶⁵ This includes widespread and severe environmental effects like deforestation; exposure to carcinogens; polluted waterways; acid rain; pesticide pollution; global climate change; stratospheric ozone depletion; and even degradation of local communities.⁶⁶ “The passage of time has only increased the conviction that cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment.”⁶⁷

To that end, CEQ explained in detail how a cumulative impacts analysis should be incorporated into agencies’ NEPA reviews at all stages of the process. CEQ emphasized that a cumulative impacts analysis must anchor agencies’ NEPA reviews to ensure that agencies’ environmental statements are scientifically accurate, and that agencies are reviewing the impacts of their projects over the long-term; adequately informing the public and decisionmakers; giving necessary detail to the formulation and consideration of alternatives and mitigation measures; and conducting a proper significance determination, all of which are required by NEPA.

Most recently, CEQ reiterated the importance of both indirect and cumulative impacts analyses in determining the contribution of federal agency actions to climate change. In its Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, CEQ “recommend[ed] that agencies quantify a proposed agency action’s projected direct and indirect GHG emissions.”⁶⁸ CEQ provided examples on the types of indirect effects that must be considered.⁶⁹ It explained the need for agencies to analyze both indirect and cumulative GHG emissions and their impacts on climate change, recommending that an agency discuss “methods to appropriately analyze reasonably foreseeable direct, *indirect, and cumulative*

⁶⁴ CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* (1997).

⁶⁵ *Id.* at 1.

⁶⁶ *Id.* at 9 tbl. 1-3, 24-25.

⁶⁷ *Id.* at 3.

⁶⁸ Council on Env'tl. Quality, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews* 11 (2016).

⁶⁹ *Id.* at 16 n.42 (“For example, where the proposed action involves fossil fuel extraction, direct emissions typically include GHGs emitted during the process of exploring for or extracting the fossil fuel. The indirect effects of such an action that are reasonably foreseeable at the time would vary with the circumstances of the proposed action. For actions such as a Federal lease sale of coal for energy production, the impacts associated with the end-use of the fossil fuel being extracted would be the reasonably foreseeable combustion of that coal.”).

GHG emissions and climate effects.”⁷⁰ As CEQ has acknowledged, “NEPA requires an agency to consider the cumulative impacts of its proposed action and reasonable alternatives” “[b]ased on the agency identification and analysis of the direct and indirect effects of its proposed action.”⁷¹

Although CEQ has, for four decades, repeatedly described indirect and cumulative effects as examples of the types of effect that agencies must consider under NEPA, DOT’s Proposed Rule would take the opposite position. DOT offers no evidence or persuasive justification for this change in position. Reasoned, non-arbitrary decision making requires more..

B. The Proposed Rule’s redefinition of “major federal action” is contrary to longstanding judicial precedent and a commonsense interpretation of NEPA

The Proposed Rule makes clear that, if the Rule goes into effect, DOT would apply the definitions set forth in the CEQ regulations, including the CEQ regulation’s redefinition of “major federal action.” See 85 Fed. Reg. at 74,644. Until recently, the definition of the statutory term “major Federal action” has unequivocally included “actions with effects that may be major and which are potentially subject to Federal control and responsibility.”⁷² Under this understanding, “[m]ajor reinforces but does not have a meaning independent of significantly.”⁷³ This interpretation of NEPA has been endorsed and applied by countless federal courts, including the Supreme Court.⁷⁴

DOT does not address this change in definition at all, instead merely incorporating the definitions contained in CEQ’s regulations by reference. Importantly, DOT does not offer its own, independent rationale for this change, nor does it reference the justification that CEQ offered for its own redefinition of Major Federal Action. This leaves the public without a complete understanding – or really any understanding – of DOT’s justification for its proposed redefinition. The absence of reasoning exemplifies the very essence of arbitrary decisionmaking.

⁷⁰ *Id.* at 5 (emphasis added).

⁷¹ *Id.* at 17.

⁷² 40 C.F.R. § 1508.18.

⁷³ *Id.*

⁷⁴ See, e.g., *Andrus v. Sierra Club*, 442 U.S. 347, 364 n.23 (1979); *Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173, 1175 (9th Cir. 2016); *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 37 (D.C. Cir. 2015); *Sierra Club v. U.S. Army Corps of Eng’rs*, 295 F.3d 1209, 1214–15 & n.10 (11th Cir. 2002); *National Audubon Soc’y v. Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997); *Bunch v. Hodel*, 793 F.2d 129, 135 (6th Cir. 1986); see also *Government of Province of Manitoba v. Zinke*, 849 F.3d 1111, 1115 (D.C. Cir. 2017) (treating the question of whether a federal action is “major” as being determined by whether the action has a significant environmental impact); *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 698 (2d Cir. 1972) (accepting and applying DOT rule that clarified that any federal action significantly affecting the environment is major).

Regardless of whether DOT has offered a rationale for the change, CEQ's reasoning based on reinterpreting the statute is not sufficient. CEQ claims that its existing interpretation is in tension with a well-known canon of statutory construction that courts should, where possible, give effect to every clause and word of a statute.⁷⁵ We can presume that the countless courts that have interpreted "major federal action" consistently with CEQ's prior interpretation were familiar with the canon. That these courts found CEQ's original interpretation persuasive and consistent with NEPA shows that CEQ's proposal to reverse course is not compelled by any principle of statutory construction.

