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ACCELERATING THE PROJECT DELIVERY PROCESS: ELIMINATING BUREAUCRATIC RED TAPE AND MAKING EVERY DOLLAR COUNT

(112–6)

HEARING

BEFORE THE

SUBCOMMITTEE ON
HIGHWAYS AND TRANSIT

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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U.S. House of Representatives
Committee on Transportation and Infrastructure

John L. Mica
Chairman

Washington, DC 20515

Nick J. Rahall, II
Ranking Member

February 11, 2011

James W. Coon II, Chief of Staff

James H. Zoia, Democrat Chief of Staff

MEMORANDUM

TO: Members of the Subcommittee on Highways and Transit
FROM: Subcommittee on Highways and Transit Staff
SUBJECT: Hearing on "Accelerating the Project Delivery Process: Eliminating Bureaucratic Red Tape and Making Every Dollar Count"

PURPOSE

The Subcommittee on Highways and Transit will meet on Tuesday, February 15, 2011, at 10:00 a.m., in Room 2167 of the Rayburn House Office Building to receive testimony related to improving the existing laws and regulations governing project delivery in order to accelerate the delivery process for surface transportation projects and save the American taxpayer money. This hearing is part of the Subcommittee's effort to reauthorize Federal surface transportation programs under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). These programs expired on September 30, 2009, but have been extended through March 4, 2011. The Subcommittee will hear from the Administrator of the Federal Highway Administration (FHWA), the Secretary of the Kansas Department of Transportation (KDOT), the Chief Executive Officer of the Orange County Transportation Authority, the Chief Executive Officer of the Transportation Corridor Agencies, and the Policy Director and Founder of the Institute for Transportation and Development Policy.

BACKGROUND

SAFETEA-LU, enacted in August of 2005, reauthorized Federal surface transportation programs through September 30, 2009. On September 30, 2009, SAFETEA-LU expired; however, a series of extensions were enacted in the 111th Congress to continue funding authority under SAFETEA-LU program structures.

As the reauthorization of the Federal surface transportation programs moves forward the Committee will be looking at potential reforms to the project delivery process. The Committee will determine what improvements can be made to existing rules and regulations governing

project delivery in order to expedite the delivery process for all projects and reduce the cost of transportation projects.

Limited financial resources for transportation infrastructure can be more effectively utilized by speeding up the process for project approval. According to the "Highway Planning and Project Development Process" timeline put together by the Federal Highway Administration, the Federal project delivery process can take up to 15 years from planning through construction.[1] An analysis conducted by the National Surface Transportation Policy and Revenue Committee found that a $500 million project that took 14 years to complete would see its cost double due to the impact of delays and inflation.[2]

The Role of NEPA in the Project Delivery Process

As State Departments of Transportation work to deliver Federal-aid transportation projects, they must meet complex legal, technical, and analytical requirements at the Federal and state level during every stage of the project development process. The environmental review and permitting process is a major component of surface transportation project delivery. At the Federal level, the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and its accompanying regulations are a means to consider the effects of a wide range of human and natural environmental issues.

NEPA establishes a national environmental policy and provides a framework for environmental planning and decision-making by Federal agencies. The NEPA process consists of a set of fundamental objectives that include interagency coordination and cooperation and public participation in planning and project development decision-making.

NEPA is only applicable to Federal actions, including projects and programs entirely or partially financed by Federal agencies and that require a Federal permit or other regulatory decision. NEPA does not apply when actions by a state or local government or private entity do not require Federal review.

The Council on Environmental Quality (CEQ) is charged with the implementation of NEPA. In 1978, CEQ issued regulations providing the procedures for implementing NEPA.[3] FHWA and the Federal Transit Administration (FTA) issued regulations to address these NEPA responsibilities established by CEQ.[4] The FHWA guidance complementing the regulations was issued in the form of a Technical Advisory and provides detailed information on the contents and processing of environmental documents.[5]

For transportation projects, NEPA requires FHWA and other transportation agencies to consider potential impacts to the social and natural environment. If a federally funded project

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[1] Federal Highway Administration, November 2008.
[2] "Transportation for Tomorrow," Report of the National Surface Transportation Policy and Revenue Commission, p. 12, December 2007.
[3] 40 CFR §§ 1500-1508.
[4] 23 CFR § 771.
[5] T.6640.8A

significantly impacts the quality of the human environment, the agency must prepare an Environmental Impact Statement (EIS). If the significance of the impact of a proposed project is unclear, the agency must prepare an Environmental Assessment (EA) in order to make that determination. The agency processes as Categorical Exclusions (CE) projects that do not individually or cumulatively have a significant impact, and which USDOT has determined from past experience have no significant impact. In addition to evaluating the potential environmental and social impacts of a proposed transportation project, FHWA must take into account the transportation needs of the public in reaching a decision that is in the best overall public interest.[6] NEPA may be the only formal opportunity for the public, including impacted communities and businesses, to learn about and comment on proposed projects.

Another requirement generally carried out within the context of the NEPA process is compliance with Section 4(f) of the Department of Transportation Act of 1966. Section 4(f) requirements apply to the use of publicly owned parks and recreation areas, wildlife and waterfowl refuges, and publicly or privately owned historic sites of national, state, or local significance. The law prohibits the use of a Section 4(f) resource for a transportation project unless there is no "prudent and feasible" alternative, and requires all possible planning to minimize harm to the resource. When a proposed project would use a Section 4(f) resource, a separate Section 4(f) evaluation must be prepared and included with the appropriate NEPA documentation.

Other requirements carried out within the context of NEPA includes compliance with the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), Section 106 of the National Historic Preservation Act (16 U.S.C. 460 et seq.) and Section 404 of the Clean Water Act (33 U.S.C. 1251 et seq.). This may require diverse agencies, such as the U.S. Fish and Wildlife Service, the Advisory Council on Historic Preservation, the U.S. Army Corps of Engineers, or the Environmental Protection Agency, to participate in the NEPA process, further adding to the complexity of the project delivery process. It is important to note that if the requirements to comply with NEPA were eliminated, project sponsors would still be subject to other Federal environmental requirements.

Federal Streamlining Efforts

The Transportation Equity Act for the 21st Century (TEA-21), enacted in 1998, included provisions aimed at improving the coordination of Federal agency involvement in major highway projects under the project delivery process. The provisions were intended to address concerns about delays in implementing projects, unnecessary duplication of effort, and added costs often associated with the conventional process for reviewing and approving surface transportation projects.

SAFETEA-LU built upon the work in TEA-21 and included numerous environmental provisions, including measures to further streamline reviews and encourage environmental stewardship for transportation projects. Section 6002 of SAFETEA-LU established a new environmental review process for highway, transit, and intermodal projects, repealing the environmental streamlining provisions established under TEA-21.

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[6] 23 USC § 109(h).

This new review process applies to projects that require USDOT approval and involve preparation of an EIS, but is optional for projects involving an EA. These requirements were intended to promote efficient project management by lead agencies and enhanced opportunities for coordination with the public and with other Federal, state, local, and tribal government agencies during the project development process. Under the Section 6002 process, USDOT as lead agency is responsible for defining the project's purpose and need, and after public comments and interagency participation, for developing a range of alternatives to be considered for the project. Section 6002 also established a 180-day statute of limitations for legal challenges to Federal agency approval and authorized expenditure of transportation dollars to fund positions at resource and permitting agencies in order to expedite transportation project reviews.

In addition to section 6002, a number of other SAFETEA-LU provisions were aimed at improving efficiency in highway program and project delivery, including the following:

- Section 6001 requires transportation agencies to consult with resource agencies in statewide and metropolitan planning. Agencies must discuss potential environmental mitigation activities during the transportation planning process.
- Section 6004 allows all states to assume Federal authority for CEs and recreational trails.
- Section 6005 established a pilot program for up to five states to assume all environmental responsibilities of the Secretary under the National Environmental Policy Act and other environmental laws, except for conformity determination under the Clean Air Act and transportation planning requirements.
- Section 6007 exempts most of the Interstate Highway System from consideration as a historic property under existing Section 4(f) legislation.
- Section 6009 simplifies the processing and approval of projects that have only de minimis impacts on lands protected by Section 4(f) of the Department of Transportation Act (i.e., public parks, recreation lands, wildlife and waterfowl refuges, and historic sites).

While NEPA has a role in the transportation decision making process, including providing the opportunity for community engagement in the project, there are real concerns with delays caused by this process. A variety of organizations involved in the project delivery process have proposals that build on efforts made in past surface transportation authorizations to improve the delivery process. These organizations point to issues as diverse as restrictions on early right-of-way procurement, inefficient utility coordination, demanding environmental review and permitting processes, limitations on innovative contracting, and duplicative administrative tasks as contributing to a lengthy project delivery process.

WITNESS LIST

The Honorable Victor M. Mendez
Administrator
Federal Highway Administration
U.S. Department of Transportation

The Honorable Debra L. Miller
Secretary
Kansas Department of Transportation

Mr. Will Kempton
Chief Executive Officer
Orange County Transportation Authority (Orange County, California)
Accompanied by –
Mr. Peter Buffa
Director
Orange County Transportation Authority

Mr. Tom Margro
Chief Executive Officer
Transportation Corridor Agencies (Irvine, California)

Mr. Michael Replogle
Policy Director and Founder
Institute for Transportation and Development Policy (Washington, D.C.)

ACCELERATING THE PROJECT DELIVERY PROCESS: ELIMINATING BUREAUCRATIC RED TAPE AND MAKING EVERY DOLLAR COUNT

Tuesday, February 15, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The Subcommittee met pursuant to notice at 10:02 a.m. in The Rayburn House Office Building, Room 2167, the Hon. John J. Duncan, Jr. [chairman of the subcommittee] presiding.

Mr. DUNCAN. The Subcommittee will come to order. I was just set to announce that Mr. Boswell was going to sit in for Mr. DeFazio, who I heard was on the house floor, but we're glad to have Mr. DeFazio, the former chairman of the Subcommittee here with us. And this is the Subcommittee's first hearing of the 112th Congress, although Chairman Mica and nine others have been going around holding some field hearings and listening sessions, and we'll do quite a bit of that next week.

I want to thank all of our witnesses for being here, and so many of the Subcommittee members already here. Some people know I try to start these meetings right on time. It's a sign and respect for those who do come on time, and I especially want to introduce and welcome the new vice chairman of the Subcommittee, Congressman Hanna from New York. He will be sitting in the chair frequently during some of these hearings as we go through the year.

We are meeting this morning to receive Federal, State and local input for streamlining the surface transportation project delivery process. There has never been a greater need for professional advice and expertise, and we need that expertise from this very distinguished panel here today. We have to get this right and we need a lot of help to do it from people all over the country.

As the reauthorization of the Federal Surface Transportation Programs moves forward, the committee will be looking at potential reforms to the project delivery process. Funding for infrastructure is hard to come by with each passing day, so we must find ways to do more with less. According to the highway planning and project development process timeline put together by the Federal Highway Administration, the project delivery process can take up to 15 years from planning through construction.

We have held many hearings. We have had many hearings where it is estimated that we take about three times as long, and usually at three times the cost, to do almost every kind of infrastructure project that comes out of this committee—three times longer than any other developed Nation. We have got to speed those projects up, not only to save money, but so that we can do more with less.

Limited financial resources for transportation infrastructure can be more effectively utilized by speeding up the process for project approval. SAFETEA–LU made small, focused changes to the existing project delivery process, and we have seen some improvement in delivery times as our witnesses will testify. For example, the State of California participated in the Surface Transportation Pilot Program, which allows FHWA to delegate its responsibilities for NEPA to the State.

Through this delegation pilot program, California has been able to shave approximately 17 months off the approval process for a standard transportation project. While these improvements are a good start, we can do more. We should be doing more, not just in California, but all over the country. With the highway trust fund unable to keep up with infrastructure demands, and with States facing dire financial situations, the time is right to take a hard look at the existing process.

There is no silver bullet for speeding up the delivery of transportation projects, but we simply must do better. I look forward to working with Chairman Mica, ranking member Rahall, and ranking member DeFazio and other members of our committee on approving this process. And I believe the witnesses today will provide us with valuable information on how we can do that.

With that, I yield to my good friend, ranking member Mr. DeFazio.

Mr. DEFAZIO. Thank you, Mr. Chairman. And congratulations upon assuming the chair. And I look forward to continuing to work together with you to rebuild and improve our Nation's infrastructure.

Bottom line, there is no excuse for unnecessary bureaucratic delays, and we have got to look at ways to eliminate those sorts of things. I think the pilot program, which was extended to California and four other States should be extended. The opportunity should be extended to all the States. Obviously, they have to develop a plan, a framework, and show they will adequately and have the capability of complying with the overarching Federal laws. But then the Department of Transportation moves into an oversight mode as opposed to a direct sort of command and control mode over the State's actions.

I want to hear more about section 6002, and whether or not we have fully utilized all of the flexibilities. I mean these are only recent changed. The Bush administration refused to use any of the flexibility in 6002, and the Obama administration has apparently embraced them and made some progress in the last two years, but could more be done? And are there other ways to improve the process?

I note that at one point one of the witnesses says how paperwork sits, because the agencies which must participate in the decision, the other concurring agencies are often understaffed, or transpor-

tation is the low priority with, say, Fish and Wildlife or somebody else. We've got to figure out ways to deal with that.

I think Section 214 that we used for the Corps of Engineers would possibly deal with that where you have a major project that a State wants to move forward, and you have to have the concurrence of these agencies like we have with the Corps of Engineers. The authority could actually help to pay the cost for the Corps of Engineers in the case of 214, or in the case for Fish and Wildlife or other agencies, which are understaffed or have other priorities to move the paper work along.

I just had an example last week in my office where there's a critical rail project in my district, a reopening of a rail line to a port in my district that had been closed by a hedge fund. It needed substantial repair, because it had been neglected by the hedge fund. And in order to finish the repairs we have got some Federal money, but we couldn't get the Federal agencies Fish and Wildlife to sign off on the Federal money because some guy was on vacation from the Roseberg office, and the paperwork had been sent down to sit on his desk.

It just happened that the State director was in my office that day, the same day that the people from the Port, ICTSI—they were in my office. I put the two of them together, and they immediately resolved the problem. It wasn't a question of waiving environmental laws or anything else, but the bureaucracy was going to grind on for four or six weeks. So this guy came back from vacation, went through his inbox, and then decided to check the box and send it back to Portland, and let it get to the top of the pile there. And someone was going to check the box and then send it on; and then it gets to the Department of Transportation and by then it might be too late.

So that kind of stuff's just had to stop, and we have to figure that out. We have proposed some ways to coordinate these activities better, to have a lead agency in, to urge these folks on, and detailing people from agencies. Again, they might have to be paid for by the sponsoring agency, but there are innovative ideas out there and I want to hear them from the panel, and I'm very open to seeing them adopted.

With that, thank you much, Mr. Chairman. I will be going to the floor, but I will be back. Thank you.

Mr. DUNCAN. Thank you very much, Mr. DeFazio.

And I ask unanimous consent that all members be allowed to submit written statements for the record. Hearing no objection, so ordered; and I will now ask vice chairman Hanna if he has any statement that he would like to make at this time.

Mr. HANNA. [No response.]

Mr. DUNCAN. All right. He does not wish to do so. Does any other member wish to make a brief opening statement on our side?

Mr. BOSWELL. I'm coming now.

Thank you, Mr. Chairman, and just briefly, and I look at Mr. Mendez and I have got to say it is a short statement, because we both have seen the situation. First off, I want to say regarding this Fifth Avenue, up there, that I want to refer to in a minute. I have got no quarrel with any of the folks that you've had on the scene.

They have been following their instructions, and they have been cordial.

And they have stayed on it, but we still haven't got it done. So the story is when we rebuilt the freeway through my capital city, of course, there is the access road, and there is all these rules, regulations and safety and so on and distances. You all know that. But it came up that the industry wanted to access that—alights there. It would be only entering it with right-hand turn, traffic coming from the other direction that would come up there to that light and make a left turn, already, anyway.

The light is already there. It would be readjusting the light. There is no expense. It doesn't take a rocket scientist to figure out it would be safe, and there is no cost. And it has just taken months and months and months to get it done, because first-off, it wasn't considered when they did the reconstruction. We understand that, but then it came up that there was this need and this opportunity, and required taking a cyclone fence down and opening up to make right-hand turns onto that situation.

We have had a delay from the industry of putting up buildings. The jobs it would have created would have been extensive. It still will, but it is going to be delayed well over a year as we went through this. I don't say this to criticize, Mr. Mendez, and I want you to really understand this. This is not a criticism. This was pointing out that good people, following their instructions and going through a process, it really bogs down. And, you know, the city, the county, the State, and finally the nationals say well, we can do that.

But, it has taken so long, and it has cost us a lot of jobs. It has cost us a lot of delay; and, to me, I'm not a transportation engineer and some of you are, would have been around a long time and it made sense, and it's made sense all the way through and it's going to happen, but it's been delayed months and months and months and months. So I just make that point, and I look across this panel there with all the experience you bring to this table. I suspect you could tell stories all day long, and I see your heads nodding. So I think this is very timely, Mr. Chairman, and I appreciate it.

And I want every one of us, both sides, to go into this with a very objective let's see, as my son would say, let's get her done. Let's keep safe. Let's don't do things we don't need to do, and protect the taxpayer's investment. We can do that; but, surely, there's a way to do it better, and I think that that's what your goal is, and I am here to help, if I can.

Mr. DUNCAN. Well, thank you very much, Mr. Boswell.

Mr. Miller would like to introduce a couple of the witnesses who are from his area. Mr. Miller?

Mr. MILLER OF CALIFORNIA. Thank you, Mr. Chairman.

With OCTA we have Will Kempton and Peter Buffa here, and they have done a really good job, and I welcome them to Washington. And TCA, we have also got Tom Margro here, and it is good to have all of you here today.

I agree on the environmental comments that were made. In fact, in the SAFETEA–LU in 2005 I introduced an amendment that allowed States that either had an environmental process that equaled what the Federal Government did in NEPA, or they ex-

ceeded it. And Californians really went along with that and it has worked very well.

We are saving about 17 months on the review process right now, which means we are getting projects completed in the review process, and getting them started much sooner than we did in the past. And even though there is a time saving, the integrity of NEPA has never maintained the degradation in any fashion. In fact, we have kept the standards, and they have exceeded what we believe we have before.

The goal we have today is we need to create jobs in this country. We have a huge problem on our highway systems throughout the entire system we deal with on this committee; and, if we can do something to streamline the process, I think we should do that. I would like to welcome our witnesses today, and I yield back the balance of my time.

Mr. DUNCAN. All right. Thank you very much, Mr. Miller.

Is there anyone else who wishes to make an opening statement? Mrs. Napolitano?

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

And I agree with my colleague, Mr. Miller, in welcoming the witnesses, especially the California ones. I have worked with Mr. Kempton many a time when he was in Los Angeles transportation.

We have many, many issues dealing with transportation in California, and California is the only State to participate in the surface transportation project delivery pilot program and authorized in SAFETEA–LU. We want to continue to be able to hear where we can be able to cut, and somehow our Federal agencies need to understand.

California has more stringent standards than the Federal when you are talking about NEPA. And it would help, not only that extra money, that extra time not only can save money, but as was pointed out, it can also provide additional jobs that we so sorely, so desperately need.

I have in my area, the Alameda Quarter East, 54 crossings. Only 20 are going to be separated. Well, the sooner we can get those built, the sooner the rest of the Nation is going to get their on-time delivery from the goods coming out of Los Angeles and Long Beach Ports. So those are critical for us, yet we sometimes time it. And we spent additional time, and because right now the projects are coming in under budget, because everybody needs the jobs, needs to spend that to be able to put people to work.

Somehow, we need to put the two together and be able to see how we can cut the time and be able to provide those local authorities moving forward on the projects. So with that I thank you, Mr. Chair, for holding this, and I totally agree. Yield back.

Mr. DUNCAN. Thank you very much. Does anyone else on the Republican side wish to make an opening statement?

[No response.]

Mr. DUNCAN. And Mrs. Johnson, I think, wants to make one.

Mrs. JOHNSON OF TEXAS. Thank you very much, Mr. Chairman.

I agree that we do need to look at ways to improve the environmental review process for highway projects, and we also need to be careful not to unravel the Federal Highway Administration's and the other agency's oversight responsibilities. Last year I heard from

several mayors in the southern sector of Dallas County about a project known locally as Loop 9. The idea for this project was first raised in 1957.

In 1991 Dallas County voters approved a bond program authorizing over $175 million in bonds for transportation improvements, and that included the funding for Loop 9 feasibility and route alignment study. The Notice of Intent for this study was filed in 2004. Three years later the first draft environmental impact statement was submitted to the Texas Department of Transportation's environmental division; and, finally, last year, the Federal Highway Administration received it for the first time.

More recently, I heard from the city of Bull Springs regarding their concerns with seven outstanding issues that were only recently raised by the Federal Highway Administration. These concerns are regarding a project that began in 2005, and I site these examples to demonstrate that we need to find out why completing and reviewing environmental studies has taken so many years. During this delay, the cost of construction, and the purchase of rights away continue to increase.

Last week, I introduced legislation, H.R. 551, that would provide help in the environmental review process. And my bill would allow States to use their own funds to assist the Federal Highway Administration in completing its review of Environmental Impact statements. Currently, States may only use certain funds that they receive from the Federal Department of Transportation for this purpose. And, I hope as we consider the next highway bill, we will consider my legislation and other proposals that will move the environmental study process along more quickly, while ensuring that the protection of our environment is intact.

Thank you, Mr. Chairman, and I yield back.

Mr. DUNCAN. Thank you very much Ms. Johnson.

We will now proceed with the panel and we are very honored to have a very distinguished panel here with us this morning. I ask unanimous consent that our witnesses' full statements be included in the record. Hearing no objection, so ordered. Since your written testimony will be made a part of the record, we request that you limit your oral testimony to no more than five minutes.

We have one panel of witnesses today, starting off with Administrator Victor Mendez, who is the top official, the Administrator of the Federal Highway Administration; Ms. Debra L. Miller, who is the Secretary for the Kansas Department of Transportation; Mr. Will Kempton, who is the Chief Executive Officer of the Orange County Transportation Authority.

Mr. Kempton is accompanied by Mr. Buffa, who is not providing testimony, but will be available to answer any questions. And Mr. Tom Margro, who is the Chief Executive Officer of the Transportation Corridor Agencies, and Mr. Michael Replogle, who is the policy director and founder of the Institute for Transportation and Development Policy. I want to thank all of you for coming to be with us today, and Administrator Mendez, you may begin your testimony.

TESTIMONY OF VICTOR MENDEZ, ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION; DEBRA L. MILLER, SECRETARY, KANSAS DEPARTMENT OF TRANSPORTATION; WILL KEMPTON, CEO, ORANGE COUNTY TRANSPORTATION AUTHORITY; TOM MARGRO, CEO, TRANSPORTATION CORRIDOR AGENCIES; AND MICHAEL REPLOGLE, POLICY DIRECTOR AND FOUNDER, THE INSTITUTE FOR TRANSPORTATION AND DEVELOPMENT POLICY

Mr. MENDEZ. Thank you and good morning, Chairman Duncan and members of the Subcommittee. I want to thank you for this opportunity to appear before you today.

I am very pleased that my first appearance before this Subcommittee as the Federal Highway Administrator is at a hearing that is focused on a subject that I have made one of my top priorities at FHWA, and that is accelerating project delivery. As you know, the President's budget was released yesterday outlining some of the administration's ideas for investing in infrastructure, and my colleagues and I at DOT look forward to having discussions with you on this topic in the future.

The year 2011 is a very busy and important year for the transportation community. We start the year in a very strong position. Our roads are the safest they have ever been, and we have a track record of success that includes improving our infrastructure and putting our people back to work. But, we also face many challenges—economic challenges, safety challenges, congestion and environmental challenges.

Delivery time in this country currently stands at an average of about 13 years for a major project. We do need to do better. We need to speed up project delivery while maintaining and improving project quality. We need to find ways to make our roads safer and maintain environmental quality.

My Every Day Counts initiative is designed to help us meet these challenges. We have engaged our State and local partners and those in the private sector in this effort from the very beginning, including the State DOTs through AASHTO, the construction community through AGC and ARTBA, the consulting community through ACEC, and the National Association of County Engineers.

We have built Every Day Counts on two pillars. First, we have a tool kit that contains a number of specific strategies to shorten project delivery time. This tool kit includes opportunities to explore and exhaust flexibilities under existing law. For example, on the planning side we can minimize some of the duplication of effort that currently delays projects. We can do that while still protecting the environment and delivering top-quality projects. On the construction phase of a project, we have encouraged the use of innovative contracting practices like Design-Build and Construction Manager/general contractor. There is a real opportunity to save delivery time by doing some things concurrently that under the traditional approach have to be done in sequence.

Our second pillar of Every Day Counts encourages the use of five technologies that deserve to be widely deployed into the field today—warm-mix asphalt, prefabricated bridge elements and systems, adaptive signal control technology, the Safety Edge, and geosynthetic reinforced soil. Every Day Counts is about taking ef-

fective, proven and market-ready technologies and ensuring their widespread use to improve safety, reduce congestion, and keep America moving and competitive. But it's also important to focus on the bigger picture beyond specific technologies or initiatives.

Through Every Day Counts, we started essential dialog throughout our entire industry. We now have people discussing not whether we can shorten delivery time, but how we are actually going to do that. That brings us closer to my real goal within Every Day Counts, which is to create an innovative culture in our community, one that is open to new ideas and new ways of doing business. Every Day Counts challenges the way we have been doing business, and proposes a better, faster and smarter approach for the future.

As President Obama has indicated, maintaining and improving our infrastructure is vital to our economic competitiveness and the ability to create good jobs. If we are going to "win the future," as the President has challenged us, we are going to have to out-innovate, out-educate and out-build the rest of the world.

Thank you very much for inviting me here today. I look forward to continued work with our transportation partners, this Subcommittee, and other Members of Congress as we move our innovative ways through the industry. Mr. Chairman, I conclude my remarks and thank you.

Mr. DUNCAN. Thank you very much, Mr. Administrator.

Ms. Miller.

Ms. DEBRA MILLER. Good morning, Chairman Duncan. Thank you for the opportunity on behalf of the State DOTs to share our views on expediting project delivery. On behalf of AASHTO, I want to thank you and Chairman Mica for your commitment to expediting Project Delivery through the 437-day plan and for your willingness to consider potential statutory changes to achieve that goal.

We offer our support and any technical assistance you may need from the State DOTs. I also want to commend Administrator Mendez for his Every Day Counts initiative. We see this as a great opportunity, and we fully support the initiative. And I would say I think it is well-named as it sets a good tone and reminds all of us that every day, in fact, does count.

Let me summarize four points for you. First, the environmental process has been and continues to be a major contributor to the delay in moving projects from conception to completion. We have made progress, because of the reforms in SAFETEA–LU, but there is still much progress to be made. Today, a major highway project can still take 10 to 15 years or more to complete. That delay results in real costs, not just from inflation, but the opportunity costs from continued congestion, loss productivity and accidents, and, one of the issues I'm very concerned about, the potential loss of public confidence that comes when we have excessive delays.

State and local governments are also over burdened with the excessive paperwork and process it takes to advance even the least controversial projects with no environmental impacts. Second, any effort to expedite project delivery should focus on making the process more efficient without compromising environmental projection or opportunities for public participation. The success of the reforms

in SAFETEA–LU shows that it is possible to both speed up the process and still preserve and enhance the environment.

Third, the environmental process reforms of SAFETEA–LU have been effective in accelerating project delivery. Nevertheless, more can and should be done to refine those provisions to make further progress to the existing process. For example, we can improve upon the pilot program that authorizes delegation of FHWA's full NEPA authority to five States. This program was successfully implemented in one State, California, and I'm sure you'll be hearing more about that.

Other States, though, have been reluctant to take this on because of one catch. By assuming U.S. DOT's responsibilities, the States give up the ability to undertake design and right-of-way activities during the NEPA process, a very important mechanism for speeding up the delivery of projects. For many States the flexibility to advance these activities in parallel with NEPA is a critical project delivery tool. In addition, in order to take on delegation, States must waive their sovereign immunity, which many State legislatures are reluctant to agree to.

We have three recommendations to improve this program. One, extend it to all States, which will lend certainty to the program that is needed to encourage States to make the substantial investment and time and resources needed to take on delegation. Two, clarify that the States can assume U.S. DOT responsibilities without reducing flexibility to acquire right-of-way and perform design work prior to the completion of the NEPA process. And, three, establish a new pilot program that would give State DOTs the opportunity to take on the increased role in document preparation and agency consultation, but FHWA would retain ultimate approval authority.