Indeed, a canon of construction that CEQ ignores holds that "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute."⁷⁶ The agencies' longstanding interpretation – under which "major" describes the kind of impact a federal action must have for NEPA to apply – gives life to NEPA's "overall statutory scheme."⁷⁷ This is, after all, a statute that directs federal agencies to "use all practicable means" to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."⁷⁸ Consistent with that goal, CEQ's longstanding interpretation recognized that if a federal action causes significant harm to the environment, it is "major" for purposes of NEPA.

By contrast, DOT's proposed new interpretation would allow significant harm to the environment without ever analyzing those harms, just because their actions were not deemed "major" by some other metric. This approach, taken literally, could have extraordinary and troubling consequences: If "major" were interpreted as creating a monetary threshold, for example, DOT's proposed approach could exempt from review federal actions with minor monetary costs but potentially devastating environmental or health impacts – say, risk of release of a toxic chemical or introduction of an invasive species. That approach would rip an unjustified loophole in NEPA's protective mandate.

In any event, interpretive canons like that which CEQ invoked, and on which DOT presumably relies, "are not mandatory rules," but "guides . . . to help judges determine the Legislature's intent as embodied in particular statutory language."⁷⁹ Congressional drafters often may not know or, if they know, may not adhere to such

⁷⁵ 85 Fed. Reg. at 1708-09.

⁷⁶ *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006).

⁷⁷ *King v. Burwell*, 135 S. Ct. 2480, 2492 (internal quotation marks omitted).

⁷⁸ NEPA § 101(b), *codified at* 42 U.S.C. § 4331(b).

⁷⁹ *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *see also King*, 135 S. Ct. at 2492 (observing that "our preference for avoiding surplusage constructions is not absolute," and that "rigorous application of the canon does not seem a particularly useful guide to a fair construction of the [statute at issue in that case]" (internal quotation marks omitted)).

canons.⁸⁰ And as the Supreme Court has recognized, Congress may sometimes repeat something for clarity.⁸¹ The proposed new interpretation of “major federal action” is not necessary to give NEPA’s text meaning, and is less consistent with NEPA’s purposes than the agency’s existing interpretation. DOT should therefore not redefine “major federal action” as it has proposed.

The Proposed Rule would further redefine “major federal action” to exclude loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of the action. This proposed redefinition is inconsistent with the relevant caselaw – and therefore contrary to law – in at least three ways. First, the relevant inquiry in determining whether an action is “federal” for the purposes of NEPA does not turn on whether the agency exercises “sufficient control and responsibility over the effects of the action.” Rather, the question is whether the agency has the ability to *influence* the outcome of the project.⁸² Second, the agency need not actually *exercise* “sufficient control” to render a private or state action “federal” for purposes of NEPA. Instead, the agency need merely “*have the authority*” to exercise such control.⁸³ Third, an action may be considered “federal” simply because of the provision of federal funds – whether in the form of loans, loan guarantees, or any other form of financial assistance. This is particularly the case when any such funding occurs after the preliminary planning stages of an action,⁸⁴ or when the federal agency provides a significant level of funding.⁸⁵

C. The Proposed Rule’s presumptive time and page limits are arbitrary, capricious, and counterproductive

The Proposed Rule imposes arbitrary page length limits and review deadlines that weaken the process and contribute to a superficial NEPA analysis. The Proposed Rule would limit the EA length to 75 pages and require an agency to complete the EA within one year from its decision to prepare one. 85 Fed. Reg. at 74,648. The rule also imposes page and time-limits on the preparation of an EIS. *Id.* at 74,649. While procedural efficiency is an important factor to consider in NEPA, emphasis should always be placed on information gathering to foster reasoned decisionmaking. “NEPA’s purpose is not to generate paperwork . . . but to provide for informed decisionmaking and foster excellent action.” 40 C.F.R. § 1500.1 Prioritizing page limits and review

⁸⁰ See, e.g., Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons (pt. 1), 65 *Stan. L. Rev.* 901, 934-36 (2013).

⁸¹ See, e.g., *County of Washington v. Gunther*, 452 U.S. 161, 169-70 (1981).

⁸² See *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995).

⁸³ *Sw. Williamson Cty. Cmty. Ass’n, Inc. v. Slater*, 243 F.3d 270, 281 (6th Cir. 2001).

⁸⁴ See *Scottsdale Mall v. State of Ind.*, 549 F.2d 484, 489 (7th Cir. 1977); *Ross v. Fed. Highway Admin.*, 162 F.3d 1046, 1052 (10th Cir. 1998).