Finally, refinements to the existing programs to expedite project delivery will help, but we also need to focus on new innovations, policies and practices to make a quantum leap in accelerating project delivery. We have several recommendations to build on the successes of SAFETEA–LU. Let me just mention one.

We urge you to consider empowering agencies to experiment with innovation. You can do this by giving U.S. DOT and the Federal resource agencies the authority on a pilot basis to waive existing procedural requirements for certain projects; those that are being developed through an integrated planning process at an ecosystem scale. Requirements could only be waived if the agencies could demonstrate that environmental outcomes are not compromised. A model for this approach is a special experiment program authority that FHWA has used in recent years to encourage innovation in contracting, and has played a critical role in encouraging the greater use of public-private participation.

Mr. Chairman and Members of the Committee, it is not only possible, but it is essential that we seek and implement creative new ways to accelerate project delivery. It is essential to find ways to deliver a better product faster, cheaper, and with better environmental results. We need more tools and ideas to stretch our precious resources, and to enable us to deliver the best possible value to our customers for their transportation investments.

Thank you very much for this opportunity. I will be happy when it's appropriate to answer questions.

Mr. DUNCAN. Thank you very much, Secretary Miller.

And Mr. Kempton?

Mr. KEMPTON. Thank you, Mr. Chairman, and thanks for the opportunity to address the Subcommittee today. My name is Will Kempton. I am the Chief Executive Officer of the Orange County Transportation Authority, and I am here today with Peter Buffa. He is a past-year and present director of the OCTA board of directors, and he was really the inspiration and the architect of the OCTA's Breaking Down Barriers initiative.

And by way of background, I just wanted you to know that I served five years as the State director of transportation in California. I don't mean to speak for the Department of Transportation in my testimony today, but I think it's important that you know about my background in that area in terms of what I am going to be talking about this morning.

The Breaking Down Barriers initiative grew out of a combination of the current recession, where scarce capital investment has led to double digit unemployment and the long-held knowledge that federally funded projects, as the chairman indicated, often can take an extraordinary length of time to process, some 14 years in many cases. This isan effort to unlock the jobs tied up in the Federal project delivery process and create those new opportunities for employment in California and across the Nation without the expenditure of additional, massive amounts of Federal funding.

Discussion with Congress and the administration over the past few months has revealed that others in Washington share this point of view. As you've heard from Administrator Mendez, the Federal Highway Administration has the Every Day Counts initiative. Chairman Mica has his 437 plan, which refers to the shortened timeframe it took to rebuild the collapsed Interstate 35 West bridge in Minneapolis. And President Obama recently published an op-ed piece in the Wall Street Journal criticizing "absurd and unnecessary paperwork requirements," and he issued an Executive Order to review existing rules that stifled job creation. This house has passed Resolution 72, calling for regulatory reform.

Our stakeholder outreach has included State and local government representatives, key transportation industry and business associates, such as the American Association of State Highway Transportation Officials, and the American Public Transportation Association, and the U.S. Chamber of Commerce for their assistance in our initiative. These efforts have yielded broad support.

The initiative is not intended to eliminate necessary environmental protections related to Federal projects, but rather to expedite the process in an environmentally friendly way. OCTA has contracted with Susan Binder and the firm of Cambridge Systematics to conduct in-depth interviews with transportation providers and to coordinate the results to find the most promising areas to seek specific changes in statutes or regulations to expedite project delivery.

Cambridge Systematics has conducted over 40 confidential interviews over the past four months with project implementers and trade associations to collect the widest sampling of situations

where changes in the status quo can expedite project delivery. We have identified more than 22 changes in existing Federal laws or regulations or practices, which could speed up the project delivery process. We have found that delay in project delivery is generally attributable to the following causes: a misplaced Federal focus on what I am calling micromanagement in the name of good control; on document length in the name of quality; and on processing in place of advancing projects.

A failure to adopt a Federal, State and local partnership effort to replace the highly risk averse attitude presently associated with Federal oversight, where delay is considered to be evidence of diligence, is absolutely a problem facing us in the delivery of projects. We also see a failure to penalize delay and reward innovation at the Federal and State or local level.

The specifics of our recommendations are being finalized, and we will report back to Congress and the administration when the final report is available, but let me take a moment to highlight a few of these changes that we are talking about. First, as you have heard today, we need to expand and continue the NEPA delegation, which was authorized by SAFETEA–LU. California, again, as you know, is the only State which took advantage of the provisions that were provided for five States across the country.

The delegation eliminates a layer of document review, and retains all NEPA and CEQA project review authority within the State. The statewide average time savings for these projects, as Administrator Mendez indicated, is about 10 to 17 months. That's huge. That's a year in terms of getting jobs to the economy sooner. The pilot program, rather, is limited only to highway projects, and it expires on August 10, 2012, and it should be extended and delayed.

Second, the planning process should not delay project implementation. We believe there should be greater delegation to the metropolitan planning organizations in terms of amendments to the Federal TIPs. We ran into that problem as we tried to implement the American Recovery and Reinvestment Act. Third, there should be a prompt action provision in law, whereby, Federal agencies will be required to act on project approvals within a set deadline.

We are interested in the concept of programmatic environmental review. Where that focus will accelerate project level documentation, but we think a cultural change in the way the Federal Government does business is needed.

Mr. Chairman, I am happy to answer any questions during the appropriate timeframe, but appreciate again the opportunity to testify before the Subcommittee today.

Mr. DUNCAN. Thank you very much, Mr. Kempton.

And now we will hear from Mr. Margro.

Mr. MARGRO. Thank you, Chairman Duncan and Members of the Committee. My name is Tom Margro. I am the Chief Executive Officer of the Transportation Corridor Agencies, and we are two joint powers authorities formed by the California legislature to plan, finance, construct and operate three toll roads in Orange County, California.

I want to thank you for the opportunity to speak before you today to discuss our agency's ongoing challenges over more than 15

years to secure the Federal approvals needed to complete the 241 toll road. Not only is this project critical to alleviating congestion in Orange County, but it will create over 34,000 jobs, and it requires no Federal or State funding.

Based on our experiences with the 241 project, we have recommendations for improving the environmental review process. Our agency completed the first 51 miles of our planned 67-mile toll road system in 12 years; however, we have spent the last 15 years trying to accomplish and finish the last 16 miles, as it has been mired in the Federal environmental review process.

This project was intended to be a model for improving the complex, Federal environmental process by integrating reviews under NEPA, the Clean Water Act, the Endangered Species Act, and other Federal environmental laws. The process was undertaken through the formation of a collaborative of State and Federal agencies working through a memorandum of understanding among the FHWA, the EPA, Corps of Engineers, and U.S. Fish and Wildlife Service with the FHWA acting as the lead Federal agency.

This process gave all of the Federal environmental agencies a seat at the table, and decisionmaking authority throughout the environmental review process. A key aspect of the MOU is the commitment by all agencies to reach consensus on key decision points throughout the process, and also not to go back in revisiting their concurrence, except in limited circumstances related to significant new information or other significant changes.

In our case, this process involved two stages for our project. In the first stage, a facilitator was hired to assist the collaborative in their process, and develop the purpose and need statement, and the alternatives for initial evaluation. This stage took four years to accomplish. The second stage took six years, during which technical studies were prepared, alternatives developed and evaluated, and decisions were made about which alternative to carry forward for full analysis in the environmental impact statement.

The last two steps of stage 2 included the identification of an environmentally preferred alternative, and an agreement on mitigation measures. In November 2005 the collaborative agencies confirmed in writing their earlier agreement on the preliminary LEDPA, also known as the Least Environmentally Damaging Practicable Alternative. Subsequently, National Marine Fisheries Service concurred with FHWA that the project would not likely adversely affect endangered or threatened fish species.

Since the Fish and Wildlife Service had been at the table throughout the collaborative process, the MOU contemplated that the Service would be able to prepare a biological opinion within the 135-day deadline established by the Endangered Species Act. While Fish and Wildlife eventually did produce a biological opinion and a Finding of No Jeopardy, it did so nearly three years after the collaborative agencies had identified the environmentally preferred alternative.

When we applied for consistency certification under the Coastal Zone Management Act, certain project opponents, including environmental groups, objected to the project despite the fact that they offered no credible evidence that the project would impact the coastal zone. At this first hint of controversy, Federal agency mem-

bers of the Collaborative, with the exception of FHWA, questioned the preferred alternative previously identified by these very same agencies, asserted the need for additional environmental studies, and reopened the debate concerning other alternatives.

Thus, rather than serving as a model for how to make the Federal environmental process more efficient, our experience with the Collaborative demonstrates that the Federal environmental process is broken and needs fundamental reform. Despite over a decade of effort by these agencies, and expenditures of over $20 million by the project sponsor, ourselves, the process failed as there was no agreement on a preferred alternative.

Now, we do have several recommendations and proposals for improving this process, some of which you have heard from the previous speakers. These include allowing States like California with stringent environmental laws to provide NEPA compliance. Prohibit agencies from rescinding their previous concurrence, unless there are significant new facts. Require FHWA to develop an MOU with EPA regarding a reasonable range of alternatives to be examined.

Revise regulations to provide that in subsequent NEPA documents you do not have to go back and reconsider issues addressed in prior NEPA documents, and limit resource agency determinations to issues within their own jurisdiction and expertise. We have appended to the testimony a chronology of events associated with this project and certain relevant letters and documents.

I thank you for the opportunity to provide testimony, and look forward to answering your questions.

Thank you.

Mr. DUNCAN. Thank you very much, Mr. Margro.

Mr. Replogle.

Mr. REPLOGLE. Good morning, Chairman Duncan, Congressman DeFazio, members of the Subcommittee.

I am Michael Replogle, founder of the Institute for Transportation and Development Policy, a non-profit group that helps cities implement transportation and urban development projects worldwide. The Environmental Defense Fund, the Natural Resources Defense Council, and the National Recreation and Park Association have also indicated support for my testimony today.

What causes federally-funded transportation projects to suffer delay? The biggest problems are usually lack of funding, or lack of consensus about what project is needed or how a project should be designed. Environmental reviews account for only a small share of transportation project delays; and, in most cases, this is associated with a few highly controversial and complex projects entailing large adverse impacts.

Typically, only three percent of projects need an environmental impact statement. Nine out of ten federally supported transportation projects undergo little or no NEPA review and are approved as categorical exclusions or findings of no significant impact. SAFETEA–LU has begun to cut delays by ensuring environmental, land management and natural resource agencies are routinely invited to participate in all planning studies. Early involvement and dialog leads to earlier issue identification and discussion to resolve important issues collaboratively.

Critically flawed projects are more likely to be identified and removed from consideration, cutting costs. But cuts in resource agency budgets pose an increasing risk to progress in reducing project delays. A recent GAO report noted that funding constraints hamper the ability of resource agencies to take on extra responsibilities beyond their core regulatory duties, and limit their capacity to respond to concurrent requests from multiple metropolitan planning organizations and State DOTs.

To curb project delays, Congress should first protect resource agency budgets. Second, it should in the next transportation bill authorize a set-aside of Federal transportation funds to ensure land management, environmental, and resource agencies, will be involved in State and metropolitan planning and project reviews. Such funding could also ensure agencies map known areas of environmental, historic or other sensitivities.

EPA supports such efforts with its NEPAssist, an innovative tool that facilitates streamlined environmental review and project planning. In the face of widespread budget cuts to resource agencies, Congress should not impose more stringent time limits on agency comments and transportation project reviews, or fine agencies that fail arbitrary timelines.

Third, Congress should create new incentives for timely project delivery. Strong partnership and coordination among stakeholders, supported by financial incentives, have been successful in engendering early project completion. Congress should allow DOT to reward States and metropolitan areas that consistently deliver projects on time while meeting or exceeding environmental standards.

Fourth, Congress should create new incentives to better link transport planning and project reviews. A voluntary pilot program should be created in which U.S. DOT, EPA and other agencies work with certain States or metropolitan areas to determine how to accelerate project delivery through more thorough Federal review of State or metropolitan long-range transportation plans, satisfying NEPA requirements through the planning process so that fewer NEPA requirements need to be satisfied at the project review level. In this way, concerted deliberations about projects might take place earlier in the process. This could be done through new kinds of programmatic agreements or program delivery partnering plans.

Fifth, increased use of mitigated findings of no significant impact and categorical exclusions under NEPA could help provide a basis for advancing some transportation projects faster. Recent CEQ guidance on this subject is helpful.

Sixth, Congress should encourage greater transportation project design flexibility. Currently, the Federal Highway Administration requires all projects to meet the highest design standards, even when potential traffic volumes may never be realized. This can lead to over-design of projects and bog down projects in drawn out exception requests. Inflexibly applied State DOT design standards can also get in the way of project implementation.

I invite the committee to consider the much more detailed analysis in my written testimony, and thank you for the opportunity to testify today.

Thank you.

Mr. DUNCAN. Well, thank you very much, Mr. Replogle, and I want to thank all the witnesses for their very helpful and very informative testimony.

When we hear that everyone, even President Obama, having written the op-ed for the Wall Street Journal, everybody wants to speed up the process. Nobody wants to hurt the environment, but when we talk about the 13-year average that Mr. Mendez mentioned and various studies show similar figures.

I have sat on this committee for 22 years now, and no matter what it is—I chaired the Aviation Subcommittee for six years, the Water Resources and Environment Subcommittee for six years—no matter what it is, we hear that we are taking at least two times, usually three times as long as any other developed nation to do these projects, and we all want to speed these things up so we can do two projects where we could have just done one. It's pretty much that simple, but I will never forget years ago when I was chairing the Aviation Subcommittee.

We heard the newest runway at the Atlanta Airport, which is several years old, took 14 years from conception to completion. It took over 99 construction days, and they were so relieved to finally get all the approvals that they completed the project in 33 24-hour days. And we always hear that it's always the environmental rules and regulations that are causing most of the delay, so we need some suggestions.

But I am going to go first to members for questions, because members sometimes have to leave, and I will be here for the whole hearing. And so I believe——

The CLERK. [Sotto voce.]

Mr. DUNCAN. Mr. Mendez is going to have to leave, and so what we are going to do, we are going to go first to questions just for Administrator Mendez.

Is there anyone on the Republican side who wishes to ask Administrator Mendez a question? Does anybody have a question for—Mr. Miller?

Mr. MILLER OF CALIFORNIA. Yeah. But the problem is questions for him relate to many on the panel. I don't know how we are——

Mr. DUNCAN. Well, we are just trying to help him get on his way, so just go ahead.

Mr. MILLER OF CALIFORNIA. Well, you talked about 13 years to deliver a project. I come from the building industry, and I mean I've watched the process for 40 years, and much of it has to do with repetitive paperwork and many projects you have on transportation. And I think some of the authorities you mentioned, they go through this lengthy process and the paperwork when they're completed just gets put aside in some filing cabinet and sits there.

That does not do anybody any good. It just protracts projects. And, you know, I look at projects that we have tried to move forward. And the Maglar project—it was improved in 2005 funding—that would have gotten a lot of the preliminary work moved ahead. Yet that funding has never even been released after six years. How do we maintain a global competitiveness and yet deal with the 13-year delivery project stream we have to deal with today?

Mr. MENDEZ. Yes, sir. Thanks for the question.

As I mentioned in my opening remarks, and I have a little more detail in the written remarks, at FHWA we have begun looking at various strategies and I refer to Every Day Counts as the overarching umbrella for the strategies. It's important for all of us, and I do agree with you. That's why I started the initiative. Thirteen years is way too long. In today's society, we have to do something about that and my goal is to cut that in half.

There are about 10 strategies that we have outlined under Every Day Counts that really speak to several of the issues that I think all of us here at the panel are really trying to address. We are trying to eliminate duplication of effort through some of those strategies and encourage the use of existing flexibility within the existing regulations.

I believe within the framework of what we do, we haven't really tapped all the flexibility within the existing rules, regulations and laws, and so we are attempting to do that as well. And finally, as I mentioned, we are also looking at the construction phase. There are some strategies out there that simply are not deployed on a national basis, including Design-Build, and some other procurement-type issues that I know from my own experience really move our major projects forward very quickly. I think it is important for all of us to think about all of these other strategies that I believe provide a lot of flexibility. Throughout the industry we have not really taken advantage of that flexibility.

Mr. MILLER OF CALIFORNIA. Well, the problem I have is that I introduced the language in the TEA–LU bill in 2005 that allowed States to avoid the NEPA process if they met or exceeded those standards, and California is the only State that took advantage of it.

I know, Ms. Miller, you mentioned we need to do something, but will the administration's authorization proposal include concepts for accelerating project delivery similar to what we try to do in the pilot program in California? And, as we have discussed, in California it is, say, between 10 and 12 months of process time, which is significant to moving projects.

Is the administration going to do something then on a national basis?

Mr. MENDEZ. Well, as you are aware, yesterday the President released the budget. Within the transportation framework you see some of the principles that we outlined. Very clearly, we are looking at reducing some of that red tape, if you will. We did consolidate over 55 programs down to five in our proposal.

The other thing that we are looking at are some project delivery ideas, and we want to continue that discussion as we move forward.

Mr. MILLER OF CALIFORNIA. Love to work with you on that, and I yield back, Mr. Chairman, because I asked specific to this one individual.

Mr. DUNCAN. Thank you very much.

Mr. DeFazio.

Mr. DEFAZIO. Thank you, Mr. Chairman.

Mr. Administrator, the full delegation of authority which California has assumed, which has saved considerable time, that was a pilot for five States. Do you have any concerns about that pro-

gram? Would you support extending that program to the other States should they so request?

Mr. MENDEZ. Mr. Chairman, ranking member, should they so request, the option is there for the other four States.

Mr. DEFAZIO. Well, not under existing law. There are five States eligible under the pilots, but I'm saying if we made it a part of permanent law that States could request that authority, you would not object to that.

Mr. MENDEZ. The benefits are very clear in that regard, given the California experience.

Mr. DEFAZIO. OK. What is the reluctance of other States, given we had five States eligible for pilots. And I don't believe five States——

Mr. MILLER OF CALIFORNIA. Would the gentleman yield?

Mr. DEFAZIO. Yes.

Mr. MILLER OF CALIFORNIA. The five States were chosen because there were only five States that met NEPA standards at that point in time.

Mr. MENDEZ. Right.

Mr. MILLER OF CALIFORNIA. But that's a very good question, and I hope we can expand it.

Mr. DEFAZIO. And as I understand it, there is a major barrier that States don't want to waive sovereign immunity. They want the Federal Government to be able to be sued for the project, and they want to take authority to do the project, but they don't want to be sued if they do the project and there's a problem.

Mr. MENDEZ. Yes, sir. That is a big impediment.

Mr. DEFAZIO. OK. All right. That is something we would have to work through. And then Mr. Replogle raised the issue of practical design, and this is a problem both at the Federal level and I believe the State level. And at the AASHTO level in terms of their green book, where everybody said—what I hear most commonly from States is "If I don't do what they say, which is I don't care if you can serve that area with two-lane road, the book says six lanes, sidewalks, guardrails, and this."

So what if that's in everybody's front yard? You know, would the feds adopt the idea of practical design standards, which I believe would help encourage the States to move in that direction and, you know, try and get projects that are more appropriate, less expensive to construct, and more appropriate for the communities. We took some considerable testimony on this last year.

Mr. MENDEZ. Mr. Chairman, ranking member, certainly we are all trying and striving to reach some of those benefits that you mentioned. Practical design does make sense, but I can assure you that within the current rules and regulations, we do have a process for design exceptions that are available.

I know from my experience we used to do that back in Arizona, and so it is not a set rule on everything. But there's a process to allow you some exceptions.

Mr. DEFAZIO. Right. But I think we need to perhaps elevate that issue higher or look at whether the exception process is the right way to go, and then also deal with the problems that have created potential legal barriers, because AASHTO publishes something and then the States adopt it, and then the States are reluctant to

change. I mean just looking at how we can sort of facilitate this whole process, and it may be that we need to have the States, AASHTO and the feds sit down and work it out. But I just think there's a lot to be gained and saved through practical design.

Thank you, Mr. Chairman.

Mr. DUNCAN. All right. Thank you very much.

Mr. Shuster.

Mr. SHUSTER. Thank you, Mr. Chairman.

The question deals with the tolling of roads. I know that in TEA–21 there were three pilot projects proposed to be approved. Two of them were approved; one was not, and I just wondered what the current status of Virginia and Missouri is. I understand Virginia is going back to the drawing board, but it seems to me the need to find dollars, if States are willing to come forward with a plan, to toll in those three pilot projects. We should move them forward if we can, if it's possible.

Mr. MENDEZ. Mr. Chairman, Congressman, yes. On the Virginia tolling concept, we are working very closely with them to make sure that happens within the framework of the rules, regulations and the law. I am not up to speed on the Missouri ones, so I apologize for that, but certainly I can get back to you on that.

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[The information follows:]

On July 26, 2005, FHWA granted Missouri a "conditional provisional" acceptance for a toll pilot project on I-70 under the ISRRPP. The Missouri Department of Transportation (MoDOT) has completed a Supplemental Environmental Impact Statement (SEIS) (including the truck only lane concept) for the I-70 corridor. The Record of Decision (ROD) was signed on August 14, 2009. The SEIS includes clearance for tolling from an environmental standpoint, but does not address specific funding methods. The FHWA continues to work with MoDOT as this project is developed.

Mr. SHUSTER. And I know what the outcome of Pennsylvania was. States lined up to want to get into that queue. If Missouri or Pennsylvania or Virginia, obviously, doesn't move forward, are there other States that are interested in looking at that?

Mr. MENDEZ. I am not aware that they are in the actual queue. I'm sure everybody is thinking about how they may get into that queue, but I am not aware that there is a formal list.

Mr. SHUSTER. And another question; I don't believe this is in Federal law that has to be done, but I know that in Pennsylvania when an engineering firm designs a bridge or a roadway, then PENNDOT takes it in and reviews the whole thing again. But once they put that stamp on the engineering firm, they're responsible. They're liable for it, and I just wondered.

Across the country, s that general practice that happens? Because it slows the process way down by several months when that occurs, and I just wondered. Is that something that's general practice in other States, or is it something that States contract with an engineering firm, get their stamp, and then say let's move forward?

Mr. MENDEZ. Normally, the engineering firm or the engineer will stamp the project plans and then you move forward. But there is a level of review, because the States have to ensure for themselves that they agree with what's within that project plan.

Mr. SHUSTER. All right. Thank you very much.

I yield back.

Mr. DUNCAN. Thank you very much.

Ms. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chairman, and this question is both for administrator Mendez and Mr. Kempton. As we've been hearing among the surface transportation project delivery pilot program, what are the perspectives on the pilot program from the Federal-State level, and how long has this pilot been in place?

Has it been successful, and should it be expended to other modes of transportation and what are your recommendations, if any? That's one question all wrapped up in one. The second one is what are you doing to train, educate, and have input from your respective staffs to be able to speed up the process, change mindsets, because sometimes that's where a lot of the boggling down comes in.

Mr. MENDEZ. OK. I will go first, if you don't mind.

Mrs. NAPOLITANO. Please.

Mr. MENDEZ. Mr. Chairman, Congresswoman, let me address your second question first. I have talked quite a bit about Every Day Counts today, and I do totally agree with you that within our industry—not just FHWA—we really need to begin looking at a new way of doing business, and part of that is how do you move the culture forward.

My ultimate goal, when I am done in my tenure here, is to have in place throughout the industry a culture of innovation—not just within FHWA, but I think everybody in the industry needs to get on board. In terms of what we have done more recently, late last year, the final three months of the year, we actually held 10 regional innovation summits where we engaged the private sector, consultants, contractors, and people from the State DOTs and my folks that actually are on the ground—not headquarters people, not people from D.C., people out on the ground—to really begin looking

at not only the strategies that I outlined under Every Day Counts, but to begin thinking about what does that culture really look like.

I want people to really engage in finding new ideas, being creative, and being innovative and bring those ideas and flush them out and make them happen every day that they come to work.

Mrs. NAPOLITANO. Where do they go from there?

Mr. MENDEZ. Well, we did lay out a strategy where every State will go back in concert with FHWA to develop a specific plan to see which of the strategies they will implement. Now, one thing I can tell you, which is part of my philosophy, I understand very clearly that not everything is the same in every State. So that's why we decided every State should go back and work with our folks to develop a State-specific implementation strategy, because what happens in California may not be the same solution in Virginia, for example.

Mrs. NAPOLITANO. That is correct. But are you also working on that internally?

Mr. MENDEZ. Certainly, yes we are.

Mrs. NAPOLITANO. To what extent?

Mr. MENDEZ. Well, like I said, we have had a lot of internal training. Before we actually began the summits, we had internal training for our division administrators. In every State we have a division administrator and we did our internal training with some of our other key folks to make sure they understood what we are attempting to do within this new Every Day Counts approach.

Mrs. NAPOLITANO. Thank you. Mr. Kempton?

Mr. DUNCAN. All right. What we agreed to do earlier was just question Mr. Mendez at this time. We will come back to you for questions to other witnesses.

Mrs. NAPOLITANO. Thank you.

Mr. DUNCAN. Does anybody over here have a question for Mr. Mendez? Yes, sir, Mr. Southerland.

Mr. SOUTHERLAND. Thank you, Mr. Chairman.

Mr. Mendez, thank you for being with us today. I am curious. What is the single greatest impediment from allowing the States to do more in accelerating project delivery?

Mr. MENDEZ. Mr. Chairman, Congressman, I don't know that there is one single impediment.

Mr. SOUTHERLAND. Yeah. But there has got to be something that just irritates you. I mean, and I am a small business owner and I get irritated daily. And there's got to be just one overriding thing, that if you were king for a day, what could you eliminate and open the door for a greater working relationship between the Federal Government and the States in satisfying the American taxpayer and moving people and products down the road.

Mr. MENDEZ. I suppose if I looked at the world as king for the day, the biggest impediment that I would see is throughout the country we need to really bring our level of coordination and partnership to a higher level. I believe the inability of people to actually sit and meet, and resolve issues on the spot rather than sending reports and e-mails and letters. If we can find a way to get people in, I think it's part of the culture. Bring people together to resolve issues today—not three months from now, not six months from now, but today—we would make a big headway on that.

Mr. SOUTHERLAND. Did you, when you met with the State DOT experts, did they say the same thing? I don't want to put words in your mouth. What do they say as that single, greatest impediment? Is it we are too large, because when you talk about the culture, the culture is large and unfortunately in charge?

I mean if you want to simplify things, common sense would say you would have fewer that you have to communicate with, but what do they say to you? What do the State DOT experts say to you regarding the same issue?

Mr. MENDEZ. I can't speak for the States, of course. A lot of concerns have been expressed by the panel here, but I really believe that if you take the project delivery process and you look at the decisionmaking process at every phase, all the way through construction, just our coordination and our ability to resolve issues takes too long. Are there other issues? I will let some of the other panel members address that at the appropriate time.

Mr. SOUTHERLAND. Thank you.

Mr. MILLER OF CALIFORNIA. Would the gentleman yield?

Mr. SOUTHERLAND. I yield, yes.

Mr. MILLER OF CALIFORNIA. You talk about project delivery. Mr. Replogle talked about lack of funding and EIRs only impact a small amount of projects, early involvement in dialog, which you talked about. Set aside funding for agencies regarding environmental review. That's kind of like paying off the mafia to me. I'm sorry. It really is, but I don't mean to insult the mafia.

But the 241 toll road was a great example. They met with every environmental group possible. They met with, I guess, the best was fish and Wildlife. Fish and Wildlife studied every environmental option available. They met with every environmental group to call the impact back, and all they ended up getting at the end was a lawsuit.

The problem I see out there, and being a builder for 40 years, is you will go through a process. Get the area approved, and then three different environmental groups will see you. Two want cash, and the other one will take you to court. How do you deal with that?

Mr. MENDEZ. Well, let me kind of step back on the broader issue, just to make sure we are all on the same page. Now, obviously, the major projects that do require an environmental impact statement are where we faced some of these broader, bigger issues.

Mr. MILLER OF CALIFORNIA. Let's take the 241 example: 15 years of process; they met with every environmental group that had a name, and Fish and Wildlife addressed their concerns. What can you do to stop those problems from occurring?

Mr. MENDEZ. You mean in terms of lawsuits?

Mr. MILLER OF CALIFORNIA. No, in terms of a process that continues forever to end up at the end of it with nothing, there's got to be some resolution on the part of government. We have laws in place that enable these groups to do that, and all they do is hamstring the entire process as government tries to go through local agencies in delivering projects.

Mr. MENDEZ. I think in most cases—and there may be some exceptions—it is the ability to resolve with the appropriate people.

Mr. MILLER OF CALIFORNIA. That's what I'd like to see you address. That's my question. We are looking to you in the administration for opportunities and options to problems, and to resolve those problems. We have discussed the problems, but have not seen any proposals that address the problems.

Mr. MENDEZ. If you look at some of our strategies within Every Day Counts, they're attempting to resolve these problems. Will the 10 strategies resolve everything? No, but I think it's a step in the right direction.

Mr. MILLER OF CALIFORNIA. I yield back. Thank you for yielding.

Mr. DUNCAN. All right. Mr. Sires?

Mr. SIRES. Thank you, Chairman, for holding this hearing. It's very important, and having been a local elected official, I have been involved in some projects.

Mr. Mendez, you have a recommendation here that I don't really agree with. You have a recommendation that says get involved. Get the environmental attorneys involved early in the process.

I have to tell you. My experience in dealing with some of the State environmental attorneys is one issue after another that they seem to come up with. It's like the kiss of death of a project. I wonder if your experience is different than mine that you make the suggestion that getting involved in environmental attorneys early is really helpful, because I just find it just very difficult.

I come from the State of New Jersey, and there seems to be more issues added every time you talk to them. They came up with issues that you never saw there before; and many times they're inflexible. I don't know if whether the instructions that you have given your attorneys is to be a little more flexible and understanding to move these projects forward, but they're like the B team.

They'll be there when you're there. They'll be there when you're gone. So can you just give me a logic behind this? I think I understand it, but thus it hasn't been my experience.

Mr. MENDEZ. Mr. Chairman, Congressman, yes. My philosophy on that is similar to what I expressed earlier. It seems to me that when you bring the right people together at the earliest possible time to resolve the issues, things move faster. I think somebody here suggested earlier that after you've gone through so many years and somebody comes in at the end and raises new issues, I believe that was Congresswoman Johnson, that's what I am trying to avoid.

If you bring the attorneys to the table early to identify those potential legal impediments that we need to resolve today, not three years from today, I believe that really gets us in the game early and helps us resolve issues faster and earlier.

Mr. SIRES. But they are so inflexible, that in many instances I disagree with that. I am sorry.

Thank you, Mr. Chairman.

Mr. DUNCAN. All right. Thank you very much. Administrator Mendez has to leave, so we will let Ms. Richardson ask the last questions to the administrator.

Ms. RICHARDSON. Thank you, Mr. Chairman, and thank you for having this very timely hearing. And I remember when we had this a year ago, and out of the hearing I actually introduced a bill called

Jobs through Environmental Safeguarding and Streamlining Act of 2010 (JESSA). And I would encourage all my colleagues to maybe consider how we could work together to bring that forward, because we spent a lot of work, and that's my understanding in the committee.

I was very well aware of it and it helped us to frame many of the comments we hear today. Mr. Mendez, I just have two questions for you. To your knowledge, have there been any instances of adverse environmental impacts in California or any of the other pilot States due to the alternative process under Section 6005, the pilot project.

Mr. MENDEZ. Mr. Chairman, Congresswoman, no. That I am aware of, we have not had any adverse impact.

Ms. RICHARDSON. OK. And then my second and last question, trying to adhere to the chairman's pleasure here, I'd like to build upon Ms. Miller's testimony where she stated the statute of limitations, and I think it's building upon some of my other colleagues, where it's my understanding the purpose of the statute of limitations is to expedite the resolution to affect any transportation projects.

Issuing the notice in the Federal Registry is discretionary. If a notice is not issued, the NEPA approval or decision remains subject to the general six-year statute of limitations for civil actions against Federal agencies. Why wouldn't you just do it?

Mr. MENDEZ. I didn't bring the information with me, but we do have information statistics on how many times we actually have issued the notice. And we happened to do it quite often. I just simply don't have the numbers.

Ms. RICHARDSON. But why wouldn't you just do it in form if they have met the requirements? If the project is consistent with the approvals, why wouldn't you just normally do it? Why would it be discretionary?

Mr. MENDEZ. I can offer a couple of examples from my experience here at FHWA. I can tell you there has been one arena where we simply didn't have an alternative that we thought would be viable, that from an environmental standpoint would actually move things forward.

And rather than issuing a final notice and closing out the determination, if they're in the future, 10 years from now if there's still a need, and there might be some other alternative out there, we didn't want to close out that potential.

Ms. RICHARDSON. OK, sir. Would you be wiling to give to the committee and to also those who are testifying the details that you have about this particular issue and why you're not doing it on a consistent basis? And what might you do to consider changing that in the future?

Thank you very much.

Mr. MENDEZ. Absolutely.

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[The information follows:]

By early 2011, FHWA had published statute of limitation (SOL) notices pursuant to 23 U.S.C. § 139(l) for more than 250 projects in 28 States and the District of Columbia. As permitted by the statute, FHWA has published notices for projects in all three classes of action under the National Environmental Policy Act (environmental impact statement, environmental assessment, categorical exclusion). Not surprisingly, the largest number of notices have been used on environmental impact statement projects.

FHWA applies a risk management approach when deciding whether to publish a SOL notice. In most instances, the notices serve the beneficial purpose of ensuring any legal challenges to a project occur within a short period of time (180 days) following Federal approvals. This gives project sponsors greater schedule reliability. In some cases, however, there are circumstances affecting the project that may argue for postponing the publication of a notice, or foregoing it altogether. Two examples illustrate this point:

- When stakeholders are engaged in negotiations with FHWA and project sponsors to resolve concerns about a project, publication of a SOL notice before the negotiations are concluded will force the stakeholders to file suit to protect their interests. Experience shows the result can be that all parties experience unnecessary costs, and that the chance for a negotiated resolution that benefits all parties may be lost.

- If a project has no reasonable likelihood of moving forward in the foreseeable future due to a lack of funding or a change in State priorities, publication of a SOL notice can lead to expensive litigation that may prove to be a waste of resources. In such cases, it often makes more sense not to publish a SOL notice until such time as it is clear the project is viable.

Situations such as these are rare and the vast majority of eligible project decisions result in the issuance of a notice. FHWA recognizes the SOL provision is a tremendously valuable tool, and will continue to work with its State partners to ensure the notices are used whenever the circumstances indicate a SOL notice is advantageous.

Ms. RICHARDSON. Thank you, Mr. Chairman.

Mr. DUNCAN. Thank you. And Mr. Mendez, one last request. All of the witnesses here today are from the government or academic backgrounds; and most of your working day is spent working with other government officials. I would appreciate if you would do something very simple and easy.

Have somebody on your staff write up one letter that you would send out to at least 100 businesses across the country that are in this area and ask for their suggestions as to how we can speed up and simplify the process. And then in about 30 days after you do that, or maybe 60 days, give us a report on any suggestions or a list of suggestions that you've gotten from that process. Would you be willing to do that?

Mr. MENDEZ. Absolutely.

Mr. DUNCAN. Thank you very much. And you are excused now, and we thank you for being with us.

Mr. MENDEZ. Thank you.

Mr. DUNCAN. And we will go now to questions for the other members of the panel, and I believe that we are going to do this in order. We have been asked to do this in the order in which the members appeared. And Mr. Crawford was here first, but he is gone.

Mr. Gibbs?

Mr. GIBBS. Thank you, Mr. Chairman.

I want to probably address Secretary Miller. I appreciate her comments about how we can move forward. Some of the things I see concurrently versus in sequence, and you might want to expand on that a little bit.

One thing that's really been bothering me, and you mentioned environmental process is a big part of the problem, and I know Mr. Replogle kind of countered that, went the other way on that. But, you know, the bridge that collapsed up there in Minnesota came in under budget and, I guess, years ahead of time. And it seems to me that the bureaucracy made decisions, because they were forced to make decisions. And I see this all across the board, not just on highway projects, but businesses.

We are getting permits from the EPA or whoever to operate. They can't get answers. They just go on and on and on and adds to cost. So I am beginning to think that there is a culture in our bureaucracy not to get excited and not to move things forward, and you might want to talk about that. And then the second part of my question is you talk about waiving States' sovereign immunity and you mentioned right-of-way procurement. Can you expound on that a little bit, because I am new to this committee. This is a new area to me.

Ms. DEBRA MILLER. Sure.

Mr. GIBBS. Is there something that maybe we should address specifically dealing with right-of-way procurement?

Ms. DEBRA MILLER. Sure. Let me start with your first question. I do think there are some cultural issues. I think there are cultural issues inside State DOTs. I can say the head of my State DOT is one of my highest priorities. I mean, you know, I tell our people, you know, every day you ought to feel like the hounds of hell are at your backs. You know, I mean that notion of urgency needs to

be driving all of us. And I think that you see the newer leadership, I think, throughout State DOTs who are very much of that mindset. But, certainly, we have long term employees, and I think you see it on the Federal level as well. So I think there are cultural issues we all need to address, and there is no question. Across the board leadership is so important. If you are not providing leadership and directing your staff that what they ought to be concerned about every single day is moving things forward, then you're probably going to get delay. You've maybe heard this before, but there is so much in this environmental arena that in so many of the Federal approaches that is process driven, not outcome driven; and, you know, increasingly, we are all talking about that language, and I think it is much easier to assess whether or not a process has been met than to make the more judgmental call about whether or not you are reaching the right outcome. So it's very easy to fall back on process; but, certainly, we only defined ways to push forward and be focused on outcome. You know. I think we are at varying levels in our State DOTs. I can just tell you we spend a lot of time with those sorts of conversations. I think the leadership issues are very big, whether it's at the Federal level or at our State levels in terms of making these projects move forward.

In terms of the second question about right-of-way for instance, our State always purchases right-of-way with State dollars, because we can do that. It's considered at risk, but we can do it. We cannot use Federal dollars to purchase right-of-way until we are all the way through the environmental process. And that so delays a project when you're doing it sequentially in that linear format.

So what we will do is we'll finish our final design, and we will do our right-of-way acquisitions using State dollars, knowing full well that they are at risk. But at least we can do it. And either the way the section has been written or the way it's been interpreted by Federal highway, if you have the delegation, you can't do it even at risk. And States just haven't been willing to give that up, because it's such an important way to speed up the process.

Mr. GIBBS. Just to follow up on the right-of-way, eminent domain, you know, Ohio the Department of Transportation has what they call "Quick Take," where they can go in, use eminent domain and then start the project. And if a property owner is contesting it, it will go through the process. Does Kansas have a similar, or the Federal Government, is that a problem where they don't have the ability to move the project forward by using an expedited eminent domain process like we do in Ohio?

Ms. DEBRA MILLER. Well, I can tell you one of the things that we do is we follow the Federal Procurement requirements. We just find whether we're using State dollars or Federal dollars. It's a better way to do it, but we always try to purchase right-of-way with our own dollars, because we can use expedited processes we could not use under Federal requirements.

Mr. GIBBS. OK. Thank you.

Thank you, Mr. Chairman.

Mr. DUNCAN. Thank you very much.

Mr. DeFazio.

Mr. DEFAZIO. Thank you, Mr. Chairman.

Just to follow up on that with Ms. Miller, you know, I have heard various discussions by various State DOTs about why they don't want to engage in these more alternate design, practical design, context sensitive designs. Whatever you want to call it, it has a lot of names. A couple of States have made it very clearly State policy, Pennsylvania among them and others. But one thing I hear is they're concerned about liability. It's not just cultural, but there is a liability concern. How could we address that?

Ms. DEBRA MILLER. Well, Congressman DeFazio, I don't know if this will be a good answer to your question. I would say from my perspective, and one of the things we have told our people is, you know, liability shouldn't be our number one concern when we're making these decisions.

We have what we call a practical improvement approach. We have been pushing very aggressively to do it, and I think if you are weighing up all the benefits and costs to the State, to the cost of infrastructure, even if in fact you end up being sued in some situation, you know, that consequence and that cost may come nowhere near outweighing the benefit you got from moving forward. So our direction has been, you know.

I'm not saying we're not following good, sound engineering principles, but don't let every decision be driven by some fear you might be sued, because there are other losses that are more significant. And one of the things I am very concerned about in everything that we do revolves around public credibility and public enthusiasm. And so, you know, I think sometimes if we are counterbalancing our fear about a liability versus looking rationale and reasonable to the public, moving forward in a way that makes sense to the public, that in my mind oftentimes outweighs the liability issues.

Now, I might also say in Kansas we have tort reform that our outward loss, you know, is limited, and so it might be easier for us to make that decision. It may be different in some other States, but again, I think that's a bit of a cultural issue. It's not that there aren't some liability risk, but I believe that gets overplayed in people's minds in terms of being a decisionmaking factor.

Mr. DEFAZIO. Wouldn't normally in your experience or in looking at this issue, would normally these sorts of practical design, context sensitive design, whatever solutions, wouldn't they often be less expensive than the optimized?

Ms. DEBRA MILLER. Absolutely. Absolutely.

Mr. DEFAZIO. OK. So, maybe, part of what we should look at from the Federal level is to provide an incentive for people to look at this with a little different cost sharing ratio when States adopt something, which is going to save both the State and the feds money in the end, but the feds will give a little bit of the premium for that.

Ms. DEBRA MILLER. I think that's an interesting thing to pursue. I think the other thing, you know, certainly in a safety arena, we all begin thinking about this, and that is there used to be such a notion. You were working on a project and you were going to build the best project you could build right there at that area. Now, we're much more likely to think about the overall system, and how can we expend our dollars in a way that gives us the best system. And,

sometimes, the best system means not doing the best individual projects, and so there might be some ways to incentive a system perspective versus a very project-focused perspective.

Mr. DEFAZIO. OK. And then, Mr. Replogle, do you have any thoughts about this since you raised this issue, about either the liability issues, or, some way to incent, taking a look at these sorts of alternate solutions?

Mr. REPLOGLE. This is something that comes up in the area of alternative design standards, and could be addressed in the Federal Highway Administration's program for innovation in administration of the Federal code. It was referred to earlier as the Special Experimental Program, and has been used a lot in public-private partnership development. That could also be used in coming up with some ways of reducing this concern about liability among the States in applying design standards.

Mr. DEFAZIO. Well, and what you are saying is perhaps at the point, which if it's an experimental program or it's an exception under Federal rules. I think that immediately raises some flags with people at its exception, as opposed to using a range of accepted standard practice. I think it's important to put an emphasis on looking at lower cost, more appropriate alternatives, that doesn't require you to take an exception or not be part of an experimental program, because I think some lawyer is going to say, "Wait a minute, wait a minute. Exception, exception, we don't like the word exception. We're going to get sued on that, you know, if there's an accident or something."

Mr. REPLOGLE. Yeah. But this special experimental program has been widely used in the Federal Procurement process, enabling States to use innovative design bill procedures and other kinds of approaches to expedite project delivery.

Mr. DEFAZIO. Right. But we want to make it mainstream.

Mr. REPLOGLE. Right. But using that program to start getting more routine exceptions, instead of having to go through a long paperwork process for design exceptions, that special experimental program might be used to facilitate having States take on, with some Federal handholding, to do deviations without having to go through a lot of paper.

Mr. DEFAZIO. Right. And Mr. Kempton, we will certainly look forward to your final report, and I assume that we will look at issues like this when it comes out. Right. When might we expect it?

Mr. KEMPTON. Mr. DeFazio, we are actually planning to start circulating that document, hopefully, by the end of this month, first of next month. We will have something out probably by mid-March.

Mr. DEFAZIO. Well, we'd love to be on the early distribution list so that we can incorporate some of the ideas into our reauthorization working with the chairman because we need to address this situation.

I just wondered, if the chairman would—just one other. I believe there are many cases of inordinate and extreme delay that exceeds the bounds of, shall we say, reasonableness. I am not certain, Mr. Margro, that your project goes there, because as I understand it, it was the California Coastal Commission, which has unbelievable power in your State—which is not extended to entities in any other

States I am aware of. I mean we have an LCDC, but they don't have the power of the California Coastal Commission, who opposed the project, and that's what brought it to a screeching halt. In addition, the United States Marine Corps' opposition from the outset, which I think was somewhat problematic. So I don't know that it was just the NEPA that caused you these problems.

Mr. MARGRO. Mr. DeFazio, thank you. The Coastal Commission was an issue and is an issue, but the points that I made in my testimony we never were able. As soon as we got to that point, that was when the agencies, the EPA and the Corps of Engineers backtracked from what they had originally agreed upon.

So before we even had our hearing with the Coastal Commission and their decision, those agencies were already backtracking and were already asking for more studies and the reopening of those studies and wanted to do more work, despite the fact that we had spent 10 years and $20 million examining every alternative that they had put on the table.

Mr. DEFAZIO. Right. But I think maybe—I'm not sure it's a solvable problem. And, I mean, when you start out being opposed by the Marine Corps and you're going to run into problems with the California Coastal Commission, I'm not sure. I agree that there are often inordinate delays and we need to deal with that. We're not going to do away with NEPA, but we need to look at how States, and California is a State that has taken jurisdiction.

And you've got CEQA, and I am fully willing to accept the equivalence of CEQA, because in many cases it seems to exceed NEPA. But I am not sure whether this project is the best example of these kind of problems, but I am willing to work with anybody who has ideas on how we can obviate unnecessary delays in the future.

Thank you, Mr. Chairman.

Mr. DUNCAN. Well, I don't know. I hope we don't get any worse examples.

Mr. Farenthold.

Mr. FARENTHOLD. Thank you very much, Mr. Chairman.

When Mr. Mendez spoke and answered Mr. Southerland's question, if he were king for a day what would he do, and it would be basically get everybody in a room to decide what it is, rather than government by memo.

I know in my experience working in the private sector, once you got beyond about five letters or memos, it was time to sit down or you weren't getting anywhere. I would appreciate just a brief response from a couple of the other panel members on whether or not they think this would solve that or not.

Mr. KEMPTON. Mr. Chairman, if I work through their day, the one in direct response to Mr. Southerland's question relative to what is the major impediment, I think I can say it in a word. It's "trust." And, if we could be more trusting of our partners in this effort, both with the environmental groups—both with the regulatory agencies with the implementing agencies—if we had performed our responsibility in a way that developed our credibility to a point where we could achieve trust in the process, I think we would have gone a long way to correcting that cultural issue that we have been talking about.

And, you know, we want to be very careful and make sure we are providing some specific recommendations to the Subcommittee on how you can approach this problem, but it really does involve a cultural change. And I'll site, just briefly, the example of the NEPA delegation in California. I can tell you when we first implemented that process and when our legislature did in fact agree to forego a sovereign immunity in the case of transportation projects.

There was a great deal of reluctance—not from the leadership of the Federal Highway Administration, but from some of the staff people, because they had grown up in a culture which was looking very specifically at how we were doing business. Now, I will tell you, and in response to Ms. Napolitano's question, we've had that process in place now for three and a half years, and you've heard the results. And the response from the Federal Highway Administration has been very positive, and I think we have gone a long way in this process to developing that credibility leading to trust.

Mr. FARENTHOLD. All right. Now in the written testimony or background material I was provided, there was a document from the Texas Department of Transportation, Texas being my State. That's the first one I read, but, you know, they list the amount of time it takes to get through some of these Federal agencies and Federal processes, signing up to six years dealing with Fish and Wildlife Service, Austin office. I mean that just seems insane.

One of the things that I learned growing up is a promise isn't a promise unless it's got a deadline and maybe a review isn't a review unless it's got a deadline. And when it gets out, would anyone on the panel like to comment about the possibility of looking at some of these laws and regulations requiring reviews by various agencies in saying, all right. You've got 'x' amount of time, and if you haven't come up with it then, sorry.

Mr. MARGRO. I'd like to comment. I believe that's a very excellent idea. There are in some cases Fish and Wildlife. They have 135 days to give you a biological opinion, and in our case it took over three years after there was a preliminary determination that had already been made that there was No Jeopardy.

There are those issues. The same thing with EPA and Corps of Engineers. There's no time limit set. You have to continue to do the study and to do the analyses that are put on the table, if you ever have any hope of being successful.

Mr. FARENTHOLD. Go ahead.

Mr. REPLOGLE. Yeah. I would say that time limits can be workable, but only if the agencies have the resources needed to meet those time limits. And at a time when, for example, EPA is being asked to take a 36 percent budget hit in the remainder of this fiscal year, their capacity to deliver on timely project reviews is going to be handicapped by those budget cuts.

Across all of the States today, we have massive cutbacks in the resource agency budgets, which impairs their ability to go beyond what is their core regulatory missions to get involved in the planning process early, which can often help forestall the kinds of delays that alarm everyone here in the room. And so I think we have to look at how these pieces connect to each other, and budget decisions do impact the ability of agencies to deliver on time.

Mr. FARENTHOLD. Even with a limited budget, however, or maybe a limited budget is a good thing. Then it forces an agency to set priorities about what they are going to want to deal with. So I just leave that, and I see I'm out of time. So thank you all very much.

Mr. DUNCAN. Thank you very much.

Ms. Napolitano.

Mr. KEMPTON. Mr. Chairman?

Mr. DUNCAN. Oh, yes?

Mr. KEMPTON. I just wanted to say that what you've suggested to the member from Texas is exactly what we're proposing in our Prompt Action provision, which would require a deadline and would require agencies to meet their responsibilities within a specific timeframe.

Now, this issue of staffing is something that we have taken very seriously in California, and it is a problem. And I really recognized what Mr. Replogle is saying. The fact of the matter is in our case, in California, many times the State would provide the consultant support or a staff person to actually aid the regulatory agency in conducting the review.

That did help speed activity along, and so that is one step that there should be a great amount of flexibility on.

Mr. DUNCAN. Thank you.

Ms. Napolitano.

Mrs. NAPOLITANO. Thank you. And Mr. Kempton, if you wouldn't mind, the question that I had posed to Mr. Mendez and an answer in regard to staff training input internally, I know that a lot of things have been done on the outreach. But, what about internally?

Mr. KEMPTON. Ms. Napolitano, I think you hit the nail on the head with respect to we have talked in general about this cultural change that needs to occur, and it really does need to be a separate focus. So I liken it to construction management.

You can do construction management where you're being the construction inspector where you're down there telling the contractor you don't like the mix of concrete or the width of the rebar; or, you can be assuring quality assurance, which is sort of setting the standards and the frameworks.

The Federal Government should be the quality assurance agency, and the State should be the quality control or the construction inspection piece of the equation; and that, I think, is the kind of internal educational process that needs to be pursued with a great deal of vigor.

Mrs. NAPOLITANO. Well, it goes back to what you pointed out in trust, because if you've been able to build up that relationship where you know that what you put on paper is actual fact that is being carried out, then there is that level of trust that you can begin to build on and work for.

The problem is, sometimes, as you stated, there are budget cuts every single State. So how are we going to be able to deal with it? And it isn't budget cuts that were 10 years ago. We were flush 10 years ago. So what's happened between then and now? And what have we learned are we going to be able to do to ensure in the future we are utilizing that as a lesson to be learned so that we can

move forward. And we are downsized, already, and there are going to be more. How do we work together on that?

Gentleman? Anybody?

Mr. REPLOGLE. There is one key thing that could be done—to set aside a portion of the Federal Transportation dollars that go to States and metropolitan areas to help ensure that the resource agencies have the funding to be involved in the planning process, just as funding is set aside for State DOTs for their planning process and set aside for metropolitan planning organizations for their planning process—have a similar set-aside for resource agencies. And then everybody's at the table; everybody's in the room and the job can get done.

Mr. BUFFA. And through the chair, Mrs. Napolitano.

When you see some of the specifics that we'll bring forward to you shortly in terms of what we're proposing for the process in a very specific sense, there are a significant number of duplicative efforts, which will help in a time of shrinking resources that the agencies themselves, there is a much smarter way to do this that will require much less of an effort on their part, not more of an effort.

Oftentimes, when people hear talk about the compression of timelines, they get worried that we're going to have to go into overtime and hire additional people, and whatever, if you just get smarter on how to do this, there will actually be less of a demand on their resources than more.

Mrs. NAPOLITANO. But isn't it something that, internally, you can identify? Because we wouldn't be able to tell you what those areas are that you can prevent that duplicity.

Mr. BUFFA. Absolutely, and that's exactly——

Mrs. NAPOLITANO. Which is going back to staff training input, being able to identify and be able to look at them and see if that is one of the areas that you may be able to move forward to. Answer, Mr. Margro.

Mr. MARGRO. Yes, thank you, Congresswoman Napolitano.

I would just say one additional thing. You know, there's this old expression that, you know, people pay attention to whatever the boss pays attention to, and I think one way to make sure that we're aware of how things are progressing with this whole environmental process and project delivery would be to make sure that there's transparency and reporting back to committees like yourselves, so that we can see examples of what's happening with these projects, how long are they taking, and call us. Call other people on these projects to come and testify why these are being held up, including the agencies themselves.

Mrs. NAPOLITANO. Thank you.

Ms. Miller?

Ms. DEBRA MILLER. Yes, I'd just like to add a couple of additional thoughts. Included in our recommendations that's contained in the written testimony are some ideas that I think would be helpful in this area. And this could be done through law. One is having one lead agency at U.S. DOT. Sometimes the fact that there might be more than one modal administration involved, I think, can lead to delay. And if there were one lead agency was clearly the lead agency and was calling all the shots, things would move much quicker.

I think picking up on something that Mr. Kempton said, what we'd like to see is moving to the place that States are doing the project by project level analysis, and the Federal Highway Administration is doing the oversight, moving towards more programmatic determinations. If we lay out a program of how we will handle certain things and get Federal Highway to sign-off on that, that as long as we're handling it according to our plan, then we can proceed.

I think that that will speed things up too, so I think there are both cultural, attitudinal and leadership issues that could be helpful, and then I think that there are some real, practical, both changes in law and changes in procedures that could also go hand-in-hand in terms of making things speed up.

Mrs. NAPOLITANO. Thank you. And thank you, Mr. Chair.

Mr. DUNCAN. Thank you.

Mr. Hanna is next on our side.

Mr. HANNA. Mr. Kempton. I found a few of your comments very insightful. It matches my 30 years in construction in terms of project delay.

Your comments were fairly nuanced, but I thought very insightful, that micromanaging in the name of good project control, that document length has a measurement somehow of quality or purpose, focusing in place of advancing processing. But one that was particularly interesting to me, an erroneous belief that delay is evidence of diligence, also a failure to penalize delay and reward innovation at the Federal and State, local level.

Those are fundamentally cultural, but they're also very human traits; and, my personal experience is that people do avoid risk and that bureaucracies—and it's not their fault, necessarily—avoid risk more than most. We always used to say that if you wanted to hold a project up ask a question. And I'm just curious if that's kind of the general experience of the panel, and how do you get around a thing like that?

Because it is deeply nuanced. It is cultural, and it also is the natural human element to avoid risk, since basically their checks are the same and their rewards are down. So how do you unwind a thing like that? And, furthermore, how much do you think that adds to the delay, generally, of these processes. Your Orange County Transit Authority seems to think quite a bit.

Mr. KEMPTON. Well, they do if I can be very candid, Mr. Hanna. The fact of the matter is if you look at the history of the project delivery process—and California is an example that is representative of the country, I think—in our own CEQA process, the California Environmental Quality Act, every time the State is sued on a document, that document grows in size, not just for that project, but for every other project that comes after it.

There is an additional step that's taken to avoid that legal challenge that was made; and, so, you take a process that may have resulted in the document this thick, and now it's a process that results in a document that is that thick. And, as I said in my comments, I don't think the size of the document relates necessarily to the quality of it.

So I am sorry that I don't have another solution, then, to say it is a cultural or an attitudinal issue that needs to be developed, but

leadership can, and the Congress and the administration can certainly set a tone for accelerating project delivery. That's the outcome that we are looking for, is getting projects to construction sooner.

That will take some time to move down in the process, but it can work. When I was at Caltrans, I focused on being good partners. In my judgment, the Department of Transportation when I became director was not a good partner. Everybody looked inward and not outward at our customers. And so I spent five years trying to change that culture, and I think I made some progress in that regard, but it is a leadership requirement.

We are going to have to have, I think, the Congress and the administration saying to the Federal Highway Administration and to the States it's OK to focus on accelerated output.

Mr. HANNA. But, implicit in that isn't there the idea that you have to add not just accountability, but an allowance for risk.

Mr. KEMPTON. I agree with that, and I think with respect to the comments that Mr. DeFazio was making, I think that there are some ways. And I hate to say this and my attorneys would probably be very upset with me, but maybe there's a form of design immunity that comes with making decisions within a reasonable framework in terms of flexibility and design standards, which can result in shorter processing times.

Mr. HANNA. Thank you.

Mr. DUNCAN. All right. Thank you very much.

Mr. Barletta is next.

Mr. BARLETTA. Thank you, Mr. Chairman.