⁸⁵ See *Sierra Club v. Fish & Wildlife Serv.*, 235 F. Supp. 2d 1109, 1121 (D. Or. 2002) (holding a private project “federal” because it received more than \$3 million in federal funding “regardless of the percentage [of the total project cost] it represents”).

windows does not “foster excellent action” nor “does it provide for informed decisionmaking” when it takes precedent over qualitative analysis. NEPA was “designed to ensure well-informed and well-considered decisions.” *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558, (1978). Accelerating the review process and abbreviating the EA to the detriment of a deliberative review process erodes NEPA’s intended purpose which is to facilitate “informed decision making.” *Id.*

DOT does not offer any reasoned basis for this change, beyond referencing the CEQ regulations’ purported justification to achieve “effective, and timely NEPA reviews” with “reduced paperwork and delays.” 85 Fed. Reg. at 1684. DOT is thus encouraging faster, abbreviated environmental reviews. Neither DOT nor CEQ have offered any evidence to show that this approach would serve CEQ’s professed goals or Congress’s mandate, and as explained below, it would not.

As a threshold matter, the stated objective of “effective, and timely reviews” is too vague to provide a metric against which to measure DOT’s proposal to impose artificial, default page and time limits. DOT certainly does not provide evidence that such shorter, faster reviews will be effective at achieving Congress’s goals in enacting NEPA. Nor does it provide any evidence that these limits would achieve CEQ’s and DOT’s apparent goal of hastening project approvals that are either not litigated or survive judicial review. Put another way, neither DOT or CEQ provide any justification for their implicit premise that a legally compliant environmental review can, with any frequency, be prepared within the proposed presumptive page and time limits. Concision takes time; accuracy under time pressure takes resources. Particularly at a time when the Administration is proposing to slash the environmental compliance budgets of multiple federal agencies, it is entirely arbitrary to assume that federal agencies will be able to complete better (less legally vulnerable) environmental reviews, in less time, with fewer pages.

As for CEQ’s professed goal of improving efficiency, which DOT does not itself articulate, an inadequate environmental review is the height of inefficiency. A short-and-sloppy EIS or EA would not adequately inform decisionmakers or the public – and therefore wouldn’t satisfy Congress’s decision to require agencies to take “a ‘hard look’ at the environmental effects of their planned action.” *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989). To the contrary, rushed, abbreviated environmental reviews are likely to be challenged in court and, when challenged, overturned. An environmental review that is so rushed that it is overturned will lead to projects being enjoined, not to “effective, timely” project approvals.

In any event, DOT provides no evidence that presumptive and arbitrary page-and time- limits are needed. DOT and CEQ cannot conclude that existing environmental reviews are too lengthy, or too time consuming, merely by pointing to the length of present environmental reviews, or the amount of time those reviews take. Put another way, the agencies present no evidence that reviews are longer than they need to be to get Congress’s job done, or that they could be sped up without either a

loss of quality or a concomitant influx of new resources that this Administration has never proposed. To prove that existing environmental reviews are too long or slow, DOT would have to demonstrate that the quality of existing reviews could be maintained if prepared under tighter time and page limits. Commonsense and experience indicate otherwise, as do the numerous judicial decisions that have overturned federal agency decisions because those decisions were supported by environmental reviews that did not cover enough.

Thinking carefully before acting is not inefficiency. Under NEPA, it is the law of the land. DOT should not establish presumptive page or time constraints that undermine Congress's mandate by rushing through inadequate environmental reviews.

The proposed exception to the page and timeline limits – under which a senior official may waive these limits – would not cure the problems discussed above. Senior officials' time is scarce and DOT provides no standard for when a senior official should grant a waiver. A senior official may not have the time to fully understand why a waiver should be granted – and indeed, probably has the least information about the reasons justifying any particular waiver – increasing the risk that waivers will be denied arbitrarily or incorrectly. Staff may not know that an extension is necessary until late in the process. Elevating the waiver decision to a senior official takes time – both staff time and senior official time – likely making staff reluctant to elevate such requests; that, indeed, would seem to be DOT's point in proposing to require a senior official approval of a waiver. . Perhaps that might make sense if there were evidence that the proposed time and page limits were appropriate in the vast majority, or even “most,” circumstances, but there is none. And CEQ refers vaguely to its own “experience,” but CEQ itself rarely prepares EAs and EISs, and it does not articulate what specific “experience” it is referring to here.

Arbitrary time and page limits will discourage agencies from thoroughly considering significant effects of complex projects. Such limits will lead to less informed decisionmaking. That, in turn, will lead to more EAs and EISs being invalidated in court. As a threshold matter, it's not clear why DOT seeks to reduce litigation by proposing roadblocks to litigating, rather than investing in better agency compliance with NEPA's mandate. Indeed, DOT offers no evidence that there is presently too much litigation. To the extent CEQ and DOT assert that litigation is delaying projects, such delays occur only when a court enjoins a project--and courts will enjoin projects only if the agency violated the law (or under the stringent standards for a preliminary injunction, if the court finds, among other things, that the agency likely violated the law and that the public interest favors an injunction). DOT offers no justification sufficient to obstruct litigation that enforces the law and vindicates the public interest.

In any event, despite high profile NEPA lawsuits, NEPA litigation is, on the whole, rare. Indeed, according to CEQ's own data, the federal government prepares approximately 51,300 NEPA documents and 51,000 NEPA decisions annually – but, on average, just 115 NEPA lawsuits are filed. And, the Federal Highway Administration

and Department of Energy (agencies responsible for infrastructure projects that the Administration seems intent on expediting) are sued even less often than peer agencies.