And my question will be to Mr. Kempton. I have the pleasure of hosting a listening session in my district this Friday as part of this committee's drafting of a new, long-term Surface Transportation Reauthorization bill. I want to thank Chairman Mica for including my district in his series of meetings behind, held across the Nation, looking at many of the same issues we were discussing here today; namely, improving performance and cutting government red tape.

One of the attendees at this Friday's listening post in my district is Thomas Lawson. He is the co-founder of an engineering design firm that designs, builds roads and bridges in Pennsylvania. He recently told me that during the flood of 2006 an emergency bridge project that normally would take up to four years to complete from design to completion, because of the streamlining of regulations from all agencies involved they were able to design, build and complete the bridge in four months.

Now, I know that the time from when a contract is awarded, a bid is awarded to the notice to proceed, that in itself could take a few months. My question is that streamlining project delivery seems to be an ongoing topic for prior and current reauthorization bills. What is different about today's climate versus previous authorization bills that indicates that we should make some substantial movement in accelerating project delivery?

Mr. KEMPTON. I think our focus has been on jobs and the economy. When we went through the American Recovery and Reinvestment Act process, we had a large sum of money that was made available to the States and to local agencies for funding projects, many of which had not gone through the Federal process.

So in order to spend those dollars quickly, we had to go back and pick up the process to qualify those projects for Federal funding, and we found that that process was onerous and took a considerable amount of time. I referenced that on my testimony relative to amendments to the transportation improvement programs, the Federal TIPs from a conformity perspective.

Those are the kinds of things that can be shortened. But, the environment today, Mr. Barletta, that you've referenced, is the economy. We've got projects that if we can get them out to bid, we are achieving 25 to 40 percent savings on the engineer's estimates for those projects. We have a very hungry construction industry out there, and we want to get everything out but the kitchen sink so that we can take advantage of that environment.

And I think that that along with the developing notion of regulatory reform that's taking place, both within the administration and the Congress, is a very positive thing. And I know Director Buffa wanted to add to that as well.

Mr. BUFFA. Yeah. Through the chair. Mr. Barletta, you used the example of a flood in your district. Two examples we quite often use are the 1994 earthquake which flattened huge portions of the I–10 freeway through Los Angeles that connects downtown Los Angeles to the coast.

Just much more recently, a horrific fire on the Bay Bridge while Mr. Kempton was in the close of his tenure in Caltrans, which he turned around—not in a matter of months, but literally a number of days. That bridge is critical to the circulation of the entire bay area. What we're trying to say is those were natural disasters. We are in an economic disaster.

All of you spend a lot of your time trying to figure out how to create jobs. If you'll accept the economic crisis in the same terms as a natural disaster, those same efforts that expediting mean that you hold, as Members of this Committee, you hold hundreds of thousands of jobs in your hand. You just have to open your hand. They're there. Those of us who have been policymakers in transportation for a long time, I've been at this game since the mid-1980s.

The position we are typically in is coming back here begging for money. Give us money for our project. We are not begging for money. We are talking about projects that are paid for. They are stuck in processing. If you will free that process up and you have to leave all of the environmental safeguards in place, if you'll free that process up and make it smarter, there will be an explosion of jobs nationally.

You hold that many jobs in your power, so that's the point we are trying to make; whether you want to make it analogous to the 1994 earthquake in our area or the flood in your district, the economic crisis is what we're asking to substitute for the motivation to finally, finally make this happen in a big way.

Mr. BARLETTA. Thank you.

Mr. DUNCAN. Thank you very much.

Mr. Southerland is next on our side.

Mr. SOUTHERLAND. Thank you, Mr. Chairman.

You know, I find a really screwed up system when given more money just becomes a really well-funded, screwed up system. And

I find that the American people have very little patience with better funding for really screwed up systems.

As a small business owner and one who ran and has never been a member of elected office before, I am telling you there's a great impatience. OK? And oftentimes, and I have heard members from the panel today talking about we need more money, and that bothers me.

You know, when you talk about 13 years to complete a project and you want more money, OK, I find that much of government, they've got to prioritize. OK? You've got to distinguish the same thing the American people are having to distinguish.

The difference between what is good and what is best, and what I am seeing in its amazing site to be exposed to for the first time, I am seeing a whole lot of activity, but not nearly enough productivity. And I think that the American people want to see results before they sign off on billions upon billions upon billions of more dollars so that we can perpetuate a really screwed up system into a really, really, really screwed up system.

So there've been some wonderful ideas here today. I love the idea of time. Put a time—if you've got an objection to a project. That's probably the single, greatest idea that I've heard today. You know, if I don't put my college children on a budget and say you just come to me whenever you need another $50, well, they're going to keep coming.

If I tell them that $50 has got to last you for, you know, a week, well, they know what the rules are. It really comes down to leadership, though. And I've heard Mr. Kempton. You've mentioned leadership, good leadership, servant leadership perpetuates trust. Great leadership also has the element of communication. OK. Well defined projects; you can't get your hands in every project. And, yet, at all levels of government, the American people feel like the government is involved in every part of our lives.

So, I asked earlier the question, you know, if you were king for a day. I would say Mrs. Miller, I would like to ask you, if you don't mind, because you represent a State. OK? And Mr. Mendez didn't want to speak for you, so I ask you to speak for yourself. If you were queen for the day, what would you get from the Federal Government that would allow the States to not have their future 15 years down the road, to be able to shrink that timeline.

What is the greatest impediment that you see right now for project delivery time?

Ms. DEBRA MILLER. I think the issue that I would put on the table is this issue of allowing programmatic plans so that we're not doing project by project reviews, and that States are doing the project by project analysis. And the Federal Highway Administration or the Federal Government, whichever resource agency it might be, would be doing the oversight of what we're doing.

Mr. SOUTHERLAND. I will say I live in Panama City, Florida, and over the last 10 years we've been affected by a couple disasters that have made some front page news: the hurricanes, obviously, and the most recent, Deepwater Horizon. And I will tell you in the recovery—and somebody that lives on the beach, OK—I would concur what you just said. All right?

If the Federal Government would have come in and provided assistance, this is our town. We know every nook, every cranny. We know the people in need. We need support, and so I would love to see us going forward, but the Federal Government realized that they have a part and they have to play.

But the people on the ground, OK, the local citizens, the local communities, the States know far better what they need for their communities and their State. So I like hearing what you're saying. You've got some great ideas here. It needs to be a partnership, but they needed to be in more of an oversight and supporting role while the States themselves take the ball and run down the field.

So thank you for your input, and I yield back.

Mr. Chairman?

Mr. DUNCAN. Thank you.

Mr. Shuster.

Mr. SHUSTER. Thank you, Mr. Chairman, and thank all of our witnesses for being here today.

I would just like to make a comment on what Mr. Southerland said about putting a timeframe in place. You know, that makes a lot of sense. One of the things we have to do in legislation is to stop these groups from putting lawsuits one after the other and slow walking these things, because that's what I saw.

A highway in my district, 60 miles, took 38 years to build, and it was mainly due to the—you know, first it was the Indiana bat. Then it was a fern. Then it was some pyrite we found, so it just takes forever to do this, and we've got to limit them on allowing them to go to court after court challenge after court challenge. So, but Mr. Southerland is absolutely right. If you put a time limit and the laws line up, I think we can get things done quicker.

My question is concerning—it's very specific, because when we're talking about these things, I like to delve into very specific projects and try to get a sense of how the Federal programs slowed us down. The Anaheim regional transportation intermodal center, which is an important transit site for rail in downtown Anaheim, it's a cost of $184 million; and, of that, the Federal Government is providing $11 million, which is to my calculation about six or seven percent.

How are those Federal funds going to affect the project from moving forward, slow it down? Speed it up, I doubt, but if that's the case, let me know.

Mr. KEMPTON. Thank you, Mr. Shuster.

Frankly, any time there's a penny of Federal money in there, you're subject to the Federal process and we anticipated that, certainly wanting to maximize the amount of available funding coming to that project. We are looking at, programmatically, for our local sales tax measure, a pretty significant shortfall going out into the future based on the decline of the economy that we've just experienced, and so we have to take advantage of every other dollar that might be out there.

However, we have gone through that process. I am happy to say that we have completed the environmental process, and that project will be going to construction this spring. And so, but your point is very well made, and a State or a local agency has to really

give careful consideration from a delivery perspective as to whether or not they want to involve the Federal Government.

When there is a fiscal imperative that you need those Federal dollars, that's when you get caught in the dilemma, because the process does take longer when you have the Federal requirements. Now, we've been talking a lot about the environmental process, and from our perspective this is not just about the environmental process.

It's really about some of the other processes that are in place administratively, regulatory and in some cases statutory. And we are trying to focus on some of the very obvious solutions to the problem, to move project delivery overall ahead faster, and that means jobs will be created sooner.

Mr. SHUSTER. All right. And can you quantify that at all, how much more you had to spend, how you slowed it down from just this project? But also, can you quantify what it does economically or in employment? I don't know if anybody's come in there and sat down with you and made those.

Mr. KEMPTON. I'm not sure that there's necessarily an increase in cost, other than the time-related cost, because process adds dollars to a project. So, for example, the NEPA delegation, which is taking a year or so off the environmental process for many projects in California, at a three or four percent inflation rate, you are saving a significant amount of dollars on a hundred-million-dollar project as an example; so getting it out sooner.

And as I mentioned earlier, to the degree that we can get projects to work right now, we're taking advantage of a very good bid environment and we're helping stimulate the national economy by getting people back to work sooner.

Mr. SHUSTER. Right. Well, thank you for the answer, and just real quick to both Secretary Miller and to you, Mr. Kempton, and your years at the Department of Transportation, California.

I asked the question earlier about this review process. And in Pennsylvania, you get it. The engineers—they stamp it. And I'm told if that stamp should be good enough to allow things to go forward, unless of course it's maybe some multi-billion-dollar where the State wants to just do a little followup, but in Kansas and in California what's the process there as far as projects and engineering, and their review?

Mr. KEMPTON. I'll start, Mr. Shuster.

California is, I think, very interested in what's going on in Pennsylvania. Your design standard flexibility program and practical design, I guess, is the name that we're calling that, has we think worked very effectively. And, again, I know that Caltrans, not to speak for them, is looking very carefully at that approach. It's been more selective or individually focused in terms of project by project attention. A program such as what Pennsylvania and other States are adopting is something that I think would have great application in California.

Ms. DEBRA MILLER. If this is responsive to your question, you know, one of the things, like many DOTs, we do in-house design, but we also do a great deal of design with outside consultants. And we've had to work, again, culturally, with our own design engineers, because, you know, my feeling is if we've hired a qualified

engineering firm and they have stamped the plans, then our engineers don't have to review every single decision that was made by that design engineer.

And I think we've made great progress, but I can tell you eight years ago they would have spent a great deal of time looking at every single calculation that was made; and, so, there is a tendency at every level, I think, for people to think I need to redo it, and we've tried to change that attitude in our department.

Mr. SHUSTER. Thank you very much.

Mr. DUNCAN. All right. I understand that Mr. Long and Ms. Herrera Beutler don't have any questions. Is that correct? Oh. All right. Go ahead, Mr. Long. All right. Go ahead.

Mr. LONG. Thank you, Mr. Chairman.

I've got a question. I asked Mr. Margro first.

You were talking about the delay of up to three years, and was that environmental delays?

Mr. MARGRO. The three-year delay was waiting for the U.S. Fish and Wildlife Service to complete their biological opinion and give a report back on that. What happened was when the——

Mr. LONG. And it was supposed to take 145 days?

Mr. MARGRO. 135 days.

Mr. LONG. OK. And what happened? I'm sorry I interrupted you.

Mr. MARGRO. Oh, sure. What happened is they don't do their final determination until there's a selection of the least environmentally damaging, practicable alternative, which is made by the Corps of Engineers and agreed to with EPA. Once that happens, that triggers the formal consultation that Fish and Wildlife then goes ahead and does their evaluation. It's supposed to be completed in 135 days. In our case, it took a little bit over three years.

Mr. LONG. OK. I've dovetailed that end of the question for Mr. Buffa. You remind me of the attorney, Jerry Spence, when you say in our hands as he would do to the jury, you hold thousands of jobs; and, in this thousands of jobs, if I understood you right, you said the money is there for those projects. All you have to do is open that, but then they did not also say that we have to follow each environmental rule, or did I misunderstand that? And, if so, it doesn't work with your seat right there.

Mr. BUFFA. I'm sorry, Mr. Long, I didn't understand the very last thing you said. We have to follow what?

Mr. LONG. You have to follow—I'm from Missouri. It's probably my New York accent that's throwing you off.

Mr. BUFFA. That's OK.

Mr. LONG. But we have to follow the EPA rule. You say we've got the money for these projects. We're holding in our hands thousands of jobs, but yet we need to—we can expediate these. I'm trying to paraphrase what you said.

Mr. BUFFA. Sure.

Mr. LONG. But you said we can expediate these projects; however, we still need to follow the environmental rules. Is that correct? And, if so, how in the world are we going to do that with what Mr. Margro just went through?

Mr. BUFFA. That comment, Mr. Long was kind of dovetailing something that Mr. Klempton said, that when you see—and we hope that's very shortly—the specifics of what we're suggesting in

this breaking down barriers plan, a lot of it is process related. It would be changes in the process that doesn't affect the environmental process. It would have made Tom's journey shorter and easier only because the whole process would get more efficient. And the best expression I've heard of this problem, we've met with the White House on three separate occasions. We'll be back there tomorrow on this program. They're quite interested.

One of the gentlemen we met with early on, I could see the moment of realization in his eyes when his eyes popped open and he realized what we were talking about: process. There are hundreds of thousands of jobs held up nationally, just because of process. He said I don't think the American people would like to know that hundreds of thousands of jobs in this economy right now are being held up because of paperwork on somebody's desk.

Mr. LONG. I don't like hearing that either, so that's why I earlier said I didn't have any questions, but I've changed my tune.

Mr. BUFFA. And that's what we're talking about. If we are going to proposed changes and process that leave the environmental processing, the environmental examination, in place, you just do it smarter.

Mr. LONG. It sounds like you're dreaming in color to me.

Mr. BUFFA. Well, I've spent a lot of time dreaming.

Mr. LONG. So these projects not only are funded, they're ready to go, thousands of jobs in our hands. They've already cleared the environmental hurdles.

Mr. BUFFA. No, they're in the process——

Mr. LONG. Well, they go back to say they're really not in our hands. We can't open up our hands tomorrow and produce these jobs like you said earlier, correct?

Mr. BUFFA. If you put just one measure out of this whole hearing, if you enacted one measure, which is time limits and expiration dates.

Mr. LONG. That's what we're here for, and I appreciate it, and we will work towards that.

Mr. BUFFA. That, by far, in my humble opinion is the most concrete suggestion that came out of this discussion. But keep in mind again I've been at this a long time. You're tampering with the primal forces of nature with regulatory agencies when you suggest time limits.

Mr. LONG. That's where the dreaming in color part comes in, but as Mr. Buffa would say, if you've got all the jobs, let's get ready to rumble.

And, Ms. Miller, real quickly, I apologize. In your testimony—I want to make sure I got the right question here. OK. Go to this one. In Kansas do all projects go through the Federal process, and if not are there any State or local ones, just go through a State process? And, if so, do you see a time or cost savings when you don't have to go through this Federal malaise?

Ms. DEBRA MILLER. Well, I'd have to say most of our projects go through something that's called a categorical exclusion, and we have a programmatic agreement with Federal Highway, so we make that determination on our own. And, you know, we end up we're a small rural State. We end up with just a handful of

projects, typically, that go into environmental assessments or environmental impact statements.

So the vast majority of our projects, they're moving forward. They're moving forward in meeting deadlines and timeframes. There's no question about that.

Mr. LONG. They're going through the Federal process, most of them, and on the State ones, you notice a big—is there anything you do on the State level that we could change on the Federal level, I guess. Is one of them tying into your projects

Ms. DEBRA MILLER. Well, if we follow the Federal process, that's what we use for environmental work. We follow the Federal process.

Mr. LONG. OK. OK. OK. I yield back, although I'm a minute over.

Mr. DUNCAN. That's all right. Well, my goal is to try to complete these hearings in a couple of hours, and I see Mr. DeFazio has come back.

Do you want to make closing comments?

Mr. DEFAZIO. No, Mr. Chairman. I want to say I think we've got a good framework from this. We'll look forward to Mr. Kempton's report as being instructive. I think there are places where we should be streamlining the process. I was attempting to do that last year. Be happy to share what I thought might work, and then build with what you want to do on top of that. So I'm really pleased, and I think we got a lot of information in a short period of time. Appreciate your respect for everybody's time.

Mr. DUNCAN. All right. Thank you very much.

I think we've heard some very helpful and very informative testimony here today. I do think that we're going to need to do much, much more to penalize delays and reward or incentivize innovations or innovation, or companies that complete projects ahead of schedule.

Finally, as a formality, I would ask unanimous consent that the record of today's hearing remain open until such time as our witnesses have provided answers to any questions that may be submitted to them in writing, and unanimous consent that during such time as the record remains open, additional comments offered by individuals or groups may be included in the record of today's hearing.

That means, ladies and gentlemen, that all of you on the panel and anyone in the audience wishes to submit any additional opinions, suggestions, ideas or testimony can do so, and that will go in the formal record of this hearing. That will conclude this hearing.

Thank you very much.

[Whereupon, at 12:08 p.m., the subcommittee was adjourned.]

OPENING STATEMENT OF REP. STEVE COHEN

Subcommittee on Highways and Transit

"Accelerating the Project Delivery Process: Eliminating Bureaucratic Red Tape and Making Every Dollar Count"

February 15, 2011

I am pleased to be here today to receive testimony from our distinguished guests.

The National Environmental Policy Act (NEPA) is a landmark environmental statute that has protected America's natural heritage for over 40 years. NEPA is an essential tool that helps federal managers make sound, responsible decisions. I believe opportunities exist to achieve NEPA's goals more efficiently, yet I worry that many in Congress are planning to circumvent rather than improve NEPA. Circumventing NEPA is a dangerous game. Let us not forget that months ago, we gathered in this room to discuss the Deepwater Horizon Oil Spill, a project given a categorical exclusion due to the fact that it supposedly posed no environmental risk.

As the Congressman for America's Distribution Hub, I am deeply involved in many major highways and transit projects. Every time I speak with the MPO, the Business Chamber, or TDOT, I hear the same reason why projects aren't moving – it takes years to line up the funding and they can't get the money they need. They do not complain about NEPA; they complain about the rising cost of construction, which is rising faster than inflation, and the inability of Congress to provide funding for these projects. If we want to expedite project delivery, we need to pass a surface transportation authorization that generates more revenue through higher user fees, so localities can pay for these nationally significant projects. We also need to move transportation planning into the 21st Century by using advanced technologies like 3D modeling which enables projects to be completed faster, cheaper, and better.

I would like to thank the witnesses for attending this important hearing today.

STATEMENT OF THE HONORABLE PETER A. DEFAZIO
RANKING MEMBER
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

HEARING ON
"ACCELERATING THE PROJECT DELIVERY PROCESS: ELIMINATING BUREAUCRATIC RED TAPE AND MAKING EVERY DOLLAR COUNT"

February 15, 2011

We're here today to discuss the project delivery process and how to eliminate red tape to deliver transportation projects more quickly, thereby reducing congestion and saving money. I have long been frustrated by a Federal process that seems more and more to focus on the process itself and less on outcomes. In particular, when it comes time for Federal agencies to play their role in approving permits and signing off on a project through the consultation process it seems a project can get held up for months while the paperwork gets shifted from desk to desk. NEPA is far from perfect and today we have the opportunity to explore issues surrounding NEPA and other parts of the project delivery process.

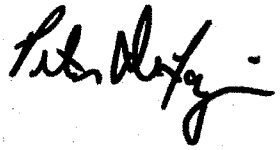
With that said, NEPA isn't the boogeyman it's often made out to be. The environmental review process is just one aspect of the overall project delivery process. Too many times "NEPA" is the default answer to explain a project delay, when other factors, such as lack of funding, are to blame. For instance, according to data from a FHWA survey one of the main causes of delays is a lack of funding and/or the project was a low priority for the sponsor (32.5 percent). A local controversy surrounding the project or project complexity combined to be the main reasons for delay 29 percent of the time. Furthermore, less than one percent of projects (only .3 percent) in a given year require a full-blown Environmental Impact Statement (EIS) while 96 percent of projects are granted a Categorical Exclusion (CE).

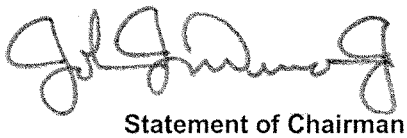
While protecting our environment is a significant goal of NEPA, it isn't just about the environment. It's also about protecting communities and giving the public a voice in proposed transportation projects. Forty years ago a state DOT might have built a freeway right through a community without any thought given to the harm that it might cause residents. Today, in large part because of NEPA, the residents and businesses in that neighborhood have a formal role to play in approving that project and can help shape alternatives to avoid needlessly cutting their community in two. In many cases NEPA is the only way a community can learn about a project and have a voice.

The answer isn't to eliminate NEPA, but to improve the process so that important environmental issues are raised early and duplicative processes are eliminated. For instance, when you're building a project like a streetcar in the existing roadway, that project should be deemed a Categorical Exclusion right from the get go. There's no reason for an Environmental Assessment or even to spend a possible six months on paperwork to get the "CE" when it's fairly obvious that a transit project in an existing roadway will have a net positive benefit on the environment.

SAFETEA-LU made a lot of improvements to NEPA and has significantly reduced the time it takes to deliver a project. For example, prior to SAFETEA-LU it took on average 73 months to complete an EIS. Since SAFETEA-LU was enacted that has been reduced to 43 months. I look forward to hearing from our witnesses today about how we can improve upon the successes of SAFETEA-LU in the next surface transportation authorization in order to help states and cities deliver more projects in less time and for less money.

Thank you.





Statement of Chairman John J. Duncan, Jr. (R-TN)
Subcommittee of Highways and Transit

We are meeting this morning to receive federal, state and local input for streamlining the surface transportation project delivery process. There has never been a greater need for your professional advice and expertise. We have to get this right, and we need your help to do it.

As the reauthorization of the federal surface transportation programs moves forward, the Committee will be looking at potential reforms to the project delivery process.

Funding for infrastructure is harder to come by with each passing day, so we must find ways to do more with less.

According to the "Highway Planning and Project Development Process" timeline put together by the Federal Highway Administration, the project delivery process can take up to 15 years from planning through construction.

Limited financial resources for transportation infrastructure can be more effectively utilized by speeding up the process for project approval. SAFETEA-LU made small, focused changes to the existing project delivery process and we have seen some improvement in delivery times as our witnesses will testify.

For example, the State of California participated in the Surface Transportation Project Delivery Pilot Program, which allows FHWA to delegate its responsibilities for NEPA to the State. Through this delegation

pilot program, California has been able to shave approximately 17 months off of the approval process for a standard transportation project.

While these improvements are a good start, we must do more.

With the Highway Trust Fund unable to keep up with infrastructure demands and with states facing dire financial situations, the time is right to take a hard look at the existing process. There is no silver bullet for speeding up the delivery of transportation projects, but we simply must do better.

SENIOR DEMOCRATIC WHIP

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SUBCOMMITTEE ON AVIATION
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STATEMENT OF CONGRESSWOMAN EDDIE BERNICE JOHNSON

Subcommittee on Highways & Transit

Hearing on:
Accelerating the Project Delivery Process: Eliminating Bureaucratic Red Tape and Making Every Dollar Count

February 15, 2011

Chairman Duncan and Ranking Member DeFazio, thank you for holding this hearing today.

PRINTED ON RECYCLED PAPER

I agree that we need to look at ways to improve the environmental review process for highway projects. However, we also need to be careful not to unravel the Federal Highway Administration's and other agencies' oversight responsibilities.

Last year I heard from several mayors in southern Dallas County about a project, known locally as Loop 9. The idea for this project was first raised in 1957.

In 1991, Dallas County voters approved a Bond Program, authorizing over $175 million in bonds for transportation improvements. This included funding for a Loop 9 Feasibility and Route Alignment Study.

The Notice of Intent for this Study was filed in 2004. Three years later the first Draft Environmental Impact Statement was submitted to the Texas Department of Transportation's Environmental Division. Finally, last year the Federal Highway Administration received it for the first time.

More recently I heard from the City of Balch Springs regarding their concerns with seven outstanding issues that were only recently raised by the Federal Highway Administration. These concerns were regarding a project that began in 2005.

I cite these examples to demonstrate that we need to find out why completing and reviewing environmental studies is taking so many years. During this delay the costs of construction and the purchase of rights-of-way continue to increase.

Last week I introduced legislation, H.R. 551 that will provide help in the environmental review process. My bill would allow states to use their own funds to assist the Federal Highway Administration in completing its review of environmental impact statements. Currently, states may only use certain funds that they receive from the Federal Department of Transportation for this purpose.

I hope that as we consider the next Highway bill, we will consider my legislation and other proposals that will move the environmental study process along more quickly, while ensuring the protection of our environment.

Thank you, Mr. Chairman.

Testimony of:

Will Kempton
Chief Executive Officer
Orange County Transportation Authority
Orange County, California

Before the

United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Highways and Transit

Hearing on:

Accelerating the Project Delivery Process: Eliminating Bureaucratic Red Tape and Making Every Dollar Count

Tuesday, February 15, 2011
10:00 a.m.
2167 Rayburn House Office Building

Chairman Duncan, Congressman De Fazio, members of the subcommittee, my name is Will Kempton and I am the Chief Executive Officer of the Orange County Transportation Authority (OCTA), located in Orange County, California. I am very pleased to have with me this morning, Peter Buffa, a past Chair and current member of the OCTA Board of Directors. Mr. Buffa has been the chief architect of the Breaking Down Barriers initiative and has championed the initiative on the OCTA Board, with our Orange County business community and here in Washington.

We both thank you very much for the opportunity to describe our efforts regarding this initiative and provide a look at the preliminary findings, some of which we hope will become a part of any transportation reauthorization legislation, but others of which can be implemented with changes to current regulations or procedures.

The Orange County Transportation Authority was formed in 1991 by the consolidation of seven separate transportation agencies. This consolidation created a multi-modal authority, which eliminated duplicate transportation functions and increased efficiency in providing transportation services for the more than 3 million residents of Orange County

OCTA has an annual budget of more than $1.2 Billion and operates a county-wide bus system which is among the top twenty busiest in the nation, providing more than 52 million rides annually. In addition, OCTA is one of the funding partners for the Southern California Commuter Rail Authority (SCCRA) which operates three Metrolink commuter-rail lines in Orange County, carrying more than 4 million passengers per year.

On the highway side, OCTA oversees all of Orange County's major investment studies and manages the funding and planning for all future transportation infrastructure improvements in the county. In addition, OCTA is the owner and operator of the State Route 91 Express Lanes toll road which carried more than 12 million vehicle trips in fiscal year 2009-10.

At OCTA we are more than equal partners in the funding of transportation infrastructure projects. This year will mark the successful completion of $4.1 billion in transportation improvements promised to Orange County voters in 1990, when they approved Measure M, a twenty-year half-cent local sales tax program. At the same time, we are beginning implementation of a renewed Measure M, that was approved by 70 percent of our voters in 2006, and is projected to provide more than $15 billion in new local funding for freeway, regional/local streets and roads, and transit improvements by 2041.

As hopeful as we are about the future, there is no denying that the economy in Orange County, the State of California, and the nation, is still in critical need of economic activity and job creation in order to climb out of the current recession.

The Breaking Down Barriers initiative grew out of a combination of the current recession, where scarce capital investment has led to double digit unemployment, coupled with the long-held knowledge that federally funded projects often take an extraordinary length of time--as much as 14 years-- from the time of funding availability to project completion. In early 2010, OCTA began discussions with top United States Department of Transportation officials and key Congressional leaders regarding the opportunity to unlock the jobs tied up in the federal project delivery process and create jobs in Orange County and throughout the nation. This earlier creation of jobs can be accomplished without the expenditure of massive amounts of federal funds.

The infusion of construction jobs into the economy at this particular time has an added benefit. Right now, bids on construction projects at OCTA, throughout California and around the nation are coming in at between 25 and 40 percent below engineering estimates. This means if we can build it faster we can receive more benefit for the dollars spent. In the past year alone, OCTA has saved $138 million from construction bids below engineering estimates. This savings will be put to work to pay for other unfunded projects in the county.

OCTA's discussions with Congress and the Administration over the past months have revealed that others in Washington share the view that now is the time to expedite federal funding and reduce the burdensome requirements long associated with major federal projects. The Federal Highway Administration's (FHWA) "Every Day Counts" initiative seeks to identify and deploy innovation aimed at shortening project delivery. The 437 Plan of House Transportation and Infrastructure Committee Chair John Mica (R-FL) is seeking to apply the goal which was achieved in the shortened timeframe it took to rebuild the collapsed Interstate 35W bridge in Minneapolis, to all federally funded projects. President Obama recently authored an op-ed piece in the Wall Street Journal criticizing "absurd and unnecessary paperwork requirements that waste time and money" and issuing an Executive Order to review existing rules that stifle job creation.

OCTA has been in contact with the United States Department of Transportation, FHWA, Mr. Mica's office and the White House Office of Intergovernmental affairs to coordinate our efforts with them.

The Breaking Down Barriers initiative has been a process of listening and collecting the experiences of OCTA counterparts in California and across the nation. OCTA has reached out to state and local governments, as well as key transportation industry and business associations such as the American Association of State Highway Transportation Officials (AASHTO), the American Public Transportation

Association (APTA), and the U. S. Chamber of Commerce for their assistance in this initiative. These efforts have yielded broad support and specific suggestions regarding ways to improve and expedite the delivery of federal transportation projects.

In addition, OCTA has contracted with the firm of Cambridge Systematics, which is using Susan Binder as their principal investigator, to conduct in-depth interviews with transportation providers and coordinate these results to find the most promising areas to seek specific changes in statutes or regulations to expedite project delivery. Together, we have conducted over 40 confidential interviews over the past four months with project implementers and trade associations in an effort to collect the widest sampling of recommendations as to where changes in the status quo can expedite project delivery.

The OCTA final report is still in development, but to date we have identified more than 22 changes in existing federal law, regulations, or practices which could speed up the project delivery process. The interviews found that delay in project delivery can be attributed to the following causes:

a. A misplaced federal focus on **micromanaging** in the name of good project control;
b. A misplaced reliance on **document length** in the name of **quality**;
c. A focus on **processing** in place of **advancing** projects;
d. A failure to adopt a federal, state, and local **partnership** effort to replace the highly **risk-averse attitude** presently associated with federal oversight,
e. An erroneous belief that **delay** is evidence of **diligence**.
f. A failure to **penalize delay** and **reward innovation** at the federal and state or local level.

The recommendations flowing from these interviews are grouped into three general areas. The first set of recommendations is intended to shift the federal focus to the outcome of delivery of a transportation benefit. Actions supporting this goal include: providing for universal pre-award spending to state and local entities; clarifying the transportation improvement program amendment process; extending the NEPA delegation authority; removing redundant steps in the environmental review process; and providing for modular or scenario-based conformity determinations.

The second set of recommended actions would encourage federal and state or local project managers to team together for project performance. Actions supporting this goal include: the ability to enter into project and program delivery partnering plans; establishment of "prompt action" provisions at key decision points in the project approval process; establishment of a partnering award program to positively reinforce prompt project action; creation and funding of liaison positions to move projects through decision chokepoints; and expansion of use of the joint permitting process.

The third set of recommendations focus on strategies that recipients can employ internally, in conjunction with federal funding agencies, to reap time and cost savings. Actions supporting this goal would include the development of transportation program data bases and project information that can be universally accessed; the establishment of a federal grant program for innovative contract management; and investment in the internal capabilities to use innovative contracting mechanisms effectively.

There is one point that needs to be clear regarding all of these recommendations. OCTA has specifically reassured the environmental community in California and at the national level that none of the recommendations from the Breaking Down Barriers initiative are intended to eliminate necessary environmental protections related to federal projects. Instead, they are designed to expedite those projects in an environmentally responsible way. OCTA will continue to inform and involve the environmental community as this initiative progresses.

We plan to complete our analysis in the very near future and begin to advocate for changes in legislation and through the regulatory process. We will continue to work with the sponsors of similar efforts to advance all of our identified process improvements. OCTA is committed to pursuing these changes to create the jobs needed in our economy now and to build for better transportation infrastructure in the future.

Thank you once again for the opportunity to testify today. Director Buffa and I would be pleased to answer any questions from the subcommittee regarding the Breaking Down Barriers initiative.

Transportation Corridor Agencies

Written Statement of

Thomas Margro

Chief Executive Officer

Transportation Corridor Agencies

before the

House Committee on Transportation and Infrastructure

Subcommittee on Highways and Transit

United States Congress

"Accelerating the Project Delivery Process: Eliminating Bureaucratic Red Tape and Making Every Dollar Count"

February 15, 2011

Transportation Corridor Agencies

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Mister Chairman, Members of the Committee. My name is Tom Margro and I am the Chief Executive Officer of the Transportation Corridor Agencies, two joint powers authorities formed by the California legislature to plan, finance, construct, and operate toll roads in Orange County, California. Thank you for the opportunity to speak before the House Committee on Transportation and Infrastructure's Subcommittee on Highways and Transit to discuss our agency's ongoing challenges over more than 15 years to secure the federal approvals needed to build the 241 toll road. Not only is this project critical to alleviating congestion in Orange County, but it is a project that will: (1) create over 34,000 jobs and (2) that requires no government funding. Based on our experiences with the 241 project, we have recommendations for improving the environmental review process so that we can expedite project delivery and reduce costs on projects around the United States.

Introduction

The 241 toll road in Orange County has been in the planning process since 1981. It is designed to provide an alternative north-south route to Interstate 5 in southern Orange County and northern San Diego County – one of the most congested Interstate highways in the nation. While the TCA completed the first 51 miles of the toll road system in 12 years, the last 16 miles has been mired in the federal environmental review and permitting process for 15 years. The project was intended to be a model for improving the complex federal environmental process by integrating reviews under the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), the Endangered Species Act (ESA) and other federal environmental laws. The state and federal agencies formed what is known as the "Collaborative" under a Memorandum of Understanding (MOU) among the Federal Highway Administration (FHWA), the Environmental Protection Agency (EPA), the Corps of Engineers (Corps) and the U.S. Fish and Wildlife Service (F&W).

Rather than serving as a model for how to make the federal environmental process more efficient, the experience with the Collaborative demonstrates that the federal environmental process is broken and needs fundamental reform. Despite over a decade of effort by these agencies, and the expenditure of over $20 million by the project sponsor, the process failed.

Project Conception and Planning

Orange County completed initial studies of the need for an alternative to Interstate-5 in the 1970s and 1980's. After approving a conceptual corridor in the early 1980s, local government realized that traditional state and federal funding sources would not be adequate to fund the construction of new regional transportation facilities. In 1986, local governments in Orange County established the Transportation Corridor Agencies, public joint-powers agencies, with the task of financing, constructing and operating the 241 and other toll roads.

TCA financed the construction of 51 miles of new regional toll highways -- The San Joaquin Hills (73), Foothill (241), and Eastern (241/261/133) by issuing non-recourse bonds – backed solely by toll revenues and development impact fees collected from new development in the area of the projects. No federal highways dollars were used to construct the projects. Since the bonds are not backed by the government, taxpayers are not responsible for repaying the debt if future toll revenues fall short. Instead, toll and development impact fee revenue go towards retiring the construction debt. **TCA was able to construct 51 miles of toll roads in 12 years.**

The NEPA/404 Collaborative Process

TCA conducted further studies and environmental evaluation of the 241 between 1989 and 1991 and the TCA completed an Environmental Impact Report (EIR) under the California Environmental Quality Act – the state version of NEPA – and, in 1991, adopted a locally-preferred alternative. TCA then embarked on the federal environmental process, including the preparation of a federal Environmental Impact Statement (EIS) and other studies required to comply with the federal Endangered Species Act, the Clean Water Act, the National Historic Preservation Act, the Coastal Zone Management Act and several other federal laws. FHWA acted as the lead federal agency.

The TCA and FHWA initiated the Collaborative process to implement a 1993 agreement (the NEPA/404 Memorandum of Understanding, or NEPA/404 MOU) among the FHWA, the Corps, F&WS and the EPA. The stated purpose of the MOU is to improve interagency coordination and integrate environmental permitting and analysis procedures. It attempts to do this by giving all of the federal environmental agencies a seat at the table, and decision-making authority, throughout the federal environmental process. A key aspect of the MOU is the commitment by all agencies to reach consensus on key decision points throughout the environmental process, including agreement on purpose and need, alternatives to be evaluated in the draft EIS, selection of the preferred alternative that would comply with NEPA, the Clean Water Act and the ESA, and, finally, agreement on mitigation measures. **These key decision points document the collective agreements that the information was adequate for that stage and the project may proceed to the next stage without modification. The MOU includes language preventing agencies from re-visiting their concurrence except in limited circumstances relating to significant new information or other significant changes.**

For the SR 241 Completion, the NEPA/404 MOU included 2 stages. In the first stage, a facilitator was hired to assist the Collaborative in their deliberations, and the Collaborative developed the Purpose and Need statement and the Alternatives for initial evaluation. This stage took 28 months. In the second stage, the technical studies were prepared, alternatives were developed and evaluated; and decisions were made about which alternatives to carry forward for full analysis in the EIS. The last steps of Stage 2 included the identification of an environmentally preferred alternative and agreement on mitigation measures.

The Collaborative agencies and the TCA worked together for an additional six years (over 10 years in total) on the second stage. After release of the draft EIS, the Collaborative evaluated and screened 9 alternatives to identify a practicable alternative that would comply with the requirements of section 404 of the Clean Water Act (the "Least Environmentally Damaging Practicable Alternative" or "LEDPA"). In November 2005, the Collaborative agencies confirmed in writing their earlier agreement on a preliminary LEDPA, referred to as the "Green Alternative." The Collaborative found that other alternatives, including widening I-5 and only making arterial improvements, were not practicable or would have greater environmental impacts than the Green Alternative. Subsequently the National Marine Fisheries Service concurred with FHWA that the project would not likely adversely affect endangered or threatened fish species (the steelhead trout).

The NEPA/404 MOU contemplated that, concurrently with the identification of the LEDPA, F&WS would complete a biological opinion under the ESA and determine whether the LEDPA is not likely to jeopardize the continued existence of federally listed species or adversely modify critical habitat. Since F&WS had been at the table throughout the Collaborative process, the NEPA/404 MOU contemplated that the Service would be able to prepare a biological opinion within the 135-day deadline established by the ESA. While

F&WS eventually did produce a biological opinion, it did so nearly THREE YEARS AFTER the Collaborative agencies had identified the environmentally preferred alternative.

The next step in the process was for TCA to obtain a consistency certification for the preferred alternative under the Coastal Zone Management Act. While none of the preferred alternatives is within the federal coastal zone, a small portion of the project comes within about a half-mile of the coastal zone.

When TCA applied for the consistency certification, certain project opponents, including environmental groups, objected to the project despite the fact that they offered no credible evidence that the project would impact the coastal zone. At the first hint of controversy, federal agency members of the Collaborative (with the exception of FHWA), abandoned the unanimous selection of the Green Alternative as the preferred alternative, asserted the need for additional environmental studies and reopened the debate concerning other alternatives.

The U.S. Army Corps of Engineers, the U.S. EPA, the National Marine Fisheries Service and the U.S. Fish and Wildlife Service all submitted comments in the Coastal Zone Management Act process that criticized the preferred alternative previously identified by these very same agencies.

Conclusion

TCA committed 10 years and $20 million to the Collaborative process. Despite extraordinary efforts to reach agreement with the federal environmental agencies, the process failed. The "streamlined" process envisioned in the NEPA/404 MOU worked initially as intended. The Collaborative agencies developed and evaluated alternatives and eventually agreed on a preliminary LEDPA. But, the federal environmental agencies failed

to carry through on the requirements of the MOU or on the decisions reached through the Collaborative process. In the face of controversy over the project, the federal environmental agencies refused to defend the process that they themselves developed and touted as the solution to the lengthy environmental approval and permitting process. Not only did they refuse to defend the process, but they backtracked from their prior agreements regarding the identification of a preferred alternative. And, rather than resolving differences through the Collaborative process, some of the federal agencies publicly questioned the project during the Coastal Zone Management Act process.

Recommendations for Improving the Environmental Review and Project Approval Process

TCA has the following proposals for improving the environmental review process in light of its experiences with the 241 completion project:

1. Allow projects in states with stringent environmental review laws, including "mini-NEPA's" as they are sometimes called, such as California, to meet federal environmental review requirements through compliance with state laws; in those instances, allow the state law process to provide the compliance with NEPA and other federal laws such as the Clean Water Act, Endangered Species Act and National Historic Preservation Act.

2. Where the project sponsor, lead agency and other federal agencies are part of a coordinated plan for environmental review or Collaborative process, a federal agency cannot change its concurrence or approval of a particular action (including selection of a preliminary LEDPA) absent new developments or the discovery of new facts, that they did not know or could have known at the time of the approval.

3. Require FHWA to develop an MOU with EPA Regarding the Reasonable Range of Alternatives for Highway Projects. Many highway projects are delayed by lengthy disputes with EPA over the range of alternatives that need to be evaluated in the EIS. EPA commonly argues that highway NEPA documents are required to consider transit and other alternatives to highway projects even where a transit alternative is inconsistent with the regional transportation plan. EPA uses its leverage under the NEPA/404 MOU to require FHWA and state transportation departments to evaluate alternatives that were rejected in studies leading to regional transportation plans. FHWA should seek agreement with the EPA and the other resource agencies that highway environmental documents are not required to evaluate mode alternatives that are inconsistent with the mode choices reflected in the regional transportation plan.
4. Establish NEPA Safe-Harbor Rules. NEPA and the CEQ regulations authorize FHWA to adopt NEPA implementing regulations. Congress should direct FHWA to implement "safe harbor" rules that provide a safe harbor for environmental documents that incorporate FHWA-approved approaches to environmental review (e.g., growth-inducement, cumulative effects, alternatives, project purpose and need). Alternatives analysis could be deemed adequate if it includes two alternatives that minimize significant effects of the project. Project growth-inducement analyses could be deemed adequate if they utilize the growth projections approved by the metropolitan planning organization.
5. Adopt Tiering Regulations. Tiering of NEPA documents provides an opportunity to expedite environmental review by avoiding duplication of the analyses of regional and programmatic issues (e.g., mode alternatives, growth-inducement) during preparation of subsequent tiers. Tiering often does not expedite environmental review (and may result in delays) because the NEPA regulations do not provide assurances to project sponsors that FHWA and the resource agencies will not revisit tier 1 issues during subsequent environmental review tiers. Congress should direct

the CEQ and FHWA to revise their NEPA regulations to provide that subsequent tiered NEPA documents shall not reconsider issues addressed in prior NEPA documents concerning the project or action.

6. Impose Limitations on Scope of Resource Agency Review. Many delays occur as a result of disputes between FHWA and the resource agencies. Often, these disputes involve issues that are outside of the jurisdiction of the resource agencies (e.g., scope of traffic analysis; construction cost estimates; engineering feasibility). Legislation could limit resource agency comments to issues within the jurisdiction and expertise of the resource agency and could require resource agencies to accept the evaluation of the FHWA on traffic, engineering and cost issues.

TCA also recommends the following change to the Coastal Zone Management Act, recognizing that it is outside the jurisdiction of the House Transportation and Infrastructure Committee:

1. Restrict the applicability of the Coastal Zone Management Act to projects that have a direct impact on resources within the coastal zone. The law and implementing regulations require a CZMA consistency determination for projects that affect land or water uses of a coastal zone even if the project is not in the coastal zone if the project has any foreseeable effect on the coastal zone or coastal resources, including direct, indirect, or cumulative. This standard allows the coastal agency to deny a consistency permit based on unsubstantiated and amorphous claims.

2. Require that the state coastal agency, in certifying consistency with the Coastal Zone Management Act, consider as a reasonable alternative only those alternatives which: (a) meet the project purpose and need, (b) the project sponsor is authorized to carry out, and (c) there are funds available for the project, or, there is a reasonable

expectation that funds can be obtained (such as through public-private partnerships or bonds).

3. In evaluating consistency certifications, the Department of Commerce should be required to defer to the determinations of reasonableness of alternatives made by departments of transportation or by federal transportation agencies. The regulations state that Commerce "should" defer to those agencies' determinations, but such deferral should be mandated.

We have appended to the testimony a chronology of events associated with this project and certain relevant letters and documents. We thank you for the opportunity to provide testimony and look forward to answering your questions.

CHRONOLOGY

The Toll Roads
Stop sitting. Get moving.

Collaborative Participants

- The Collaborative members included: the U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, Federal Highway Administration and California Department of Transportation, the U.S. Marine Corps also participated actively on issues relevant to the U.S. Marine Corps Base at Camp Pendleton.
- The TCA participated as the lead agency for the SR 241 Completion project under the California Environmental Quality Act.
- The chronology below does not list all 80+ Collaborative meetings or all the other meetings held with various Collaborative participants, such as meetings with the U.S. Fish and Wildlife Service on the Endangered Species Act consultation.

1993-1996
Began NEPA process

1996-2000
Began process pursuant to NEPA 404 MOU

Collaborative agreed on Purpose and Need, evaluation criteria, types of alternatives and the draft project alternatives to be evaluated in the technical studies for the EIS

24 alternatives, consisting of 19 toll road alternatives, 3 non-toll road alternatives and 2 no action alternatives).

2001-2002
Collaborative agreed on content and methodology for technical studies, criteria for elimination of alternatives. Informal consultation with U.S. Fish and Wildlife Service.

2002-2003
Collaborative studied alternatives and their impacts. Removed two alternatives that went further east into Marine Corps Base Camp Pendleton from further consideration.

June-August 2003
Eliminated eight alternatives from additional detailed consideration in Draft EIS, based on several evaluation parameters.

2003-2004
Conducted practicability analysis and determined that three toll road alternatives were practicable. Refinements to alternatives to reduce impacts and Collaborative input on refinements and mitigation measures to reduce impacts.

May-August 2004
Public review of Draft Environmental Impact Statement.

2004-2005
The Collaborative unanimously agreed that the "Green Alternative" was the preliminary Least Environmentally Damaging Practicable Alternative (LEDPA).

February 2005
FHWA requested formal Endangered Species Act Section 7 consultation with the U.S. Fish and Wildlife Service.

September 2005
U.S. Fish and Wildlife Service issued preliminary conclusion that the project is not likely to jeopardize the continued existence of any endangered or threatened species or to adversely modify any critical habitat.

February 2006
TCA Board of Directors certified Environmental Impact Report under California Environmental Quality Act.

November 2006
Last formal Collaborative meeting (by teleconference) pending coastal consistency certification

May 2007
National Marine Fisheries Service issues concurrence with Federal Highway Administration determination that project would not likely adversely affect the Southern California DPS of steelhead or its critical habitat.

February 2008
California Coastal Commission objects to TCA's coastal consistency certification.

March 2008
TCA appeals Coastal Commission objection to Secretary of Commerce.

April 2008
U.S. Fish and Wildlife Service issued Biological and Conference opinion finding that the project is not likely to jeopardize the continued existence of federally listed species or adversely modify proposed or designated critical habitat.

December 2008 – Secretary of Commerce sustains Coastal Commission objection to TCA's consistency certification.

2008
EPA, Army Corps and USFWS publicly question their prior agreement on LEDPA and submit comments to Secretary of Commerce that contradict prior Collaborative agreements and seek to distance themselves from the Collaborative process.

2000 | 2002 | 2004 | 2006 | 2008

May 25, 1961
President John F. Kennedy threw the gauntlet down to Congress – let the first man to walk on the moon be an American, and not a Russian.

September 12, 1962
President Kennedy proclaimed America's goal of putting a man on the moon in that decade.

July 20, 1969
Neil Armstrong became the first man on the moon.

1961 | 1962 | 1969

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET NW
WASHINGTON, D.C. 20314-1000

MAY 28 2008

REPLY TO
ATTENTION OF:
Civil Works Directorate - Operations

Joel La Bissonniere
Assistant General Counsel
for Ocean Services
National Oceanic and Atmospheric Administration
Washington D.C. 20230

Dear Mr. La Bissonniere:

I am responding to your May 1, 2008 letter to LTG Robert Van Antwerp, Commander of the U.S. Army Corps of Engineers (Corps) in which you requested comments from the Corps concerning the Foothill/Eastern Transportation Corridor Agency (TCA) appeal of the California Coastal Commission's objection to the construction of TCA's proposed extension of California State Route 241 in Orange County, California. This letter represents my agency's official response to your Federal Register notice of March 17, 2008.

TCA's proposed project would entail the discharge of dredged or fill material into waters of the United States. Pursuant to Section 404 of the Clean Water Act (CWA), Department of the Army authorization (through a Corps Section 404 permit) is required for such discharges. Our Los Angeles District office has been engaged for many years with the Federal Highway Administration (FHWA), Environmental Protection Agency (EPA), Fish and Wildlife Service (FWS) and others in an effort to develop an environmental impact statement (EIS) to evaluate various alternatives for this project. Pursuant to the National Environmental Policy Act (NEPA), FHWA is the lead federal agency responsible for preparing this EIS.

The draft EIS was circulated for public review in 2004. It evaluated eight "build" alternatives, all of which meet the overall project purpose to "provide improvements to the transportation infrastructure system that would help alleviate future traffic congestion and accommodate the need for mobility, access, goods movement, and future traffic demands on the I-5 freeway and arterial network in the study area." Based on the best information available at the time, the Los Angeles District determined in 2005 that six of the eight build alternatives (as toll roads) were available to TCA and thus "practicable," for our CWA Section 404 evaluation purposes.

Also in 2005 (and pursuant to the 1994 State of California Memorandum of Understanding between FHWA, California Department of Transportation, EPA, FWS, National Marine Fisheries Service, and the Corps on integrating the NEPA and 404 processes for transportation projects), the Los Angeles District preliminarily identified alternative A7C-FEC-M ("green" alignment) as the least environmentally damaging practicable alternative (LEDPA). As of the date of this letter, this preliminary determination has not changed. Federal regulations governing

our regulatory program prohibit granting of Section 404 authorizations unless the Corps determines that the proposed action constitutes the LEDPA and that the proposed alternative is not contrary to the public interest. A finalized EIS that satisfies the Corps' statutory requirements is necessary before our agency can complete these determinations and render a permit decision. The Los Angeles District Commander will ultimately be the Corps decision maker for TCA's permit application.

Two of the eight build alternatives were found not to be available to TCA because they were not toll road alternatives. Because they were not available to the applicant (TCA), they were not considered to be practicable under the definition of that term in our CWA Section 404(b) (1) regulations. These non-toll road alternatives could meet the overall project purpose, and to ensure NEPA compliance, these alternatives were carried through for analysis in the draft EIS.

The interagency effort to develop the environmental review documents for this proposed project is known as the "Collaborative". The Collaborative is the forum that has been used for many years to implement the procedural provisions of the 1994 NEPA/404 Integration MOU which has so far lead to the publication of the draft EIS and preliminary identification by the Corps and EPA of the LEDPA. The Collaborative is now actively working with FHWA to move the federal environmental review process forward; however substantial work remains with respect to both the NEPA and the Section 404 permit application processes, including an evaluation of information received subsequent to the release of the draft EIS. Release of the Corps' standard Public Notice (PN) soliciting public and agency comment on the proposal is expected to take place concurrent with the publication of FHWA's Federal Register Notice of Availability of the final EIS. Any substantive comments received on the PN and final EIS would be given full consideration in helping us to determine compliance with the CWA regulations and in understanding the scope of potentially significant public interest factors – both evaluated in our Record of Decision (ROD). Once the ROD is complete, the Corps can issue a permit decision.

In our regulatory role in reviewing applications for permits to discharge dredged and fill material into waters of the United States, my agency is neither a project proponent nor opponent. We are committed to fair and balanced permit decisions which acknowledge the legitimate needs of permit applicants as well as the public's interest in protecting the aquatic ecosystems and other environmental resources. I appreciate the opportunity to provide these official U.S. Army Corps of Engineers agency comments to your March 17, 2008 Federal Register notice. If you have any questions please call Jennifer Moyer, Acting Chief of our Regulatory Program at (202) 761-4599.

Sincerely,

Steven L. Stockton, P.E.
Director of Civil Works

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Ecological Services
Carlsbad Fish and Wildlife Office
6010 Hidden Valley Road
Carlsbad, California 92011

In Reply Refer To:
FWS-OR-1041.22

SEP 30 2005

Mr. Gene K. Fong, Division Administrator
U.S. Department of Transportation
Federal Highway Administration, California Division
650 Capitol Mall, Suite 4-100
Sacramento, California 95814

Attention: Mary Gray and Stephanie Stoermer

Subject: Preliminary Conclusions for the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), A7C-FEC-M Initial Alignment, Orange and San Diego Counties, California

Dear Mr. Fong:

In our letter dated August 17, 2005 (FWS-OR-1041.20), regarding our formal consultation and conference in accordance with section 7 of the Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*), on the referenced project, we indicated we would provide you with preliminary conclusions for listed species and identify any outstanding issues by September 30, 2005. You had specifically requested that we provide a "preliminary" jeopardy/non-jeopardy determination on the endangered Pacific pocket mouse (*Perognathus longimembris pacificus*, "PPM") to further the National Environmental Policy Act process for the project.

Based on our draft analyses, we have determined in our preliminary conclusions that the construction and maintenance of the SOCTIIP A7C-FEC-M Initial Alignment (the "proposed action") will not jeopardize the continued existence of the Riverside fairy shrimp (*Streptocephalus woottoni*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), tidewater goby (*Eucyclogobius newberryi*), southwestern willow flycatcher (*Empidonax traillii extimus*), least Bell's vireo (*Vireo bellii pusillus*), or thread-leaved brodiaea (*Brodiaea filifolia*). Our preliminary conclusions also support a no adverse modification determination for designated critical habitat for the San Diego fairy shrimp and tidewater goby and proposed critical habitat for the thread-leaved brodiaea.

Our draft analyses for the arroyo toad (*Bufo californicus*, "toad"), coastal California gnatcatcher (*Polioptila californica californica*, "gnatcatcher") and its designated and proposed critical habitats, and PPM identify significant project-related impacts to individuals, populations and habitat for these species. Regarding the toad and gnatcatcher, conservation measures identified by the Transportation Corridor Agencies ("TCA") in the April 2004 draft Environmental Impact

TAKE PRIDE IN AMERICA

BUCK UP AMERICA

Statement/Subsequent Environmental Impact Report ("DEIS") to avoid and minimize impacts to these species will provide the basis for no jeopardy/no adverse modification determinations. However, because of impacts that are not fully offset, we believe that our overall analyses and final no jeopardy/no adverse modification determinations would be further supported by implementation of additional conservation measures. We will discuss our recommendations for additional conservation and other measures in an upcoming consultation meeting.

Regarding PPM, the San Mateo North population is necessary for the survival and recovery of the PPM because it is one of only four populations known for the species. The PPM recovery plan calls for stabilizing and protecting all existing populations and establishing 10 populations within its historic range. Based on our analysis, we have determined that the proposed action as described in the Biological Assessment likely would increase mortality factors at the San Mateo North site during construction and in association with the direct and indirect effects of toll road operation. The proposed action would also reduce the area of suitable habitat available to PPM at San Mateo North. This loss of suitable habitat likely would reduce the ability of the site to support large population fluctuations that are characteristic of this species. Absent the adoption of the measures described below, this loss would effectively "cap" the size of the San Mateo North population during population expansions. Population expansions during favorable conditions likely are essential for sustaining this isolated population through periods of environmental adversity when individuals may forego reproduction and population persistence relies on adult survivorship. Coupled with increased mortality factors likely associated with animals entering the roadway, roadway lighting, predator concentrating effects, and increased fire frequency, the proposed action further increases the vulnerability of the San Mateo North population.

This increased vulnerability can be addressed by the adoption of an adaptive management program for the San Mateo North population and the incorporation of the following minimization and conservation measures into the project:

A. With the approval of and coordination with Marine Corps Base Camp Pendleton (MCBCP), establish an endowment and hire an entity to adaptively manage the PPM population at San Mateo North. The amount of the endowment must be supported through a property analysis record ("PAR") or another similar cost calculation method that is indexed for inflation and incorporates funding for; 1) invasive species control, 2) habitat management and enhancement, 3) predator control, 4) control of public access, 5) PPM population monitoring and augmentation, and 6) contingencies.
B. Construction of a barrier to small mammal movement along the entire western edge of the roadway alignment in the San Mateo North area to prevent PPM from entering the roadway and getting killed.
C. Minimization and shielding of all roadway lighting, including light cast by vehicle head and taillights, from adjoining habitat areas. This measure may require the construction of a block wall or other solid shielding to prevent light from entering adjoining habitat. All

walls constructed adjoining PPM habitat shall be constructed to minimize perching opportunities of owls and other avian predators.