VI. The Proposed Rule's delegation of EIS preparation to an applicant is improper

The Proposed Rule suggests “that the applicant will carry out some of the responsibilities of the O[perating] A[gency] on its behalf, and therefore could conduct activities under the Department's NEPA procedures on behalf of that O[perating] A[gency].” 85 Fed. Reg. 74,644. Allowing applicants, who are by definition “seeking an approval, financial assistance, special permit, waiver, certification, or other action from” an Operating Agency to also carry out the responsibilities of the Operating Agency related to its own application is wholly improper. *See id.* at 74,654.

The Proposed Rules recognize that “[d]ecisionmaking under NEPA is an inherently governmental function.” *Id.* at 74,657. Despite this acknowledgement, the Proposed Rule Section 13.13(i) states that Operating Agencies “may use contractors to assist in the preparation of NEPA documents” where contractors comply with the regulations and Operating Agency procedures and follow relevant guidance. *Id.* The language of the Proposed Rule Section 13.13(i) reads as if the contractors at issue are hired by the Operating Agency, not the applicant, while the portion of the Proposed Rule explaining the change suggests that it is the applicant hiring – and paying – the contractors. Allowing applicants to hire and pay for contractors to produce work that the Operating Agency then uses in the applicant's NEPA process violates ethical standards and compromises the Operating Agency's independence in completing the NEPA process. The Proposed Rule should clarify that where contractors are used to complete the NEPA process, they must be selected by, supervised, and paid for by the Operating Agency, and undergo independent and rigorous agency review.

Additionally, any DOT regulation would need to contain stringent requirements to ensure that contractors involved in a NEPA process do not pose conflicts of interest. Allowing anyone – including a self-interested, profit-motivated, private-industry applicant – to prepare an EIS would undercut the public's trust in NEPA and the integrity and reliability of the environmental review process. DOT must ensure the integrity of NEPA by applying stringent conflict-of-interest requirements.

Federal agencies' own studies demonstrate that conflict-of-interest protections are necessary. Yet DOT intends to sidestep these protections with scant explanation. And all CEQ offers to support this major change is the conclusory statement that it is “intended to improve communication between proponents of a proposal for agency action and the officials tasked with evaluating the effects of the action and reasonable alternatives, to improve the quality of NEPA documents and efficiency of the NEPA process.” This unsupported statement alone is insufficient.

Available evidence shows that delegation of authority impairs the quality of NEPA documents and, at least if sufficient oversight is conducted, the efficiency of the NEPA process. For example, there have been multiple instances in which the process has been delayed by an applicant that “does not initially provide the quantity or quality

of information necessary for resource agencies' field office staff to complete permits and consultations. These staff must then request additional information from the lead federal agency or project sponsor, extending the permit or consultation reviews."⁸⁶ The Nuclear Regulatory Commission (NRC) provides a useful example. NRC currently has applicants prepare the environmental report.⁸⁷ Private applicants fail to include everything that is needed, requiring significant effort from the agency to badger them to include it, thereby opening the door to more litigation when the public sees the document and finds more holes in the review.⁸⁸

VII. The Proposed Rule permits agencies preparing an Environmental Assessment to only examine a preferred alternative and a non-action alternative, which undermines the hard look review required under NEPA

Under NEPA, an EA's purpose is to aid the agency in developing sufficient information about potential project impacts and alternatives before selecting a preferred alternative. The EA is a major artery to the heart of NEPA: the EIS. The EA has two functions. The EA evaluates potential environmental impacts of a proposal to determine whether an EIS should be prepared by the agency. Independent of this purpose, NEPA also requires an EA to consider alternatives. *Pub. Employees for Env'tl. Responsibility v. United States Fish & Wildlife Serv.*, 177 F. Supp. 3d 146, 157 (D.D.C. 2016) ("NEPA's requirement to consider alternatives is an independent requirement of an EA, separate from its function to provide evidence that there is no significant impact"). The EA "should set out relevant information to help the decisionmaker choose a policy option (and to help others evaluate that choice), and not simply to provide a justification as to why a choice is permissible (i.e. why there is no significant impact)." *Sierra Club v. Watkins*, 808 F. Supp. 852, 870 (D.D.C. 1991). Together, these procedural obligations ensure that the EA provides sufficient information to assist the decisionmaker during the NEPA process.

A. DOT's modification to the EA's alternatives analysis severely limits the range of alternatives to consider.

Under DOT's Proposed Rule, the agency plans to modify its alternative's analysis in the EA by restricting the analysis to two alternatives. The two alternatives to be considered under the Proposed Rule are the agency's "preferred alternative" and the "no action" alternative. 85 Fed. Reg. at 74,648. This does not facilitate a reasoned analysis.

NEPA sets out clear requirements to ensure the agency performs a thorough alternatives analysis when preparing an EA. An EA should "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal

⁸⁶ Gov't Accountability Office, *Highway and Transit Projects, Better Data Needed to Assess Changes in the Duration of Environmental Reviews*, GAO-18-536 (July 2018).