D. Minimizing the potential for fire ignitions associated with toll road construction and usage to travel into adjoining habitat. This measure should minimize the width of any fire break by means of engineering (e.g., block or crib walls adjoining habitat).

E. Development of a fire response plan in coordination with the local fire agencies to minimize the detrimental effects of fire suppression activities in the habitat should a fire occur.

We understand that TCA is willing to implement these additional conservation measures and to work with MCBCP and our agency to assure the long-term conservation of the San Mateo North population of the PPM. Based on this commitment, we have made a preliminary determination that the proposed action will not jeopardize the continued existence of the PPM.

We anticipate further discussions with your agency, TCA and the California Department of Transportation (Caltrans) regarding the issues in this letter prior to providing our final conclusions and a draft biological opinion for your review and comment. If you have any questions regarding this letter, please contact Jill Terp of my staff at (760) 431-9440, extension 221.

Sincerely,

Karen A. Goebel

Karen A. Goebel
Assistant Field Supervisor

cc:
Macie Cleary-Milan, TCA
Sylvia Vega, Caltrans

DEPARTMENT OF THE ARMY
LOS ANGELES DISTRICT, CORPS OF ENGINEERS
P.O BOX 532711
LOS ANGELES, CALIFORNIA 90053-2325

November 1, 2005

REPLY TO
ATTENTION OF:
Office of the Chief
Regulatory Branch

Mr. Gene Fong
Division Administrator
U.S. Department of Transportation
Federal Highway Administration
650 Capitol Mall, Suite 4-100
Sacramento, California 95814

Dear Mr. Fong:

We have reviewed your letter dated October 13, 2005 and received October 17, 2005 requesting our agreement on the South Orange County Transportation Infrastructure Improvement Project ("SOCTIIP"; "Project") alternative most likely to represent the least environmentally damaging practicable alternative ("LEDPA").

The Project's jointly prepared Environmental Impact Statement ("EIS") and Subsequent Environmental Impact Report ("SEIR") evaluated eight build alternatives and two no action alternatives. In our earlier review, the Corps found the Interstate 5 Widening and Arterial Improvement Only alternatives to be impracticable because neither is available to the applicant, (i.e., Transportation Corridor Agencies; "TCA"), for acquisition and implementation. Of the six remaining build alternatives, the A7C-FEC-M alternative appears to be the 'preliminary' LEDPA based on information contained in the draft EIS/SEIR and its appendices/technical studies; Table 1.1 of the draft EIS/SEIR entitled *Evaluation Matrix Summary of Adverse Impacts Before Mitigation*; public comments received on the draft EIS/SEIR (dated 2004) and the Corps' preliminary Public Notice (dated 2004); the Corps' final jurisdictional determination for the SOCTIIP (letter dated September 27, 2005); and the U.S. Fish and Wildlife Service's preliminary conclusions for the A7C-FEC-M alternative (letter dated September 30, 2005).

In accordance with the 1994 California National Environmental Policy Act ("NEPA")/Section 404 of the Clean Water Act ("404") Integrated Process Memorandum of Understanding ("MOU"), we offer our agreement that the A7C-FEC-M is the 'preliminary' LEDPA. Please be advised this determination does not constitute our final Department of Army permit decision. As part of our final regulatory decision-making process a final Corps Public Notice must be published to solicit agency and public comments on the TCA's proposed action as well as to consider all relevant public interest review factors outlined in 33 C.F.R. § 320.4(a)(2) to evaluate whether the A7C-FEC-M is contrary to the public interest.

I am forwarding a copy of this letter to Mr. Steven John, Environmental Protection Agency, 600 Wilshire Blvd., Suite 600, Los Angeles California 900017; Ms. Jill Terp, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, California 92011; California Department of Transportation, Ms. Smita Deshpande, 3337 Michelson Drive, Suite 380, Irvine, California 92612; and Ms. Macie Cleary-Milan, Transportation Corridor Agency, 125 Pacifica, Irvine, California 92618.

If you have any questions, please contact Ms. Susan A. Meyer of my staff at (213) 452-3412. Please refer to this letter and 200000392-SAM in your reply.

Sincerely,

for David J. Castanon
Chief, Regulatory Branch

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

November 8, 2005

Gene K. Fong, Division Administrator
Federal Highway Administration, California Division
650 Capitol Mall, Suite 4-100
Sacramento, CA 95814

Subject: Concurrence on the Preliminary Least Environmentally Damaging Practicable Alternative for the South Orange County Infrastructure Improvement Project, Orange County, California

Dear Mr. Fong:

The Environmental Protection Agency (EPA) has reviewed Federal Highway Administration's (FHWA) October 17, 2005 letter requesting concurrence, under the National Environmental Policy Act/Clean Water Act (CWA) Section 404 Integration Process Memorandum of Understanding (NEPA/404 MOU), on the preliminary least environmentally damaging practicable alternative (LEDPA) for the South Orange County Infrastructure Improvement Project (SOCTIIP), Orange County, California. We appreciate the interagency coordination efforts by FHWA, California Department of Transportation, and Transportation Corridor Agency to identify the LEDPA.

EPA concurs that the A7C-FEC-M Initial Alignment is the preliminary LEDPA. Our concurrence is based on: 1) the information contained in the Draft Environmental Impact Statement (EIS) and its technical studies, 2) the preliminary determination by Fish and Wildlife Service, dated September 30, 2005, that the A7C-FEC-M Initial Alignment will not jeopardize the continued existence of listed species, including the Pacific pocket mouse, and 3) the concurrence by the Corps of Engineers, dated November 1, 2005, that alternative A7C-FEC-M is the preliminary LEDPA.

EPA looks forward to working with the SOCTIIP Collaborative on the development of the conceptual mitigation plan for impacts to aquatic resources, to be completed in advance of the Final EIS. This is the next step in the NEPA/404 integration process. EPA will also provide comments on the Final EIS pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and Section 309 of the Clean Air Act, as well as the Corps of Engineers Final Public Notice for the Clean Water Act Section 404 permit when they are

published for public review. If you have questions, please contact me or Matthew Lakin, the lead reviewer for this project, at (415) 972-3851 or Lakin.Matthew@epa.gov.

Sincerely,

for Duane James, Manager
Environmental Review Office

Cc: Susan Meyer, Army Corps of Engineers, Los Angeles District Office
Jill Terp, Fish and Wildlife Service
Smita Deshpande, California Department of Transportation
Macie Cleary-Milan, Transportation Corridor Agency
Larry Rannals, Marine Corps Base Camp Pendleton

file

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
CALIFORNIA DIVISION
650 Capitol Mall, Suite 4-100
Sacramento, CA. 95814

REC'D OCT 2 4 2005

October 17, 2005

IN REPLY REFER TO
HDA-CA
File # 11-ORA-00 SOCTIP
Document # P53352

Steven John
U.S. Environmental Protection Agency
Southern California Field Office
600 Wilshire Blvd., Suite 1460
Los Angeles, CA 90017

SUBJECT: Request for Concurrence on the Preliminary Least Environmentally Damaging Practicable Alternative (LEDPA) for the South Orange County Infrastructure Improvement Project (SOCTIIP).

Dear Mr. John:

Over the past five years, the Federal Highway Administration (FHWA) has, as part of the collaborative process under the National Environmental Policy Act and Clean Water Act Section 404 Memorandum of Understanding (NEPA/404 MOU), coordinated with the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, U.S. Army Corps Of Engineers, Caltrans, Transportation Corridor Agencies, the Marine Corps, and Camp Pendleton. Based on project analysis and past coordination efforts, the FHWA is formally requesting a preliminary LEDPA determination for the SOCTIIP project. FHWA believes that the A7C-FEC-M Initial (see enclosed map) is the LEDPA. We also enclosed the letter from U.S. Fish and Wildlife Service dated September 30, 2005 regarding their preliminary conclusions on the endangered species for the project to help in this decision process. We would appreciate receipt of your concurrence on the preliminary LEDPA determination on or before 45 days, as stated in the NEPA/404 MOU.

Please contact Tay Dam, Senior Project Development Engineer (213) 321-6360, or Macie Cleary-Milan at (949) 754-3483 if you have any questions.

Sincerely,

/s/ Lisa Cathcart-Randall

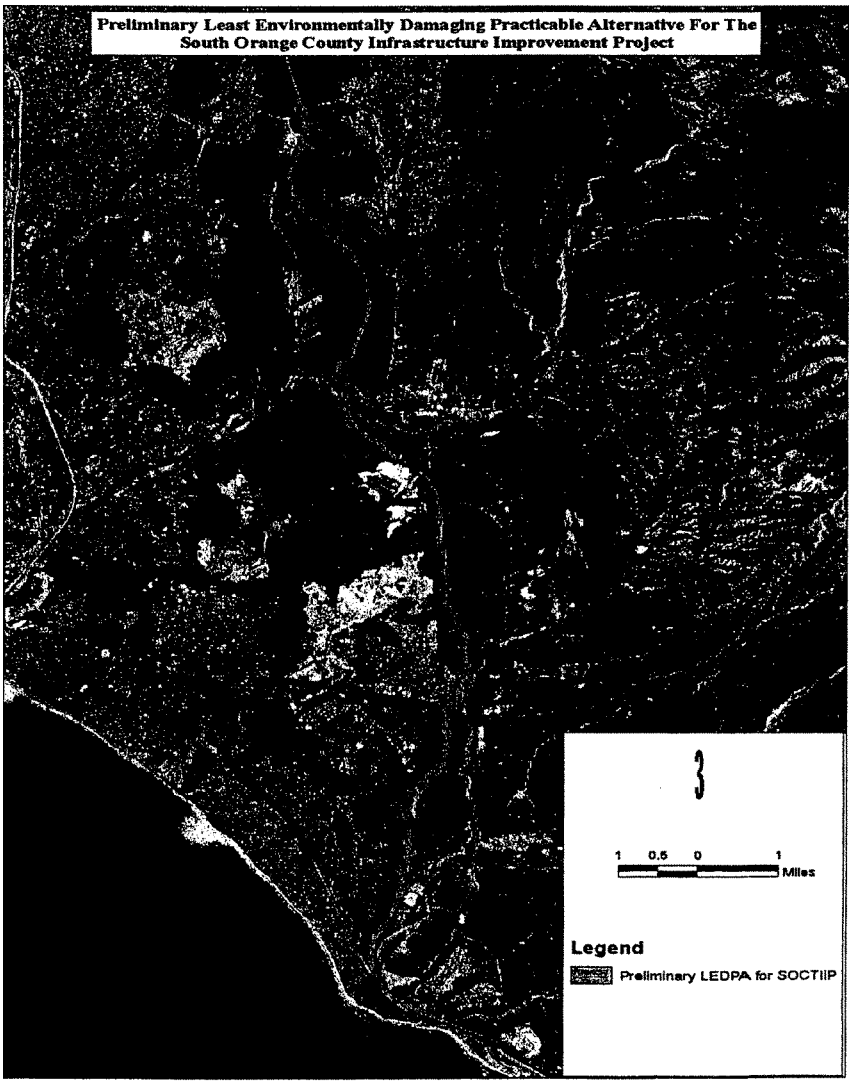
For
Gene K. Fong
Division Administrator

Enclosures

cc: (hard copy w/ enclosures)
Macie Cleary-Milan, TCA
PO Box 53770
Irvine, CA 92619-3770

cc: (email w/ enclosures)
Jay Norvell, Caltrans
Sylvia Vega, Caltrans
Susanne Glasgow, Caltrans
Mary Gray, FHWA
Tay Dam, FHWA
Lisa Cathcart-Randall, FHWA
Larry Vinzant, FHWA

LCathcart-Randall/lmg


Preliminary Least Environmentally Damaging Practicable Alternative For The South Orange County Infrastructure Improvement Project
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1 0.5 0 1
Miles
Legend
Preliminary LEDPA for SOCTIIP

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET NW
WASHINGTON, D.C. 20314-1000

OCT 1 2008

South Pacific Division
- Regional Integration Team

Joel La Bissonniere
Assistant General Counsel
for Ocean Services
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

Dear Mr. La Bissonniere:

I am responding to your letter of September 16, 2008, requesting additional comments regarding the Foothill/Eastern Transportation Corridor Agency (TCA) appeal of the California Coastal Commission's objection to the construction of TCA's proposed extension of California State Route 241 in Orange County, California. You requested any additional information or analysis that has been developed since my letter of May 28, 2008, that would, on substantive grounds and with respect to the criteria described in your letter, affect your examination of the alternative that the State of California asserts is consistent with the coastal zone management program.

The basis of our comments is our statutory authority under Section 404 of the Clean Water Act, and the National Environmental Policy Act (NEPA) requirements that flow from our action. I want to reiterate from our previous letter that substantial work remains with respect to both the NEPA and the Section 404 permit application processes. Since our last letter, the evaluation of information received subsequent to the release of the Federal Highway Administration's (FHWA) Draft Environmental Impact Statement (DEIS) continues. Further, since my letter of May 28, 2008, we have received additional information from both TCA and other organizations regarding the project. However, we have not yet received FHWA's reevaluation of their DEIS. A reevaluation is required in order to fully evaluate and take into consideration information received by FHWA since the publication of its DEIS four years ago. Therefore, at this time it is not possible to draw any conclusions from our review over the scope of the alternatives that will be considered (i.e., "available" to TCA), or which alternative may be selected as the final Least Environmentally Damaging Practicable Alternative.

In our regulatory role in reviewing applications for permits to discharge dredged and fill material into waters of the United States, my agency is neither a project proponent nor opponent. We are committed to fair and balanced permit decisions which acknowledge the legitimate needs of permit applicants, as well as the public's interest in protecting the aquatic ecosystems and other environmental resources. The Los Angeles District Commander and his team have been in regular dialogue with the project applicant (TCA), local stakeholders and environmental groups

and federal partners that make up the collaborative. These discussions have been mutually beneficial and have moved the process forward.

I appreciate the opportunity to provide these comments. If you have any questions please call Linda Morrison, Acting Chief of our Regulatory Program at (202) 761-8560.

Sincerely,

Steven L. Stockton, P.E.
Director of Civil Works

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

October 7, 2008

Mr. Thomas Street
Attorney-Advisor
Office of General Counsel for Ocean Services
National Oceanic and Atmospheric Administration
1305 East-West Highway, Suite 6111
Silver Spring, Maryland 20910

Subject: Additional Comments on the Federal Consistency Appeal by Foothill/Eastern Transportation Corridor Agencies for the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), Southern Orange County and Northern San Diego County, California

Dear Mr. Street:

This letter responds to the September 16, 2008 letter from your office requesting additional comments on the Federal Consistency Appeal, under the Coastal Zone Management Act (CZMA), by Foothill/Eastern Transportation Corridor Agencies (TCA) regarding the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP). In particular, you requested additional comments regarding the new information we referenced in our May 28, 2008 comment letter.

The U.S. Environmental Protection Agency's (EPA) involvement in the project is pursuant to our authorities under the National Environmental Policy Act (NEPA), Section 309 of the Clean Air Act, and Section 404 of the Clean Water Act (CWA). The development of the environmental impact statement (EIS) for this project has followed the NEPA and CWA Section 404 Integration Process for Federal Aid Surface Transportation Projects in California Memorandum of Understanding (NEPA/404 MOU).

To prevent further misunderstanding concerning EPA's position on SOCTIIP, please note that we have not made any final determinations on the SOCTIIP. Our review of the proposed project continues, pending receipt of additional information from the Federal Highway Administration (FHWA). We continue to evaluate the project alternatives in light of changing circumstances and new information that is brought to our attention.

Through the NEPA/404 process and as a member of the SOCTIIP Collaborative, EPA participated in defining the project purpose and need, determining the alternatives for analysis, and reviewing technical reports required under NEPA and the CWA. In November 2005, we gave our preliminary concurrence on the A7C-FEC-M alternative as the Least Environmentally Damaging Practicable Alternative (LEDPA). That preliminary concurrence was based on information available at that time and does not constitute an endorsement or final determination on a preferred project alternative.

Since the Draft EIS was circulated more than four years ago, new information and programmatic authorities have become available that may affect the practicability under both CWA and NEPA of project alternatives that were previously determined to be impracticable. Based on our review of the new information and authorities, EPA believes that additional analysis of alternatives that improve existing infrastructure is warranted. In particular, the following issues should be carefully examined by the TCA, FHWA, and reviewing agencies:

- New federal and state tolling authorities and initiatives may influence the availability of alternatives for SOCTIIP that improve existing infrastructure.
- Context sensitive design and Value Engineering Analysis approaches may enable reductions in the number of takings and other impacts associated with alternatives in urban areas.
- The feasibility and traffic congestion benefits of building High Occupancy Toll (HOT) lanes or converting High Occupancy Vehicle (HOV) to HOT lanes should be evaluated on I-5 in Southern Orange County.
- Given the overlap between the SOCTIIP alternatives and improvements identified in the South Orange County Major Investment Study (SOCMIS), the alternatives analysis should be revised to consider the relevant projects and their impacts.

We expand on these issues in our detailed comments (Attached).

In close coordination with the U.S. Army Corps of Engineers (Corps) and the U.S. Fish and Wildlife Service (FWS), we raised new information and circumstances to FHWA to consider in its reevaluation of the project's Draft EIS, as required under 23 CFR 771.129. In April 2008, FHWA's Office of Project Development and Environmental Review in Washington, DC offered to help answer our questions and provide a second opinion on the findings of Smart Mobility Inc., which report significantly fewer residential impacts are associated with an alternative that improves existing infrastructure. To date, we have not received a response to our questions from FHWA's Washington office, nor have we received FHWA's NEPA reevaluation. EPA believes there remain a number of unresolved questions regarding the feasibility of several alternatives that improve existing infrastructure.

Thank you for considering the above comments during the appeal process. If you have any questions regarding these comments, please call David Smith at 415-972-3464 or Kathy Goforth at 415-972-3521, or refer your staff to Eric Raffini, at 415-972-3544 or Susan Sturges at 415-947-4188.

Sincerely,

Alexis Strauss, Director
Water Division

Enrique Manzanilla, Director
Communities and Ecosystems
Division

Attachment

CC: Gene Fong, Federal Highway Administration
Nancy Bobb, Federal Highway Administration
Christine Johnson, Federal Highway Administration
Will Kempton, California Department of Transportation
Sylvia Vega, California Department of Transportation
Thomas Margro, Transportation Corridor Agencies
Colonel Thomas Magness, U.S. Army Corps of Engineers
David Castanon, U.S. Army Corps of Engineers
Jim Bartel, U.S. Fish and Wildlife Service
Colonel James B. Seaton III, Marine Corps Base Camp Pendleton
Larry Rannals, Marine Corps Base Camp Pendleton
Edmund Pert, California Department of Fish and Game, South Coast Region
John Robertus, California Regional Water Quality Control Board, San Diego Region
Mark Delaplaine, California Coastal Commission

Detailed EPA Comments
Federal Consistency Appeal by Foothill/Eastern Transportation Corridor Agencies for the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP)

I. Smart Mobility Inc. Reports

Since our preliminary concurrence on the proposed least environmentally damaging practicable alternative (LEDPA) in 2005, outside organizations have submitted several technical reports and studies regarding alternatives to the proposed project. Specifically, on behalf of Endangered Habitats League et al., the transportation consulting firm Smart Mobility Inc. (SMI) issued several reports on the feasibility of the alternatives that improve existing infrastructure, including refinements to the I-5 Widening Alternative and the Arterial Improvements Plus High Occupancy Vehicle (HOV) and Spot Mixed-Flow Lanes on I-5 Alternative (referred to as the AIP Alternative). These include technical reports dated July 2005, January 2008 and May 2008. In the reports, SMI claims that by using context-sensitive design techniques in tightly constrained urban areas, the number of residential and commercial takings associated with alternatives that improve existing infrastructure could be significantly reduced.

The I-5 Widening Alternative was one of the eight alternatives studied and carried forward in the Draft Environmental Impact Statement (Draft EIS) because, according to traffic modeling results, it provided the greatest traffic relief and resulted in minimal environmental impacts. However, the large number of takings and displacements estimated by the Transportation Corridor Agencies (TCA) to be associated with that alternative resulted in costs that were several times those of the other alternatives. EPA did not consider this alternative as the preliminary LEDPA under Section 404 based in part on these large estimated impacts on residential communities.

Because the SMI reports brought forward several pieces of new, pertinent information, and TCA and SMI estimates of takings associated with the I-5 Widening alternative were far apart, EPA asked California Division Federal Highway Administration (FHWA) to take the technical lead in evaluating this issue. In close coordination with the U.S. Army Corps of Engineers (Corps) and the U.S. Fish and Wildlife Service (FWS), we submitted a list of outstanding questions and issues to FHWA to consider in its reevaluation of the project's Draft EIS, as required under 23 CFR 771.129.

In response to our requests, we received additional information from the California Department of Transportation (Caltrans), TCA, and California Division FHWA that countered several SMI findings. Transportation experts from SMI later provided rebuttals to these transportation agency responses. Given the conflicting analysis from transportation experts, EPA concluded it may be appropriate for an independent third party to review the SMI recommendations. In April 2008, FHWA's Office of Project Development and Environmental Review in Washington, DC offered to help answer our questions and provide a second opinion on the refined-AIP alternative identified in the SMI Report. To date, we have not received a response to our questions from FHWA's Washington office, nor have we received FHWA's

NEPA reevaluation. EPA believes there remain a number of unresolved questions regarding the feasibility of several alternatives that improve existing infrastructure.

II. Tolling Initiatives and the Evaluation of Alternatives

As stated in the Draft EIS, the purpose of the project is to *provide improvements to the transportation infrastructure system that would help alleviate future traffic congestion and accommodate the need for mobility, access, goods movement and future traffic demand on I-5.* The Draft EIS further summarized the various needs of the project. Together, the project's purpose and need provides the primary basis for selecting reasonable and practicable alternatives for consideration, analyzing those alternatives in depth, and selecting the preferred alternative.

Both NEPA and Section 404 require analysis of a range of alternatives that satisfy both the purpose and need. However, the analysis requirements of NEPA and Section 404 are slightly different. A Section 404 permit can only be issued for the LEDPA, as defined by EPA's 404(b)(1) Guidelines (Guidelines) (40 CFR 230), and, therefore, requires a more detailed analysis of the aquatic impacts of each alternative than typically is required under NEPA.

The Guidelines define a "practicable alternative" as one which is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose. The presence or absence of funding for a particular alternative does not determine its practicability.

In August 2004, the SOCTIIP Collaborative discussed the eight alternatives carried forward in the Draft EIS in terms of their "practicability" under Section 404 and NEPA. Based on the information available at that time, EPA and the Corps determined that the I-5 Widening and the Arterial Improvements Only (AIO) alternatives were impracticable under Section 404 because the applicant did not have the legislative authority to obtain (buy), utilize (e.g. rent), expand or manage non-toll public roads.

Over the last four years, several new provisions have been enacted into federal law that may affect the practicability of the alternatives involving I-5. In particular, new and innovative federal programs promote tolling by both public and private entities on both new and existing interstate highways for the purposes of reducing congestion. The Safe, Accounting, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) Section 1604(b), enacted in 2005, offers States and public authorities, or public or private entities designated by States, broader authority to use tolling on a pilot or demonstration basis. SAFETEA-LU authorized three new federal tolling programs including the Value Pricing Pilot Program, the Interstate System Construction Toll Pilot Program and the Express Lanes Demonstration Program (ELD). The ELD program permits tolling on selected facilities to manage high levels of congestion, reduce emissions in a non-attainment (e.g. South Coast) or maintenance area pursuant to the Clean Air Act Amendments, or finance added interstate lanes for the purpose of reducing congestion.

The Secretary of Transportation is authorized to carry out 15 ELD projects through 2009 to allow States, public authorities, or public or private entities designated by States to collect a toll from motor vehicles at an eligible toll facility for any highway, bridge, or tunnel, including on the interstate. According to FHWA staff who manage the ELD program, opportunities currently exist to conduct an ELD project in California. Therefore, SAFETEA-LU now appears to provide TCA the ability, either acting on its own or in partnership with the Orange County Transportation Authority (OCTA) and/or Caltrans, to implement one of the tolling alternatives involving I-5 that were previously deemed impracticable.

Over the past several years, there has been increased recognition of the benefit of managed highway toll lanes, also know as High Occupancy Toll or "HOT" lanes. With their announcement of the ELD program in February 2008, and by giving states additional flexibility to utilize electronic tolling, the U.S. Department of Transportation has made the use of congestion pricing and HOT lanes a national priority.

Managed HOT or Express Toll lanes are already being used to reduce traffic congestion at several locations throughout Southern California, including on State Route 91 in Los Angeles County and along Interstate 15 in San Diego County. On State Route 91, HOT lanes can maintain free flowing travel speeds (60 to 65 mph) during peak travel hours while carrying up to twice the volume of congested general-purpose lanes.[1] A large-scale congestion-reduction pricing demonstration project has been approved for the San Bernardino Freeway in Los Angeles County. Additionally, both Orange County and San Diego County are considering utilizing HOT lanes on I-5 as part of their long-term transportation planning efforts. Finally, a recent report by the nonprofit research organization Rand Inc., identified congestion pricing as one of the most effective ways to reduce traffic congestion in the Los Angeles area.[2]

Tolling of existing and new transportation infrastructure is also gaining support at the state level. The California Legislature has approved the creation of a new state-level agency - the California Transportation Financing Authority (CTFA) - to issue toll road bonds and authorize local authorities to convert existing HOV lanes into toll projects without further legislative approval. If the CTFA is established, a wide variety of local and regional agencies, as well as the State transportation department, would be eligible to sponsor projects that would expand the use of tolls in California, create a method to finance projects, and ease traffic congestion.

III. Southern Orange County Major Investment Study (SOCMIS)

Another piece of information that has come forward since our preliminary concurrence on the LEDPA is the Southern Orange County Major Investment Study (SOCMIS). The SOCMIS is an effort by the OCTA to examine the transportation needs of south Orange County over the next 25 years. The SOCMIS identifies alternatives for addressing transportation

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[1] Obenberger, Jon, "Managed Lanes," Public Roads, Vol. 68, No. 3, November– December 2004, pp. 48–55. Available online at http://www.tfhrc.gov/pubrds/04nov/08.htm

[2] Moving Los Angeles : Short-Term Policy Options For Improving Transportation/ Paul Sorensen ... [et al.]. 2008. Rand Corporation. Available online at http://www.rand.org/pubs/monographs/2008/RAND_MG748.pdf

demands and other problems in southern Orange County. Earlier this year, OCTA published a draft locally preferred strategy (LPS) which highlights a number of transportation improvements for the region. The draft LPS identifies numerous projects that overlap with alternatives studied under SOCTIIP. For example, the draft LPS proposes to increase capacity of I-5 by: 1) adding one General Purpose lane in each direction on I-5 in the following locations: Avenida Pico to Ortega Highway, Avery Parkway to Alicia Parkway, and in the vicinity of SR-133 to the SR-55 ramps; and 2) adding one HOV carpool lane in each direction on I-5 from the San Diego County Line to Pacific Coast Highway. The draft LPS proposes intersection improvements at many of the same intersections identified in the SOCTIIP I-5 Widening and AIO Alternatives. In effect, if these improvements identified in the draft LPS were implemented, the combined result would look very similar to SOCTIIP's I-5 and AIO alternatives. Therefore we believe it is important that the interagency process further examine the feasibility of these alternatives in light of SOCMIS.

IV. Value Engineering Analysis

Finally, the Final EIS for the I-5 Corridor Improvement Project in Southern Los Angeles and Northern Orange County (August 2007) provides a Value Engineering Analysis that should be considered with regard to whether or not a similar analysis of some of the SOCTIIP alternatives might alter previous estimations of residential takings. In the I-5 Corridor Improvement Project, the project sponsor Caltrans proposes to improve I-5 between State Route 91 and Interstate 605, a length of approximately 9 miles, by widening to provide a minimum of 10 lanes across the entire route. During the development of the project, Caltrans completed Value Engineering Analyses for alternatives of 10 and 12 lanes. According to Caltrans, a Value Engineering Analysis is a function oriented, systematic team approach, used to analyze and refine a product, facility design, system, or service. The Value Engineering Analysis completed for the 10-lane alternative reduced the estimated residential takings needed by 50% - from 208 to 104. For SOCTIIP, Value Engineering Analysis may enable reductions in the number of takings and other impacts associated with alternatives that improve existing infrastructure.

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Ecological Services
Carlsbad Fish and Wildlife Office
6010 Hidden Valley Road
Carlsbad, California 92011

In Reply Refer To:
FWS-OR/MCBCP-08B0352-08TA0525

MAY 28 2008

Thomas Street, Attorney-Advisor
Office of the General Counsel for Ocean Services
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
1305 East-West Highway, SSMC4, Suite 6111
Silver Spring, Maryland 20910

JUN 02 2008

Subject: State Route 241 Extension, Foothill Transportation Corridor – South, in Orange and San Diego Counties, California

Dear Mr. Street:

This correspondence is in response to your letter dated May 1, 2008, requesting our comments regarding the Transportation Corridor Agencies' (TCA) appeal of the California Coastal Commission's (CCC) ruling on February 6, 2008, that the proposed extension of State Route 241, the Foothill Transportation Corridor – South (toll road), in Orange and San Diego counties, California, is inconsistent with the Coastal Zone Management Act.

The primary mission of the U.S. Fish and Wildlife Service (Service) is to "work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people." Specifically, the Service administers the Endangered Species Act of 1973 (Act), as amended, and provides support to other Federal agencies in accordance with the provisions of the Fish and Wildlife Coordination Act.

We have also worked as a member of the interagency "Collaborative" group comprised of the Federal Highway Administration (FHWA), Environmental Protection Agency (EPA), Caltrans, the Department of the Navy – Marine Corps Base Camp Pendleton, Corps of Engineers (Corps), TCA, and the Service. Members of the collaborative have met since the mid-1990's to evaluate various project alternatives with respect to their ability to meet the purpose and need, environmental impacts, and feasibility. We have appreciated the opportunity to participate in this process, although at times we have not been an active participant due to workload constraints.

Our intent in providing comments is to clarify our role in evaluating the proposed project pursuant to the Act and as a member of the Collaborative. We are neither a supporter nor an opponent of the proposed project. We offer the following comments based on our review of the CCC's Principal Brief dated April 11, 2008, and TCA's Principal Brief dated March 18, 2008, regarding the CCC's ruling.

TAKE PRIDE IN AMERICA

CCC's Principal Brief, dated April 11, 2008, stated that the Service "made only a preliminary determination regarding the toll road; it has yet to issue a final opinion" (p. 5). However, the Service completed formal consultation on the proposed project on April 30, 2008, concluding that the project was not likely to jeopardize the continued existence of federally listed species, including thread-leaved brodiaea (*Brodiaea filifolia*), tidewater goby (*Eucyclogobius newberryi*), arroyo toad (*Bufo californicus*), coastal California gnatcatcher (*Polioptila californica californica*, "gnatcatcher"), least Bell's vireo (*Vireo bellii pusillus*), and Pacific pocket mouse (*Perognathus longimembris pacificus*).

TCA's Principal Brief, dated March 18, 2008, stated that "the project as proposed by TCA reflects the unanimous recommendation of the federal transportation and environmental agencies with jurisdiction over the Project (Federal Highway Administration ("FHWA"), U.S. Environmental Protection Agency ("EPA"), U.S. Army Corps of Engineers ("ACOE"), and the U.S. Fish and Wildlife Service ("USFWS")). These federal agencies evaluated a wide range of project alternatives under the National Environmental Policy Act ("NEPA"), the Clean Water Act ("CWA") and the Endangered Species Act ("ESA"), and concluded that the project proposed by TCA is the Least Environmentally Damaging Practicable Alternative ("LEDPA")" (p. 2). On page 6, TCA's brief stated that "after comparing all other alternatives addressed by the Draft EIS/SEIR, the Collaborative unanimously determined that the Project described in the Consistency Certification is the LEDPA [Least Environmentally Damaging Preferred Alternative]." However, the Service did not determine that the project is the LEDPA as defined under NEPA. The determination of the LEDPA is not a Service responsibility.

Thank you for the opportunity to comment on the proposed project. If you have questions regarding this letter, please contact me at (760) 431-9440, extension 211.

Sincerely,

Jim A. Bartel
Field Supervisor

cc:
Thomas H. Magness, Corps
Gene Fong, FHWA
Peter Douglas, CCC
Ed Pert, CDFG
Valarie McFall, TCA
Wayne Nastri, EPA
Cindy Quon, Caltrans
Lupe Armas, USMC

CINCO CITIES MEETING

April 21, 2005

12:00 – 1:30 p.m. – TCA Committee Conference Room

Minutes

Jim Thor	Bill Woollett	Kate Keena
Jim Dahl	Macie Cleary-Milan	Brian Lochrie
Lance MacLean	James Brown	Mike Erickson
Lara Anderson	Lisa Telles	Mike Shulz
Doug Chotkevys	Maria Levario	Steven John
Bill Huber	Paul Bopp	
Holly Veale	Dale Todd	
	Jen Johnson	
	Jeff Bott	
	Clare Climaco	

The meeting commenced at 12:08 pm.

Macie welcomed EPA's outgoing Director Mike Schulz, and their incoming Director Steven John. Introductions were made and congratulations and best wishes were given to both.

1. EPA presentation .....Mike Schulz & Steven John

EPA gave a presentation about their experience in working with the SOCTIIP Agencies' Collaborative. EPA believes the SOCTIIP Collaborative process has benefited the project and the environmental process. EPA indicated that the TCA did an outstanding job in reducing environmental impacts, especially for wetlands.

EPA discussed themes for Air Quality improvement in southern California. Some of the themes discussed could pertain to the FTC-S project, however, most were ideas for local agencies to consider. EPA provided sources of information that discuss the themes in more detail.

2. Collaborative Update ..... Macie

A meeting with the US Fish and Wildlife Service has been set for Monday, April 25th, to discuss the Section 7 Consultation, which addresses the endangered species impacts to the FTC-S Project. Federal Highways is the lead agency and will track the progress of the discussions.

3. May Board Report on TCA/USFWS Agreement..... Macie

A Staff Report will be going before the May Board for approval for money to provide a staff person to USFWS to facilitate USFWS' review of the Section 7 Consultation.

4. Firefighter Jim's Tip of the Day..... Jim

Did you remember to put new batteries in your smoke detector? Lowes has a lithium battery that lasts for 10 years. Cost is $6.99.

5. Other Items

San Clemente is concerned about gridlock in traffic. It is starting at 3:00 pm not only south-bound, but north-bound. Summers will be difficult. Accident reports are constant.

The meeting adjourned at 1:14 pm.

The next Cinco Cities meeting is scheduled for May 19, 2005.

STATEMENT OF
VICTOR M. MENDEZ, ADMINISTRATOR
FEDERAL HIGHWAY ADMINISTRATION
HEARING ON
ACCELERATING THE PROJECT DELIVERY PROCESS
BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
UNITED STATES HOUSE OF REPRESENTATIVES

FEBRUARY 15, 2011

Chairman Duncan, Ranking Member DeFazio, and Members of the Subcommittee, thank you for the invitation to appear before you today to discuss accelerating project delivery. One lesson we have learned from the American Recovery and Reinvestment Act is the importance of bringing a greater sense of urgency to our work, and the Federal Highway Administration (FHWA) is committed to helping the highway community deliver projects more quickly. We understand that the longer it takes to deliver a project, the more the project ultimately will cost, and the longer the public will have to wait to enjoy the project's benefits. And, as President Obama has indicated, maintaining and improving our infrastructure is vital to our economic competitiveness and the ability to create good jobs. If we are going to "win the future," as the President says, we are going to have to out-innovate, out-educate and out-build the rest of the world.

There are opportunities to reduce project delivery time while continuing to maintain and enhance the environment and project quality. Today, I will share with you some of the strategies FHWA is employing under my Every Day Counts (EDC) initiative and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) to maintain and improve project quality and improve project delivery times.

EVERY DAY COUNTS

Since the passage of SAFETEA-LU, we have seen some progress in shortening project delivery time. However, much work remains if we are to meet the major transportation challenges of the 21st century—economic challenges, safety challenges, congestion challenges, and environmental challenges.

It is a commonly held perception that it takes an average of 13 years to deliver a major highway project from planning through completion. I know firsthand that major projects can be completed faster. When I served as Director of the Arizona Department of Transportation, we built the Regional Freeway System in the Phoenix area 6 years ahead of schedule and consistently delivered statewide construction programs on time.

We need to work more efficiently. The public wants greater accountability in how we spend their money, enhanced safety on our roadways, and a transportation system that helps support our economy and sustain our environment. To that end, I launched an initiative called Every

Day Counts to shorten project delivery time and to speed the deployment of new and proven technologies into the marketplace. Every Day Counts is an innovation initiative that presents new technologies, new ideas and new ways of thinking. Ultimately, it provides the transportation community with a better, faster, and smarter way of doing business. EDC is about taking a select number of effective, proven processes and market-ready technologies and getting them into widespread use. Both can have a direct impact on shortening project delivery and cost avoidance. All processes and techniques associated with EDC are permitted under current statute and regulations.

In launching the Every Day Counts initiative, I looked at the range of challenges we face today as a society and a transportation community. Without exception, I believe the best way to meet those challenges is through innovation.

Consider the budget constraints that governments at all levels are facing. We are compelled to deliver the best value for every taxpayer dollar. We can meet that challenge by becoming more innovative in the way we deliver projects, so they are completed faster and the public can realize their benefits sooner.

Safety—Secretary LaHood's top priority at DOT —is clearly enhanced by innovation. The Nation has made tremendous progress in reducing traffic deaths to historic lows, but we still have work to do. By delivering better-designed roads to the public sooner, we can help make travel safer. And by making greater use of innovative technologies like the Safety Edge, which makes it easier to steer a vehicle safely back on the road, we will be able to save more lives. Safety Edge is one of the new technologies we are recommending to State and local transportation agencies for rapid deployment.

We must also find ways to meet the public demand for reduced congestion, a cleaner environment, and less energy consumption. These goals, too, are advanced through EDC. Getting projects completed sooner helps reduce congestion and improve air quality. Making greater use of technologies—like assembling bridges from prefabricated elements—allows critical parts of our infrastructure to be built with much less disruption to the traveling public. There are also benefits to be found in new road-building materials that improve the quality of water runoff and new technologies like warm-mix asphalt, which can be produced and placed on the road at lower temperatures, resulting in significant cost and energy savings.

Finally, it is critical that we have an infrastructure system that allows our economy to grow and compete, especially with such economic powers as China and emerging ones like Brazil. That means keeping the infrastructure we have in a state of good repair and providing new infrastructure as quickly and efficiently as possible.

I am pleased that EDC enjoys the strong support of the American Association of State Highway and Transportation Officials (AASHTO), the American Road & Transportation Builders Association, the Associated General Contractors of America, the National Association of County Engineers, and many other organizations. These organizations and others have helped shape EDC with their ideas and their commitment.

We introduced the basic concepts behind EDC more than a year ago. Late last year, in partnership with AASHTO, we held a series of 10 regional summits to present EDC initiatives to our State and local partners, Federal regulatory agencies, and the private sector, including many contractors and consultants. Each summit included delegates from several States. A total of nearly 1,000 transportation professionals attended the summits to discuss how the initiatives could accelerate project delivery and get important technology deployed sooner.

Shortening Project Delivery Toolkit

We have built EDC on two pillars. First, we have a toolkit that includes a number of specific strategies to shorten project delivery time. This toolkit includes initiatives for using existing flexibilities in the law and not duplicating efforts in the planning and environmental review process. We also recommend a number of innovative contracting practices.

The toolkit presents approaches for addressing what we have identified as frequently-cited problem areas. In addition to presenting these options, FHWA is playing an active leadership role in helping the people who actually deliver projects—States, metropolitan planning organizations, contractors—understand and accept these practices and technologies. We hope that EDC will help foster a culture of innovation within the highway community and that many of these strategies will become common practice as decision makers are provided with information regarding the benefits of applying these strategies.

Planning and Environmental Linkages

This initiative establishes a framework for considering and incorporating planning documents and decisions from the earliest stages of project planning into the environmental review process. It represents an approach to transportation decision-making that takes environmental, community, and economic information collected early in the planning stage and carries it through project development, design, and construction. This can lead to a seamless decision-making process that minimizes duplication of effort, promotes environmental stewardship, and reduces delays in project implementation.

Legal Sufficiency Enhancements

Decisions made early in planning and project development play a substantial role later in the environmental review process. Consultation with FHWA environmental attorneys at early decision points can help decision makers save time and costs by avoiding problems that could negatively affect the legal sufficiency of NEPA and section 4(f) documents. This initiative is also identifying the most common problems in document development, their root causes, and the measures preparers can take to avoid the problems.

Expanding Use of Programmatic Agreements

Programmatic agreements establish a streamlined process for handling routine environmental requirements for commonly encountered project types. For example, a merger process like the longstanding agreement in North Carolina enables agencies to fulfill the requirements of section 404 of the Clean Water Act and NEPA concurrently. The continued and expanded use of programmatic agreements, where process reviews and permit application procedures have been standardized and agreed upon, has been very effective in saving time. When prior agreements exist for avoiding, minimizing, and mitigating impacts, projects are reviewed more quickly and trust is developed that results in improved relationships between State DOTs and regulatory agencies. The goal of this initiative is to identify and assist in the expansion of new and existing programmatic agreements to a regional or national level.

In December 2010, FHWA, the New Mexico Department of Transportation, the Advisory Council on Historic Preservation, and the New Mexico State Historic Preservation Office signed a programmatic agreement to address expeditiously project effects in accordance with section 106 of the National Historic Preservation Act. This agreement provides for appropriate tribal consultation as well as public participation and minimization of extraneous documentation. It also reduces case-by-case review when historic properties will not be affected or when standard protocols and treatments can be applied. The update of this agreement is an important tool in the efforts to continue to shorten project development.

Use of In-Lieu Fee and Mitigation Banking

In projects that will impact waters of the United States, the permitting process under section 404 of the Clean Water Act is an important part of the project development process. The toolkit encourages use of in-lieu fees and mitigation banking where appropriate and allowed under existing statutes, FHWA regulations, State laws, and court decisions. Generally, mitigation banks and in-lieu fee programs provide for mitigation on a larger ecological scale, which is funded by multiple (transportation and non-transportation) projects. In some cases, this approach can save time and support expedited project delivery.

For example, North Carolina has developed an Ecosystem Enhancement Program (EEP) that is recognized as a national model for wetlands mitigation. The EEP's mitigation program addresses environmental impacts proactively, not reactively. Each year, the North Carolina Department of Transportation (NCDOT) provides EEP with an updated list of its 7-year program of construction projects, along with each project's estimated wetland and stream impacts. Funds are invested in environmental protection ahead of the date the impact will occur. Prior to the creation of the EEP, up to 40 percent of NCDOT projects were delayed due to compensatory mitigation problems. Since the inception of the EEP, no NCDOT projects have been delayed due to a lack of compensatory mitigation.

Clarifying the Scope of Preliminary Design

This initiative clarifies which design work meets the criteria as preliminary design and is allowable under current law prior to NEPA completion regardless of contracting mechanism. This initiative also develops guidance to allow this work to be done consistently in all project delivery mechanisms. Implementation of this initiative through our guidance promotes concurrent processes in a manner that does not prejudge environmental analysis under NEPA.

Flexibilities in Right-of-Way

The Right of Way (ROW) process is currently a major part of the project development and implementation processes. This initiative is based on flexibilities allowed under existing regulations and statutes. Significant time savings can be achieved by employing flexibilities already provided for in statute and FHWA regulations. This initiative underlines opportunities for improved coordination of ROW activities with other key project development actions in preliminary design; land acquisition for utilities accommodation and relocation project activities; mitigation for unavoidable environmental impacts; and a number of other areas where streamlined approaches may prove beneficial.

Flexibilities in Utility Accommodation and Relocation

The often-conflicting priorities of State transportation agencies and utility companies can adversely affect the timely completion of transportation projects. Potential utility conflicts exist on most transportation projects. It is estimated that half of all highway and bridge projects eligible for Federal funding involve the relocation of utility facilities, and construction generally takes longer and costs more when utilities need to be relocated. This initiative spotlights existing flexibilities currently in place under Federal law and regulations and describes techniques that foster effective utility coordination during project development and warrant more widespread use.

Enhanced Technical Assistance on Ongoing EISs

This initiative provides additional FHWA technical assistance to identify major challenges on ongoing EIS projects and implement solutions to resolve project delays where feasible. Candidate projects ideally include projects where 60 months have elapsed since issuance of the Notice of Intent without issuance of a Record of Decision. FHWA teams focus on facilitating interagency coordination and collaboration to resolve outstanding issues and provide peer-to-peer activities, workshops, training, or specialized on-site assistance.

Accelerated Project Delivery Methods

The Accelerated Project Delivery Methods (APDMs) initiative focuses on the construction phase of a project using methods like Design-Build (DB) and Construction Manager/General Contractor (CM/GC), which have proven to shave years off project schedules in some cases. We are confident that by using APDMs, State DOTs can deliver projects 50 percent faster.

Traditionally, a project is designed, put out for bid to construction firms, and then built by the winning bidder (design-bid-build). With DB, the design and construction phases are combined into one contract, eliminating the separate bid phase and allowing certain aspects of design and construction to take place at the same time. This can provide significant time savings compared with the design-bid-build approach. With DB project delivery, the designer-builder assumes responsibility for the majority of the design work and all construction activities. This provides the designer-builder with increased flexibility to be innovative, along with greater responsibility and risk.

In addition to the time savings, a DB contract provides savings in cost and improvement in quality. Cost savings are realized by transferring many of the construction engineering and inspection costs from the contracting agency to the designer-builder. The arrangement also results in fewer change orders or claims for errors or delays. Finally, the ongoing involvement of the design team throughout the process puts a greater focus on quality control and assurance and allows better coordination between the needs of the project and the contractor's capabilities.

Construction Manager/General Contractor occupies the middle ground between the traditional design-bid-build approach and DB. In a general CM/GC scenario, the project owner hires a general contractor to serve as the construction manager and to provide the owner with constructability, pricing, and scheduling information during the design phase. As the design phase nears completion, if the owner and construction manager are able to agree on a price for construction, they sign a construction contract and the construction manager becomes the general contractor. CM/GC allows State DOTs to remain active in the design process while assigning risks to the parties most able to mitigate them. As with the DB approach, there are potential time savings because of the ability to undertake a number of activities concurrently. This approach provides several other additional benefits, including: increased partnership and team building, which fosters an environment where innovation can be nurtured, rewarded, and flourish; potential for lower project costs, primarily due to risk identification and allocation during early project development; and enhanced cost certainty at an earlier point in design because of real time costing information inherent to CM/GC. Because FHWA does not have general authority to permit CM/GC on a general basis, CM/GC projects under the Federal-aid highway program are carried out under FHWA's Special Experimental Project No. 14 (SEP-14).

Utah DOT (UDOT) used this innovative contracting method to reconstruct 15 bridges and widen Interstate 80. CM/GC allowed UDOT to reduce the project schedule from 3 years to 2 years. By working with the general contractor throughout the design process, UDOT was able to take advantage of the contractor's resources, design the most efficient scope for the project goals, and meet quality and public expectations for maintenance of traffic. UDOT has estimated direct savings for 7 of its larger projects to be $13.8 million, with estimated user cost savings of $289 million.

Accelerating Technology and Innovation Deployment

Our second pillar of EDC provides outreach and education to the highway community on 5 technologies that we believe should be widely deployed into the field today: warm-mix asphalt, prefabricated bridge elements and systems, adaptive signal control technology, the Safety Edge, and geosynthetic reinforced soil. Every Day Counts is not about inventing the next "big thing"—it is about taking effective, proven and market-ready technologies and ensuring their widespread use. By advancing these 21st century solutions, we can accelerate project delivery, improve safety, reduce congestion, and keep America moving and competitive.

Warm-Mix Asphalt

Warm-Mix Asphalt (WMA) is the generic term for a variety of technologies that allow asphalt to be produced and then placed on the road at lower temperatures than the conventional hot-mix method. WMA production occurs at temperatures ranging from 30 to 120 degrees lower than hot mix. In most cases, the lower temperatures result in significant cost savings and reduced greenhouse gas emissions because less fuel is required. WMA also has the potential to extend the construction season, allowing projects to be delivered faster. By 2009, more than 40 States constructed WMA projects, with 14 adopting specifications to accommodate WMA.

Prefabricated Bridges

With Prefabricated Bridge Elements and Systems (PBES), many time-consuming construction tasks no longer need to be done sequentially in work zones. An old bridge can be demolished while the new bridge elements are built at the same time off-site. Because PBES are usually fabricated under controlled climate conditions, weather has less impact on the quality, safety, and duration of the project. The use of PBES also offers cost savings in both small and large projects. The ability to rapidly install PBES on-site can reduce the environmental impact of bridge construction in environmentally sensitive areas. And there is less disruption to the traveling public during construction.

The $4.164 million Phillipston Heavy Lift Bridge Project in Phillipston, Massachusetts used PBES, innovative construction methods, procurement, and communication to surpass its ambitious goal to replace a well-travelled highway bridge while minimizing road user impacts to just a few days. The DB team demolished and replaced the bridge in just 121 hours. Road users and residents were pleased with the brevity of the detour period and rapid construction. The Massachusetts Department of Transportation estimates the cost avoidance totals to users to be approximately $2.5 million.

Adaptive Signal Control

Adaptive signal control technologies adjust when green lights start and end to accommodate current traffic patterns, promote smooth flow, and ease traffic congestion. The main benefits of adaptive signal control technology over conventional signal systems are that it can automatically adapt to unexpected changes in traffic conditions, improve travel time reliability, reduce

congestion and fuel consumption, and prolong the effectiveness of traffic signal timing. An array of adaptive signal control solutions exist, from those that tackle the complexity of large urban areas to those that can be deployed on arterial streets typically found in smaller cities. Selecting the proper products and solutions is a significant element in implementing efficient and cost effective adaptive signal control technology.

Safety Edge

The Safety Edge is a simple and extremely effective solution that can help save lives by allowing drivers who drift off highways to return to the road safely. Instead of a vertical drop-off, the Safety Edge consolidates the edge of the pavement at 30 degrees. The Safety Edge provides a strong, durable transition for all vehicles. Even at higher speeds, vehicles can return to the paved road smoothly and easily. By including the Safety Edge detail while paving, this countermeasure can be implemented system-wide at a very low cost. The Safety Edge provides a more durable pavement edge that prevents edge raveling. FHWA's goal is to accelerate the use of the Safety Edge technology, working with States to develop specifications and adopt this pavement edge treatment as a standard practice on all new and resurfacing pavement projects.

Nationwide, thousands of lives are lost each year in crashes where vehicles run off the road or drivers cross into on-coming traffic after trying to over-correct when their wheels leave the pavement. This safety matter is why States such as Iowa have embraced this technology so quickly to address the problems that occur when vehicles leave the roadway. The Iowa Department of Transportation (Iowa DOT) has adopted the Safety Edge as a standard practice and has implemented it across the entire State. The evaluations of Iowa DOT and others have shown that simply providing this slope, allowing drivers to more easily recover when their tires leave the pavement, can reduce total crashes by more than 5 percent. Experiences like Iowa's have shown that rapidly implementing innovation cannot only save lives but can do so at very little cost. Following the conclusion of the EDC summits last fall, 47 States and many of their local agencies have selected the Safety Edge as one of their EDC priority initiatives.

GRS-IBS

Instead of conventional bridge support technology, Geosynthetic Reinforced Soil (GRS) Integrated Bridge System (IBS) technology uses alternating layers of compacted granular fill material and fabric sheets of geotextile reinforcement to provide support for the bridge. GRS also provides a smooth transition from the bridge onto the roadway, and alleviates the "bump at the end of the bridge" problem caused by uneven settlement between the bridge and approaching roadway. The technology offers unique advantages in the construction of small bridges, including:

- reduced construction time and cost, with costs reduced 25 to 60 percent from conventional construction methods;
- easy to build with common equipment and materials and easy to maintain because of fewer parts; and

- flexible design that is easily modified in the field for unforeseen site conditions, including unfavorable weather conditions.

Defiance County, Ohio officials are implementing this method to build bridges using readily available materials and common construction equipment. Using this innovative technology on the Stever Road Bridge project, the County reduced construction time by 2 months and reduced construction costs from an estimated $800,000 if built conventionally, to $620,000 using GRS—a net savings of $180,000 on one bridge protect. Defiance County has built 15 bridges using GRS with another 7 bridges planned. The savings the County achieves using GRS helps stretch the limited funds the County receives for its bridge needs.

State-Based Model

FHWA recognizes that each State operates in a unique environment and, therefore, decisions on which initiatives to advance must be made at the State level. Accordingly, one of the keys to making EDC successful is working with each individual State to develop an approach that works best for it. Each State currently is selecting its priority initiatives and working with its FHWA partners and local and private stakeholder partners to create an implementation plan tailored to meet the unique needs, laws, and regulations of the State.

SAFETEA-LU IMPLEMENTATION

Section 6002 of SAFETEA-LU authorized changes to make the environmental review process more efficient, while protecting environmental and community resources. We do not know the full extent to which the enactment of 6002 may have furthered these objectives. However, early results from FHWA's tracking of Environmental Impact Statements (EISs) since SAFETEA-LU's enactment indicate a reduction in the average time of environmental reviews. For the 18 EIS projects initiated and completed after SAFETEA-LU, the average time to complete the process (from Notice of Intent to Record of Decision) was 43 months. In comparison, in the 6 years prior to SAFETEA-LU, the average time to complete this process was 73 months. Additionally, FHWA has seen a positive reaction from agencies and the public regarding their early involvement in the environmental review process.

Section 6004 of SAFETEA-LU allows for FHWA to assign, and for State Departments of Transportation (State DOTs) to assume, responsibilities for determining whether certain highway projects meet criteria to be classified as categorically excluded from the requirements to prepare either an Environmental Assessment (EA) or an EIS. Responsibilities for complying with other related environmental laws and regulations also may be assigned to State DOTs. California, Alaska, and Utah, the 3 States with assignments, have reported that they have been successful in saving processing time of categorically-excluded projects as well as in maintaining and improving decision-making.

Section 6005 of SAFETEA-LU established a pilot program to allow the Secretary to assign, and the State to assume, the Secretary's responsibilities under the National Environmental Policy Act (NEPA) for one or more highway projects. Implementation of the pilot by the California

Department of Transportation (Caltrans) has provided indicators of success in accelerating project review times. In June 2007, FHWA and Caltrans entered into a Memorandum of Understanding (MOU) that established the assignments and assumptions of responsibility to Caltrans. Under the MOU, Caltrans assumed the majority of FHWA's responsibilities under NEPA (excluding project level air quality conformity analysis and tribal consultation), as well as FHWA's responsibilities under other Federal environmental laws, for most highway projects in California. While during this period of time no EIS projects have been processed solely under the pilot program, Caltrans claims time savings in the range of 12 to17 months in connection with about 50 EAs processed. Having such authority for the process has given Caltrans increased confidence in managing its projects.

Section 6009 of SAFETEA-LU also helps accelerate project delivery for projects that impact publicly owned parks, recreation areas, wildlife and waterfowl refuges, or historic sites, which are protected under section 4(f) of the Department of Transportation Act. Specifically, section 6009 provides that section 4(f) requirements will be considered satisfied if the United States Department of Transportation determines that the project will have a *de minimis* impact on the area in question. It also establishes conditions for *de minimis* impacts findings. Our Phase I evaluation results suggest that the *de minimis* impact provision can enable transportation agencies to better balance the timely delivery of transportation projects with protection of these publicly owned facilities. In addition, the *de minimis* impact provision has simplified the fulfillment of section 4(f) requirements, particularly in cases where the official with section 4(f) jurisdiction initiates or sponsors the transportation project. We are currently surveying State DOTs, other entities, and stakeholders for the Phase II report, which will include an update of *de minimis* findings and evaluate application of the new feasible and prudent standard.

CONCLUSION

Our society and the transportation community face an unprecedented list of challenges. We need to deliver projects more efficiently and with greater accountability. We need to find ways to make our roads safer and maintain environmental quality.

But it is not sufficient to simply address those challenges. We need to do so with a new sense of urgency. It is that urgency that I have tried to capture in FHWA's EDC initiative. In challenging times, it is imperative we pursue better, faster, and smarter ways of doing business.

This is a very busy and important year for the transportation community as we work on a new authorization of our surface transportation programs. President Obama's Fiscal Year 2012 Budget released yesterday outlines some of the Administration's ideas for investing in our infrastructure in a way that will support thousands of jobs, make our roads safer and our communities more livable, and lay a foundation for future economic growth. I look forward to working with you and other members of Congress in the weeks and months ahead as we look for innovative ways to make every day—and every dollar—count.

Mr. Chairman, thank you for the opportunity to appear before you today. I would be happy to answer your questions.