⁸⁷ Anthony Roisman, Erin Honaker & Ethan Spaner, *Regulating Nuclear Power in The New Millennium (The Role Of The Public)*, 26 Pace Env'tl. L. Rev. 317, at 340 (2009).

⁸⁸ *Id.* at 323.

which involves unresolved conflicts concerning alternative uses of available resources.” 40 C.F.R. § 1501.5; 42 U.S.C. § 4332(E). In both the EA and the EIS, NEPA requires “the agency to give full and meaningful consideration to all reasonable alternatives.” *Friends of Animals v. Sparks*, 200 F. Supp. 3d 1114, 1118 (D. Mont. 2016). Reasonable alternatives include an alternative that it is “objectively feasible” and is “reasonable in light of [the agency's] objectives.” *Myersville Citizens for a Rural Cmty., Inc. v. F.E.R.C.*, 783 F.3d 1301, 1323 (D.C. Cir. 2015) (quoting *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72 (alterations in original)) (quoting *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir.1999)).

DOT’s Proposed Rule on the alternatives to be considered in the EA constricts the agency’s ability to consider information necessary to select the appropriate alternative. DOT’s Proposed Rule shrinks the alternatives to review down to two: the one the agency prefers and the “no action” alternative. 85 Fed. Reg. at 74,648. For those alternatives the agency eliminated from the EA prior to assessing their environmental impacts, the agency only needs to “provide a brief justification.” *Id.* This does not reflect a “full and meaningful consideration of alternatives.” *Friends of Animals v. Sparks*, 200 F. Supp. 3d 1114, 1118 (D. Mont. 2016). Instead, the EA presents a false choice to the public in which the only alternatives to consider are the agency’s preferred alternative or the no action alternative.

Under NEPA, an agency has a duty to consider all reasonable alternatives. *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 F. App'x 440, 443 (9th Cir. 2007) (noting that “in every case, the agency's duty under NEPA remains to consider ‘all reasonable alternatives’”) (quoting *Native Ecosystems Council v. USFS*, 428 F.3d 1233, 1238 (9th Cir. 2005)). This means reviewing alternatives that are feasible and meet the purpose and need for the project regardless of how many there are. Narrowing the range of alternatives to simply two for every single project forces an agency to eliminate every other reasonable alternative from consideration in the EA regardless of the complexity of the project, public opposition, or a host of other influential factors. Alternatives that the agency does not prefer will not be reviewed in the EA to determine their potential environmental impacts despite the agency’s requirement to “discuss . . . the environmental impacts of the proposed action and alternatives.” 40 C.F.R. § 1501.5(c)(2). As a result, the agency will fail to “study, develop, and describe” sufficient alternatives to allow for an informed decisionmaking process to determine which project minimizes environmental impacts. 42 U.S.C. § 4332(E). A comparative assessment of the environmental impacts of each reasonable alternative is necessary to fully determine the appropriate course of action to take. A one-size-fits-all model for the range of alternatives will not result in informed decisionmaking.

The EA’s alternatives analysis permits the agency to withhold information from the public and engage in a superficial review of rejected alternatives. Under the Proposed Rule, for rejected alternatives, the agency only needs to provide a “brief description” to justify why the alternative was rejected. 85 Fed. Reg. at 74,648. This “cursory dismissal of a proposed alternative unsupported by agency analysis, does not

help an agency satisfy its NEPA duty to consider a reasonable range of alternatives.” *Envotl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 F. App'x 440, 443 (9th Cir. 2007). An agency is required to “study, develop, and describe” reasonable alternatives. 42 U.S.C. § 4332(E). This is what allows for a deliberative process during the environmental review. Authorizing the agency to provide hasty statements for rejecting an alternative without requiring the agency to provide any evidence to support its position does not facilitate meaningful public involvement nor does it foster a deliberative review process, two crucial principles essential to NEPA.

B. The Proposed Rule limits the environmental impacts considered in an EA for the preferred alternative

The Proposed Rule limits the scope of environmental impacts to be considered for the preferred alternative based on non-environmental factors. An EA is prepared when “the significance of the [environmental] effect is unknown” to assist with agency planning and decisionmaking. 40 C.F.R. §1501.5. An EA shall “discuss the environmental impacts of the proposed action.” *Id.* But DOT’s new rule would limit the scope of impacts to “a degree commensurate with the nature of the proposed action and the OA’s experience with the potential environmental impacts of similar projects.” 85 Fed. Reg. at 74,648. These new conditions are vague qualifications that move the focus away from what is central: the potential environmental impacts the project may produce. The EA is meant to assess unknown effects. Thus the “nature” or the “OA’s experience” provide little insight into what impacts are important to consider in a particular instance and set of circumstances. Limiting the impacts to be reviewed based on the “nature” of the project or the “OA’s experience” increases the likelihood that unknown impacts will be overlooked. DOT fails to provide any justification for why reducing the range of environmental impacts to review for the preferred alternative advances informed decisionmaking.

VIII. The Proposed Rule’s categorical exclusions are unlawful

A. The Proposed Rule permits the use of categorical exclusions for actions that may have significant impacts

1. The extraordinary circumstances provision applies to projects eligible for a categorical exclusion

DOT’s modification to the extraordinary circumstances provision will weaken NEPA’s regulatory force for railroad, highway, and transit projects governed under 23 C.F.R. § 771.101 (Federal Railroad Administration, Federal Highway Administration, and Federal Transit Administration). The White House Council on Environmental Quality’s NEPA framework allows an agency to exempt specific categories of actions from the preparation of an environmental assessment or environmental impact statement when “the agency has determined” that the action “normally do[es] not have a significant effect on the human environment.” 40 C.F.R. § 1508.1(d); *see also id.* § 1501.4. Under this provision, an agency must also provide for an “extraordinary circumstances” limitation on the use of a categorical exclusion (CE) without

environmental review. This is a precautionary measure used to prevent actions that qualify for a CE, but have potential significant impacts from escaping environmental review. This clause lists additional environmental impacts to be assessed before the agency may move forward with a categorical exclusion. 40 C.F.R. §1501.4. Where extraordinary circumstances exist (or what is referred to as an “unusual circumstance” in the surface transportation context, *see* 23 C.F.R. Part 771), the agency must conduct further environmental review beyond what is normally required for a categorical exclusion. Under the regulatory scheme, an action must be eligible for a categorical exclusion for the extraordinary circumstances analysis to become relevant.

2. The Federal Highway, Railroad, and Transit Administrations preclude the use of a categorical exclusion for actions that impact traffic and noise volumes

Because the Federal Highway, Railroad, and Transit Administrations oversee projects that impact surface transportation infrastructure, these agencies typically encounter similar environmental impacts in the course of their work. As a result, they use the same NEPA implementing regulations to carry out projects. 23 C.F.R. Part 771 (prescribing NEPA procedures and policies for the “processing of highway, public transportation, and railroad actions”). Under their NEPA framework, all three agencies prohibit the use of a categorical exclusion for actions that will “induce significant impacts to planned growth or land use for the area,” “have a significant impact on any natural, cultural, recreational, historic or other resource,” “involve significant air, noise, or water quality impacts,” “have significant impacts on travel patterns; or . . . either individually or cumulatively, have any significant environmental impacts.” 23 C.F.R. §§ 771.116-118. The operating logic behind this consensus shows that the agencies share a common understanding that the type of activities they perform do induce significant impacts on the natural and human environment e.g. planned growth, air, noise, and water impacts, and traffic patterns, that warrant the hard look that NEPA requires. Therefore, the regulations prohibit the use of a categorical exclusion for actions with these types of impacts.

3. The Proposed Rule incorporates significant impacts into the extraordinary circumstances despite their ineligibility for a categorical exclusion

DOT fails to address how its modification to its extraordinary circumstances clause is likely to nullify the preclusive effect of the categorical exclusion standard for these three agencies. Under NEPA, the extraordinary circumstances analysis presupposes that an action is eligible for a categorical exclusion e.g. does not have significant impacts on the environment. But DOT’s modification of this provision allows actions with significant impacts to be processed under the categorical exclusion review procedures. DOT plans to expand the impacts that fall under extraordinary circumstances to include just about everything under the sun: “substantial increases of noise in a noise-sensitive area; substantial adverse effects on a species listed or proposed to be listed on the List of Endangered or Threatened Species, or designated

Critical Habitat for these species; a site that involves a unique characteristic of the geographic area, such as prime or unique agricultural land, a coastal zone, a historic or cultural resource, park land, wetland, wild and scenic river, designated wilderness or wilderness study area, sole source aquifer (potential sources of drinking water), or an ecologically critical area; as well as inconsistency with any applicable Federal, State, or local air quality standards, including those under the Clean Air Act, as amended; substantial short-or long-term increases in traffic congestion or traffic volumes on any mode of transportation; or substantial impacts on the environment resulting from the reasonably foreseeable, reportable release of hazardous or toxic substances.” 85 Fed. Reg 74,640, 74,647 (Nov. 23, 2020). These impacts are nearly identical to impacts that preclude the use of a categorical exclusion under the three agencies’ categorical exclusion definitions.

DOT’s Proposed Rule allows a categorical exclusion to be used for activities that increase traffic volumes without demonstrating that there are no significant impacts to the environment. The current regulations prohibit use of a categorical exclusion for projects that “induce impacts to planned growth or travel patterns.” 23 C.F.R. § 771.116-8. Courts have interpreted this to include projects that increase traffic volumes. *See West v. Dep’t of Transp.* 206 F. 3d 920, 929 (9th Cir. 2000) (noting that design built to accommodate future growth in traffic volumes impacts traffic patterns). The proposed regulations include increased traffic volumes as an unusual circumstance for which an agency may still use a CE. 85 Fed. Reg. at 74,647. The proposed regulation therefore represents a major shift in policy that would allow projects that increase traffic to use a categorical exclusion without any evidence in the record that those types of projects do not have significant impacts.

The Proposed Rule allows a categorical exclusion to be used for activities that increase noise volumes without demonstrating that there are no significant impacts to the environment. The current regulations prohibit use of a categorical exclusion for projects that “involve significant . . . noise . . . quality impacts.” 23 C.F.R. § 771.116-.118. The current regulation defines noise impacts as “noise levels that create a substantial noise increase over existing noise levels.” *Id.* § 772.5. The proposed regulations include increased noise volumes as an unusual circumstance for which an agency may still use a CE. 85 Fed. Reg at 74,647. The proposed regulation therefore represents a major shift in policy that would allow projects that increased noise volumes to use a categorical exclusion without any evidence in the record that those types of projects do not have significant impacts.

4. The extraordinary circumstances provision will allow DOT to undermine current categorical exclusion procedures and allow projects with significant impacts to escape NEPA review

In the thirty-three years since their original enactment in 1987, the three agencies have declined to remove these impacts or their preclusive effect. *See* 23 C.F.R. § 381. DOT’s Proposed Rule upends this regulatory scheme by dislodging this restrictive

language from the initial categorical exclusion determination. While not requiring them to adopt these circumstances, DOT's new rule directs the agencies to "consider whether any of the extraordinary circumstances . . . are appropriate to add" when updating their respective procedures. 85 Fed. Reg at 74,647. Were the agencies to incorporate these extraordinary circumstances into their existing regulations, there is a serious risk that burying these impacts under the extraordinary circumstances language will negate the existing preclusive effect that these impacts currently impose on the use of a categorical exclusion. Rather than acting as a buffer to prevent projects with significant impacts from not being evaluated under NEPA, as the extraordinary circumstances provision was intended, the modification will open the flood gates, dramatically expanding the types of projects that receive little if any environmental review.

B. The Proposed Rule should not allow agencies to borrow categorical exclusions from other agencies

1. DOT's Proposal to permit its agencies to borrow categorical exclusions from other agencies is incompatible with the definition of a categorical exclusion

DOT's proposed change to its categorical exclusion procedures does not comport with the definition of a categorical exclusion. A categorical exclusion is defined as "a category of actions that the agency has determined, in its agency NEPA procedures . . . normally do not have a significant effect on the human environment." 40 C.F.R. § 1508.1. The Proposed Rule will allow outside agencies to borrow a categorical exclusion from another agency within the Department despite the borrowing agency's lack of determination in its own procedures that the impacts are not significant. 85 Fed. Reg. at 74,647-48. Agency experience is what informs the set of categorical exclusions for each agency. Using categorical exclusions outside of the context in which they were originally intended does not align with the underlying rationale for the use of a categorical exclusion.

This change represents a sweeping expansion of what should be a narrow exception tailored to a specific federal agency and its mission-specific undertakings. DOT's change to the CE borrowing procedures will dramatically expand the universe of CEs available for its agencies. DOT oversees eight separate departments; each of which manage different modes of transport: the Federal Railroad Administration, the Federal Highway Administration, the National Highway Traffic Safety Administration, the Federal Aviation Administration, the Federal Transit Administration, the Pipeline and Hazardous Materials Safety Administration, the Maritime Administration, and the Saint Lawrence Seaway Development Corporation. 49 U.S.C. §102. These agencies govern different modes of transport: marine vessels, automobiles, trains, and airplanes; and different mediums of travel: air, land, or sea. While they do all govern transportation in some fashion, their duties are not analogous. DOT's Proposed Rule ignores material differences between its agencies' operations that inform how each individual agency determines which of its activities qualify for a categorical exclusion. Expanding the CE

universe department-wide will result in less thorough review of project impacts across the board.

Presently, DOT permits the Federal Railroad Administration, the Federal Highway Administration, and the Federal Transit Administration to borrow categorical exclusions. This change was approved because the agencies already used the same environmental review procedures and DOT found that “their actions are, in many cases, very similar.” 83 FR 54480, 54482 (Nov. 28, 2018). This rationale does not withstand scrutiny when applied department-wide. Unlike these three agencies, the five other departments do not share environmental review procedures nor can it be said that the activities conducted by the individual agencies are “similar” as the agencies oversee different transportation modes and transit mediums. Compare 23 C.F.R. Part 771 (covering FRA, FHWA, and FTA NEPA regulations) with FAA Order 1050.1F; FMCSA Order 5610.1; Maritime Admin. Order 600-1; NHTSA 40 C.F.R. Part 520; PHMSA DOT Order 5610.1(c); SLSDC Order 10-5610.1C. As DOT recognizes, expanding the use of CEs to agencies that do not share common features would result in “functionally expanding the type of projects for which the CE was originally established.” 83 Fed. Reg. 54480, 54482 (Nov. 28, 2018). This would directly contravene the definition of a CE because it would materially change the category to include functionally different activities than what the agency originally contemplated before determining whether the activity has significant impacts. DOT fails to explain how its changes align with its past rationale for permitting the borrowing of categorical exclusions.

2. DOT should rely on its existing rulemaking procedures to adopt new categorical exclusions, not the proposed informal borrowing practice

NEPA already has procedures in place for the agencies to promulgate new categorical exclusions to add to an agency’s respective NEPA implementing regulations. Borrowing CEs would enable agencies to skirt the rulemaking procedures and avoid public accountability. This is not the purpose of a categorical exclusion and should not be adopted into DOT’s Final Rule.

The public comment process on this rulemaking has shown disrespect for public engagement

IX. The public comment period for the Proposed Regulations violates DOT regulations and is woefully inadequate

A. The 30-day public comment period violates DOT’s own regulations

DOT’s regulations on “general rulemaking procedures” direct that “the comment period for significant DOT rules should be at least 45 days.” 49 C.F.R. § 5.13 (i)(3). The Proposed Rule acknowledges that that “Office of Information and Regulatory Affairs determined that this rule is a significant regulatory action under E.O. 12866... because it

is related to the agency's implementation of the CEQ regulations implementing the procedural requirements of NEPA." 85 Fed. Reg. 74,651.

Because the Proposed Rule is a significant DOT rule, DOT should have provided a 45-day comment period for the Proposed Rule. By only providing a 30-day comment period without identifying any "special considerations" that would justify a comment period of less than 45 days for a significant rule, DOT has violated its own regulations. See 49 C.F.R. § 5.13 (i)(3). Truncating the public comment period for a significant rulemaking fails to "provide interested persons a fair and sufficient opportunity to participate in the rulemaking" and violates DOT's own regulations. See 49 C.F.R. § 5.13(i)(1). DOT should recirculate the Proposed Rule for a minimum of 45 days, in order to comply with its own regulations.

B. Additional time and opportunity for comment is needed

Given the scope and potential impact of the regulatory changes that DOT has proposed, and the complexity of incorporating by reference CEQ regulations that are currently subject to numerous legal challenges, the public interest demanded that the agency provide a robust opportunity for public comment and involvement. That has not happened.

There is no need for haste; DOT's existing procedures currently govern NEPA review for the agency. Yet DOT speeds forward, rushing rather than encouraging public engagement, without regard for whether the public and public officials have as much time as they need to thoughtfully participate in the rulemaking process.

Particularly in light of the coronavirus pandemic, the transition to virtual work, and the upcoming holidays, DOT should provide a public comment period that exceeds 30 days. DOT should also provide the opportunity for public hearings, to allow for public input. The inadequate opportunity for the public's voice to be heard here is compounded by DOT's repeated failures to cite any evidence that supports the many implicit or explicit factual premises on which the rulemaking proposal rests.

We are also concerned that DOT may adopt revisions that have not yet been disclosed to the public. Given the subject matter, these issues are likely to involve matters of considerable potential importance to the undersigned organizations. But we cannot meaningfully comment on proposals that DOT has not actually detailed publicly. Should DOT propose to make further changes to its proposal before taking final action, we request that DOT provide a robust opportunity to comment on those further changes.

* * *

To all appearances, this rulemaking is not designed to improve federal decisionmaking, better engage the public, or protect the environment. It is instead a cynical attempt to expedite federal project approvals by bypassing or truncating environmental analyses, limiting the public's role, and restricting the ability of the judiciary to ensure agency

compliance with the law. Those apparent intentions are fundamentally at odds with NEPA's aims. We urge DOT to change course.

Respectfully,



Claire Woods
Senior Attorney
Natural Resources Defense Council
cwoods@nrdc.org



Sharon Buccino
Senior Director, Lands Division, Nature Program
Natural Resources Defense Council
sbuccino@nrdc.org



Jill Witkowski Heaps
Staff Attorney
Earthjustice
jheaps@earthjustice.org



Sophia Jayanty
Earthjustice
212-845-7376
sjayanty@earthjustice.org

Mark Hefflinger
Communications Director
Bold Alliance

Edward B. Zukoski
Senior Attorney
Center for Biological Diversity

Ivette Torres
Policy Coordinator
Center for Community Action and Environmental Justice

Dara Baldwin
Director of National Policy
Center for Disability Rights

Lee Epstein
Lands Program Director and Special Counsel
Chesapeake Bay Foundation

RL Miller
President
Climate Hawks Vote

Donald M. Goldberg
Executive Director
Climate Law & Policy Project

Aaron Mintzes
Senior Policy Counsel
Earthworks

Taylor Thomas
Co-Director
East Yard Communities for Environmental Justice

Michele Roberts
National Co-Coordinator
Environmental Justice Health Alliance for Chemical Policy Reform

Ann Mesnikoff
Federal Legislative Director
Environmental Law & Policy Center

Thomas Wheeler
Executive Director
Environmental Protection Information Center

Tarah Heinzen
Legal Director
Food & Water Watch

Andrea Marpillero-Colomina
Clean Transportation Advocate
GreenLatinos

Kimberly Baker
Executive Director
Klamath Forest Alliance

Matthew Davis
Legislative Director
League of Conservation Voters

Maddie Schumacher
Legislative Specialist
League of Women Voters of the United States

Kevin Reuther
Chief Legal Officer
Minnesota Center for Environmental Advocacy

Elizabeth Merritt
Deputy General Counsel
National Trust for Historic Preservation

Carol R. Foss
Senior Advisor for Science and Policy
NH Audubon

Ana Parras
Executive Co-Director
Texas Environmental Justice Advocacy Services

Mike Petersen
Executive Director
The Lands Council

Union for Reform Judaism

Susan Jane Brown
Wildlands Program Director & Staff Attorney
Western Environmental Law Center