TESTIMONY OF

THE HONORABLE DEBRA L. MILLER

SECRETARY
KANSAS DEPARTMENT OF TRANSPORTATION

ON BEHALF OF

THE AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS

REGARDING

Accelerating the Project Delivery Process: Eliminating Bureaucratic Red Tape and Making Every Dollar Count

BEFORE THE

SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES

FEBRUARY 15, 2011

American Association of State Highway and Transportation Officials♦444 North Capitol Street, N.W., Suite 249, Washington, D.C. 20001♦202-624-5800

Chairman Duncan and Members of the Committee, thank you for the opportunity to testify on accelerating the transportation project delivery process. My name is Debra Miller. I am Secretary of the Kansas Department of Transportation, and am speaking today on behalf of the American Association of Highway and Transportation Officials (AASHTO) which represents the state departments of transportation (DOTs) of all 50 states, Washington, D.C. and Puerto Rico.

First, on behalf of AASHTO, I want to express our gratitude to you and to Chairman Mica for your commitment to expediting project delivery – the "437 Day Plan" – and for your willingness to consider potential statutory changes to achieve that goal. We thank you and offer our support and any technical assistance you may want from the state DOTs.

In my testimony I want to cover the following points:

- The environmental review process has been – and continues to be – a major contributor to the delay in moving projects from conception to completion. We have made progress in a number of areas because of reforms in SAFETEA-LU, but there is much more progress to be made.

- Any effort to expedite project delivery should focus on making the process more efficient, without compromising environmental protection or opportunities for public participation. The success of several reforms in SAFETEA-LU shows that it is possible to do both – we can speed up the process, while still preserving and enhancing the environment;

- The environmental streamlining provisions of SAFETEA LU are working. I will discuss several of the key provisions, as well as some recent reports highlighting their effectiveness. I will also offer some suggestions for extension and refinement of these SAFETEA-LU initiatives.

- Lastly, I will describe several new ideas that could help further streamline the environmental review process and other elements of the overall project delivery process. These changes would build on the progress in SAFETEA-LU, setting the stage for further improvements in project delivery.

I. The Need to Streamline the Environmental Review Process

Environmental reviews for transportation projects take far too long. The Federal Highway Administration estimated the average time required to complete Environmental Impact Statements (EIS) between 1999 and 2010 as ranging between 63 and 83 months; approximately 5 to 7 years.[1] Such delay has very real consequences for the American public. Inadequate and congested highways cost drivers thousands of hours of lost time, and cost businesses millions of dollars in productivity. Delayed highway safety improvements literally cost lives in crashes that could have been avoided. Getting projects on the ground more quickly reduces congestion by

[1] http://www.environment.fhwa.dot.gov/strmlng/nepatime.asp. Appendix A provides annual information on the time to complete the NEPA process from 1999 to 2010.

adding capacity to the system, increases safety to the users by improving the facilities earlier, and saves costs attributable to inflation, particularly related to construction materials.

The environmental review process is enormously complex. The process has grown incrementally over the last 40 years. New requirements are added through laws, regulations, and policies, and old requirements are rarely scaled back or eliminated. As State DOTs work to deliver Federal-aid transportation projects, they must negotiate this maze of legal, technical, and analytical requirements at the national and state level during every stage of the project development process. The overall complexity of this process is not only burdensome to the states, but has become a barrier to the public in understanding the process and participating effectively. The NEPA process has become so complex, document-intensive, and slow-moving that stakeholders often stop paying attention – or, worse, they lose confidence in the fairness and usefulness of the process. Reform is needed not only to save money and time, but also to restore the public's confidence in the process that is used to make decisions of great consequences in their communities.

Although SAFETEA-LU made progress in reducing project delivery times, there is much more that can be done. It is time to refocus the environmental review process on meaningful outcomes, rather than rigid processes. We need to revisit the purpose and intent of NEPA and other environmental laws and develop a new framework that results in improved environmental and transportation outcomes, while reducing the costs and time associated with traditional environmental reviews.

As stewards of the environment and civil servants responsible for the largest public works projects in the country, state DOTs must protect the natural and human environment for future generations while delivering needed transportation solutions. The States are committed to developing new ways of doing business to find the most efficient and effective methods for reducing congestion, improving safety, increasing mobility, and protecting the environment. However, leadership is needed at the federal level to get the job done.

II. Streamlining Initiatives in SAFETEA-LU

SAFETEA-LU provided some of the most significant changes to environmental provisions affecting transportation in decades. This legislation addressed several of the underlying causes of project delay; it required better coordination among agencies, set new deadlines for agency comments, simplified the requirements for projects with minor impacts to parklands and historic sites, created time limits for lawsuits, and authorized greater delegation of federal responsibilities to States. These streamlining measures are explained in more detail below.

Streamlined Environmental Review Process for Projects

SAFETEA-LU Section 6002 created a streamlined environmental review process that is required for all environmental impact statements (EIS). The goal of this process is to develop EISs in a timelier manner without diminishing the quality of project decision making. The core of this new process is a higher-profile role for transportation agencies as the "lead agencies" in the NEPA process. The new process focuses on improving coordination and review timeframes and enhancing agency and public participation. The process also establishes new time limits on

agency and public review and comment periods and specifies a process for resolving interagency disagreements.

Section 4(f) "de minimis" Determinations
SAFETEA-LU created a simpler process for approving projects that have minor ("de minimis") impacts to parklands and historic sites, which are protected under Section 4(f) of the USDOT Act. The law essentially provides an exemption from Section 4(f) for projects that have a de minimis impact on the area in question.

Statute of Limitations
SAFETEA-LU created a 180-day statute of limitations for challenges to federal approvals of highway and transit projects. Claims made after this time limit are barred. This time period is initiated by the filing of a notice in the Federal Register. The purpose of the statute of limitations is to expedite the resolution of any issues that may affect transportation projects. Issuing the notice in the Federal Register is discretionary. If a notice is not issued, the NEPA approval or decision remains subject to the general six-year statute of limitations for civil actions against federal agencies.

Delegation of USDOT Responsibilities to State DOTs
SAFETEA-LU created two programs that authorize USDOT to delegate its responsibilities in the environmental review process to State DOTs. The delegation programs were developed to provide information regarding any efficiencies in environmental reviews that may be gained by the states implementing environmental reviews rather than FHWA. The first program authorized delegation of FHWA's authority for projects that qualify for categorical exclusions (CEs) under NEPA. This is a permanent program that is open to all the States. The second program is a pilot program, which authorizes delegation of FHWA's environmental authority to State DOTs for all project types, including those that require EISs. This program is open only to five designated States.

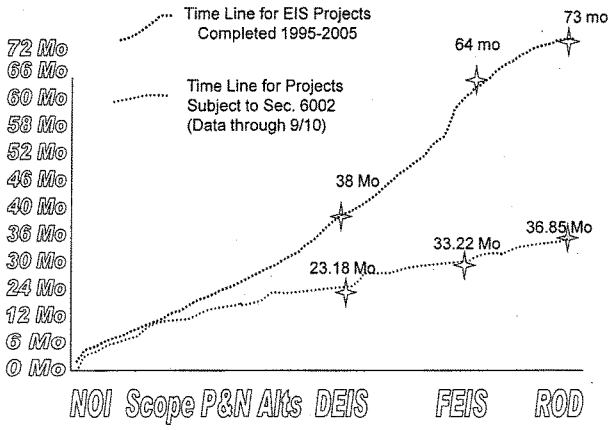
Integrated Planning
SAFETEA-LU includes numerous changes related to transportation planning, including significant new opportunities for consideration of environmental issues in the statewide and metropolitan transportation planning processes. Statewide or metropolitan long-range plans must include a "discussion of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the plan." In addition, as part of the planning process, states and MPOs "shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of a long-range transportation plan." They also must consider, if available, conservation plans and maps and inventories of natural or historic resources.

III. SAFETEA-LU Streamlining Implementation

The changes in SAFETEA-LU were focused primarily on making the existing environmental review process work more efficiently. The changes focused on carrying out project-by-project

reviews with tighter deadlines, better coordination, and simpler documentation. The streamlining initiatives in SAFETEA-LU have been implemented effectively and are showing results. In September, 2010, the Federal Highway Administration conducted an analysis of all EISs that were initiated under the SAFETEA-LU environmental review process and reached various stages of completion. The assessment reveled that thirty-eight projects reached the Draft EIS milestone with an average time frame of 23.18 months (approximately 1.9 years); twenty-two projects reached the Final EIS milestone with an average time of 33.2 months (approximately 2.8 years); and twenty projects issued a Record of Decision with an average timeframe of 36.85 months (approximately 3.1 years).[2] The following chart from this report compares average milestones for projects initiated and developed under the SAFETEA-LU environmental process to EIS projects completed between 1995 and 2005. It is important to note that the SAFETEA-LU environmental streamlining provisions have been in place for approximately 5 years. By definition, any ROD issued during this period will have been one that was issued relatively quickly. Projects that are taking longer will still be in the pipeline, and would not show up in this data.

Figure 1: Timing in Achieving Section 6002 Milestones On Average



The following is more specific information on implementation of the SAFETEA-LU streamlining provisions.

[2] Biannual Assessment of SAFETEA-LU Section 6002 Implementation Effectiveness, September, 2010, Federal Highway Administration.

Streamlined Environmental Review Process

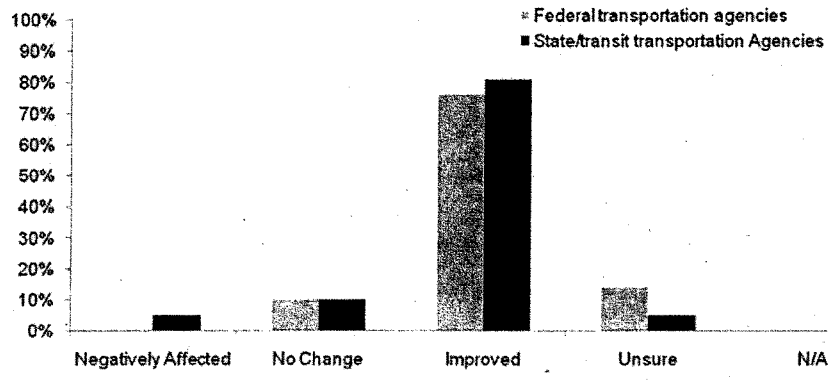
All projects initiated after August 11, 2005 are required to follow the new SAFETEA-LU Section 6002 environmental review process. This process contains numerous streamlining initiatives, but also contains new procedural requirements that have created additional burdens without providing a measurable improvement in the environmental review process. Generally, this process has been implemented effectively, but has not yielded measurable reductions.

In December 2010, the National Cooperative Highway Research Program (NCHRP) studied federal and state implementation of SAFETEA-LU environmental provisions. Their report highlights the potential benefits as well as the reservations expressed by some States.[3] Specifically, most states indicated a positive response to implementing the SAFETEA-LU environmental provisions and have revised their practices in response to SAFETEA-LU. However, only a few states indicated that the SAFETEA-LU environmental review process has been effective at preventing or reducing delays.

Section 4(f) de minimis Interpretations

The section 4(f) de minimis authority was implemented quickly by FHWA, first through guidance and then through regulations. Now in widespread use, hundreds of 4(f) de minimis findings have been made since 2005. Implementation of the 4(f) de minimis authority has been studied by National Academies of Sciences, and their most recent report included results of a survey which found widespread agreement that this change had significantly reduced the time needed to comply with Section 4(f) while maintaining protection of 4 (f) resources.[4]

Figure 5. Effect of the *De Minimis* Impact Provision on the Timeliness of Completing the Section 4(f) Requirements



[3] http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_lrd_54.pdf

[4] http://www.environment.fhwa.dot.gov/4f/Section_6009Study/index.asp#fig5

Statute of Limitations

The statute of limitations (SOL) provision was implemented promptly through FHWA guidance, and since 2005, FHWA has issued more than 200 SOL notices. The notices have been issued primarily for EISs and for some environmental assessments (EAs); FHWA generally does not issue notices for CEs. In addition, FTA has issued many SOL notices for transit projects. The recent NCHRP report, "Practice Under the Environmental Provisions of SAFETEA-LU," found that State DOTs consider this a valuable streamlining tool because it provides certainty after the environmental process has been completed.[5]

Delegation

The delegation programs have been implemented by USDOT in a way that makes many States highly reluctant to seek delegation. Further changes in the law are needed to make the delegation programs effective. There is one major factor that discourages States from seeking delegation under the existing programs. FHWA has determined that States can only assume USDOT's responsibilities if the State gives up the ability to undertake design and right-of-way activities during the NEPA process on an at-risk basis (i.e., with their own funds). For many States, the flexibility to advance these activities in parallel with NEPA is a critical project-delivery tool; because they are unwilling to give up that flexibility, they do not pursue delegation. As a result, only three States (Alaska, Utah and California) have been delegated CE authority and only one State (California) has been delegated full NEPA authority.

The adoption of the delegation program is also hindered by the "pilot" status of the full delegation program, which authorized States to assume responsibility for the full range of transportation projects. As a pilot, this program is limited to five designated States, and the authorization for this program was scheduled to expire in 2011. By limiting the program to only a few States, and leaving major uncertainty about the program's future, the program discouraged States from making the substantial investment that is needed to obtain a delegation of USDOT's responsibilities.

Additionally, the program is hindered by the requirement for States to waive sovereign immunity (generally, by an act of the State legislature or the State Attorney General) before assuming USDOT responsibilities. This waiver is required because, by law, one of the conditions of delegation is that the State must agree to stand in USDOT's shoes for purposes of any lawsuits challenging the outcome of the environmental review process. Obtaining a waiver of sovereign immunity has proven to be quite difficult.

Lastly, through programmatic CEs with FHWA, state DOTs have obtained vastly increased CE responsibilities. Due to the authority the states have obtained under these programmatic CEs, many states have not seen value in undertaking the significant investment that is needed to obtain the small additional decision-making that would be afforded to them through the CE delegation.

Regardless of these barriers, the limited experience to date suggests that delegation is effective at delivering performance as well as faster environmental reviews. The results in California in particular are very encouraging. In 2007, the California Department of Transportation (Caltrans)

[5] http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_lrd_54.pdf

assumed delegation of FHWA responsibilities for CEs first, and later assumed FHWA responsibilities for the full delegation encompassing a full range of project types. After the first three years of the pilot program, Caltrans found average time savings of 17 months, with a median time savings of 24 months, for state highway system projects requiring an EA. This data and other data on time savings from delegation in California can be found in Caltrans' report to its legislature in January, 2011.[6]

Although Caltrans does not have direct timeframe comparisons for CE's, they estimate that for the 10% of CE's that were not already delegated to Caltrans under the programmatic CE with FHWA, they are saving approximately ten days in processing. In addition, Caltrans indicated that when a CE has required consultation with a resource agency, the time savings are much greater. For example, Section 7 consultations are, on median, completed more than 5 months faster under the pilot program.

SAFETEA-LU requires that FHWA audit Caltrans' performance under the pilot program. The audit reports are posted in the Federal Register. Five audits have been conducted thus far and the audits have generally indicated that Caltrans is meeting expectations, continues to improve its processes and procedures, and has benefited from participation in the pilot program.

Utah DOT assumed CE delegation in 2008. Prior to this assumption, Utah DOT had a programmatic CE agreement with FHWA, which gave the DOT only limited authority to approve CEs . Utah DOT estimates that they are saving between 20 and 30 days in processing larger CEs under the delegation program. In addition, Utah DOT feels that the overall quality of the CE documents has notably improved as a result of the CE delegation and the quality control efforts put in place. Utah DOT sees the delegation as a catalyst to assume more responsibility and further streamline the process, while not sacrificing quality or thoroughness.

Alaska DOT assumed CE delegation in 2009. The programmatic CE agreement Alaska DOT had with FHWA prior to obtaining CE delegation covered 90% of their CEs. Alaska reports, however, that the 10% of CE's that were not already delegated to Alaska pursuant to the programmatic CE agreement were the larger more complex CEs that generally took more review time. Now that Alaska is handling these more complex CEs, they are being processed more quickly and FHWA is focusing their review on progressing EAs and EISs.

Integrated Planning

The SAFETEA LU environmental review process language provides a general foundation for using the transportation planning decisions in the NEPA process. However, due the uncertainty associated with applying these decisions in the NEPA process, this provision has largely been disregarded by the state DOTs. To provide the sates with certainty regarding the application of this provision, specific legislative authority needs to be adopted to allow FHWA to adopt in the NEPA process, decisions made in the transportation planning process.

[6] http://www.dot.ca.gov/hq/env/nepa_pilot/pdf/AB2650_jan2011.pdf

IV. SAFETEA-LU Lessons Learned

SAFETEA-LU laid the foundation for reform by addressing several of the underlying causes of delay. The SAFETEA-LU provisions focused on specific "problem areas" (e.g., 4(f) de minimis, 180-day statute of limitations) have been effective and are in widespread use. However, the reforms in SAFETEA-LU were focused primarily on making the existing environmental review process work more efficiently. The reforms focused on carrying out project-by-project reviews with tighter deadlines, better coordination, and simpler documentation. Major advances in project delivery will require more substantial improvements. To significantly reduce project delivery time, it will be necessary to reinvent the environmental review process, while still maintaining a high level of protection for the environment and communities. Building upon what we learned from SAFETEA-LU, the following general recommendations provide a framework for the project delivery recommendations for the next reauthorization.

Eliminating Unnecessary Process Steps

To date, efforts to streamline the process have consisted largely of directing federal agencies to do a better job of managing the interactions among dozens of different agencies, procedures, and requirements. True reform requires a willingness to recognize that some steps in the existing process are unnecessary and/or duplicative and can be removed without compromising the quality of decision-making.

Reducing Federal Involvement in Project-Level Decisions

Much of the delay in the current process results from the 'logjam effect' in which too many projects are being pushed through too narrow of a pipeline of USDOT staff. The USDOT simply does not have the staff to manage the environmental review process for every project that receives federal funding. But that is what current law generally requires: the USDOT is legally bound to oversee the environmental review process and render the final decision on every federally assisted transportation project, from a recreational trail to construction of a new Interstate. To prevent this long jam, USDOT's project-level responsibilities should be delegated to State DOTs, and USDOT should shift into an oversight role. SAFETEA-LU enabled this type of delegation to occur. Although initial implementation has been slower than expected, with a few adjustments, this program could be expanded nationally with enormous streamlining benefits. The next authorization should greatly accelerate delegation to the states as the program has a huge potential to streamline reviews.

Reducing Project-by-Project Review

The environmental review process is not just a single process: it involves compliance with an array of federal statutes and regulations, each with separate procedures, which must be woven together for each project into a single coordinated process. Each of these laws and regulations sets forth a process for approving an "action," which is typically defined as a specific project. Current law assumes that each project will receive separate environmental documentation, consultation, and approval. This project-by-project approach is not only inefficient; it also hinders strategic decision making by impeding efforts to consider alternatives, impacts, and mitigation on an ecosystem level. There is a solution: addressing environmental concerns programmatically, through integrated planning. This concept has been embraced by a broad

range of environmental and transportation agencies. But little progress has been made in the real world, because most agencies' regulations are geared toward project-by-project reviews, not programmatic decision-making. New legislation is needed to empower and direct agencies to embrace programmatic approaches as the norm – not the exception.

Environmental Protections Remain Intact
Throughout the development of the SAFETEA-LU streamlining language, several environmental stakeholders expressed concern regarding the potential of the streamlining measures to undermine environmental protections. Not only have these concerns not been borne out, but the SAFETEA-LU environmental streamlining measures have been implemented largely without controversy.

V. Actions Needed to Achieve Further Reductions in Project Delivery Times

In preparation for this authorization cycle, AASHTO convened a group of State DOTs, working through the AASHTO Standing Committee on Environment, to assess environmental streamlining progress under SAFETEA-LU and recommend further changes to streamline project delivery. The group recommended the following legislative streamlining steps, to build upon SAFETEA-LU streamlining provisions.

Increase Delegation of USDOT Decision-Making Responsibilities to State DOTs.

- Remove the Barriers to Delegation
  Remove the barriers that made States reluctant to take on delegation by expanding and refining the programs under which state transportation agencies can assume USDOT responsibilities under NEPA and related environmental laws. Delegation should be made standard practice by first, making the 5-state pilot program a permanent program and allowing all States the option to participate. Second, clarify that the States can assume USDOT responsibilities without reducing flexibility to acquire right-of-way and perform design work prior to the completion of the NEPA process. Finally, clarify that a State can assume USDOT's responsibility for making project-level conformity determinations under the Clean Air Act, along with all other project-level environmental review responsibilities.

- Create an Alternative to Full Delegation
  Establish a new pilot program, as an alternative to the full delegation program that would allow a State DOT to assume expanded responsibilities for EAs and EISs without waiving sovereign immunity. This "delegation-lite" program would give State DOTs the opportunity to take on an increased role in document preparation and agency consultation, but FHWA would retain ultimate approval authority and sign the decision documents. Because authority would remain with FHWA, the States would not be required to waive sovereign immunity. This program would give States an opportunity to build up the capabilities that would eventually enable them to assume full delegation and help states to overcome their reluctance to take on the responsibilities involved in full delegation.

Simplify the Section 6002 Environmental Review Process

Remove unnecessary paperwork steps and clarify and/or strengthen provisions that will provide additional streamlining benefits. Unnecessary procedural requirements in Section 6002 include:

- Project Initiation Notice. The environmental review process is required under the CEQ regulations to begin with a Notice of Intent published in the Federal Register. Section 6002 creates an additional requirement for a project initiation notice, which is submitted by the project sponsor to the USDOT. This initiation notice is superfluous and does not contribute to streamlining the process. To remedy this duplication in effort, the requirement for the project sponsor to submit a project initiation notice should be eliminated.

- Consultation on Methodology and Level of Detail. Section 6002 provides that "the lead agency also shall determine, in collaboration with participating agencies at appropriate times during the study process, the methodologies to be used and the level of detail required in the analysis of each alternative for a project." Many FHWA division offices interpret this provision to mean that State DOTs must conduct additional agency coordination for almost any change in the project's methodology. This requirement increases time and cost with little added value or benefit to the environmental review process. As such, the requirement for agency consultation on issues of "methodology and level of detail" should be revised so that such consultation is conducted during the scoping phase of the project, when methodologies are being developed.

- Coordination Plan and Schedule. Section 6002 requires the lead agency to establish a "coordination plan" for a project, and provides that the plan "may" include a schedule. FHWA has effectively required inclusion of a schedule in all coordination plans. While agency coordination clearly is an important aspect of streamlining, the "coordination plans" themselves have become more of a paperwork exercise than an effective tool for improving coordination. In addition, many states have adopted plans and procedures for inter-agency coordination prior to the implementation of SAFETEA-LU. Preparing an additional project-specific coordination plan often adds little value, and becomes just another paperwork burden, when effective program-wide coordination procedures are already in place. The coordination plan requirement should be amended to allow a State DOT to meet this requirement by adopting program-wide coordination procedures, rather than developing a separate coordination plan each time an EIS is prepared.

There are also ways that the SAFETEA LU environmental review process could be modified to better achieve the underlying goals of the original statute.

- Preferred Alternative to Higher Level of Detail. Section 6002 allows the preferred alternative, once it has been identified, to be developed to a higher level of detail. In concept, this is an important streamlining tool. However, the use of this flexibility has been limited by FHWA and FTA in their Section 6002 guidance, which requires a State to obtain FHWA or FTA authorization on a project-by-project basis to advance the preferred alternative to a higher level of detail. As a result, the streamlining potential of this provision is still largely untapped. States should be able to develop the preferred alternative to a higher level of detail without requiring FHWA's individual, project-by-project approval. The requirements for developing the preferred to a higher level of detail

should be defined in standard procedures so that individual project-level approval is not needed.

- Reliance on Transportation Planning-Level Decisions. The existing SAFETEA LU language provides a basis for using the transportation planning process to establish the purpose and need for a project. However, there are currently no strong assurances or mechanisms in place to allow state DOTs to use these planning efforts to streamline the NEPA and permitting processes. As such, this provision has largely been disregarded. There is a need for more specific legislative authority allowing FHWA to adopt in the NEPA process, decisions made in the transportation planning process, with regard to both purpose and need and the range of alternatives.

New Initiatives
In addition to the above legislative recommendations that further build upon SAFETEA-LU successes, AASHTO also developed the following new legislative recommendations related to environmental streamlining.

Increase Authority for States and USDOT to use Programmatic Approaches and Integrated Planning to Comply with NEPA and other Environmental Requirements
To begin using programmatic approaches on a broad scale, agencies will need a new mandate and new flexibility. Legislation is needed to make programmatic approaches a part of every agency's mission – not just something they can do, but something they are *expected* to do as a normal practice. Clear statutory authorization and encouragement should be provided that focus USDOT and federal resource agencies on programmatic approaches and strategies that focus on integrated planning, resource banking, and flexibility in environmental mitigation. In addition, federal funding should be available for appropriate advanced mitigation.

Create an "Integrated Planning Pilot Program"
Legislation also is needed to *empower* agencies to experiment with programmatic approaches in a manner that does not compromise environmental protections. Empowering innovation means giving agencies the authority, on a pilot basis, to waive existing procedural requirements for projects that are being developed through an integrated planning process that considers environmental resources and transportation needs on a broad scale.

A model for this approach is the Special Experiment Program (SEP) authority that FHWA has used in recent years to waive regulatory requirements to encourage innovation in contracting and other aspects of the federal highway program. For example, "SEP-15" played a critical role in encouraging greater use of public-private partnerships by providing FHWA with a basis for granting limited exceptions to regulatory requirements established in Title 23 of the Code of Federal Regulations.

The SEP-15 model should be used to authorize USDOT to establish a special experimental program for integrated planning (SEP-IP), in which federal transportation and environmental agencies would be authorized to waive regulatory requirements for projects that are developed through an integrated planning process at an ecosystem scale. As part of this pilot program, individual federal agencies could only waive their own requirements, subject to appropriate

safeguards to ensure that environmental outcomes are not compromised. This program would empower individual agencies to develop truly innovative practices that achieve better environmental and transportation outcomes in less time.

Simplify the Steps in the NEPA Process for EIS Projects

In the 1970s, when the CEQ environmental process regulations were written, the preparation of an EIS was a largely internal agency process, with minimal opportunities for the public to provide input until after a Draft EIS was published. Aside from submitting written comments, the public had few other opportunities, except for those who could spare the time to attend an informational meeting in person. Today, the process of public engagement starts earlier and provides many more opportunities for involvement. States conduct public outreach through multiple channels – using social networks, blogs, websites, community meetings, and door-to-door contacts, as well as traditional means such as newsletters and public hearings. By the time a Draft EIS (DEIS) is published, the community has often been engaged for many years. The DEIS is viewed as nearly the culmination, not the beginning, of the process

As early coordination has increased, it is often possible for an agency to identify a preferred alternative in the DEIS. In these situations, there is little additional benefit in publishing a separate Final EIS (FEIS) before issuing the ROD. The environmental review process could be greatly expedited by allowing the preparation of a single EIS rather than the current process of publishing of a DEIS followed by the FEIS prior to issuance of the ROD. If a single EIS is prepared, the ROD itself would include responses to comments on the EIS. This process would closely parallel the process that is used for an EA/FONSI today, where a single EA is issued and the FONSI includes responses to comments on the EA. Also, if significant new issues are raised in the comments on the EIS, the federal agency would have the flexibility to address them in a Supplemental EIS. The proposed two-step rather than three-step process could greatly expedite the environmental review process.

Federal Funding for Corridor Preservation Prior to the Completion of NEPA

Over the next 50 years, the U.S. is expected to grow by 140 million people, and will likely grow by a similar amount in the last half of this century. A majority of this growth is anticipated to occur in and around urban areas, which are already congested and have few opportunities for developing transportation solutions without major cost and disruption. The goal of corridor preservation is to minimize development in areas that are likely to be required to meet future transportation needs. Corridors must be preserved to limit the cost of future projects, as well as community and environmental impacts.

Due to fiscal constraints, most states are limited in their ability to preserve needed transportation corridors. In addition, the ability to use Federal funds for corridor preservation is severely restricted. Until the NEPA process is completed for a transportation project, Federal funds can only be used to acquire individual parcels that meet the definition of "hardship" or "protective" acquisitions. Because these exceptions are relatively narrow, it is difficult to protect a continuous corridor – or even to simply acquire strategic parcels from willing sellers – until after the NEPA process is completed. This constraint has unnecessarily constrained the amount of parallel project development work that can be completed during the NEPA process.

To accommodate parallel project activities and expedite project delivery, States should be able to use federal funds for right-of-way acquisition, prior to completion of the NEPA process, where necessary or desirable to protect existing or future transportation corridors from development.

Designating One Lead USDOT Agency

Transportation projects are becoming increasingly multimodal. These projects serve an important public need by ensuring that travel demand needs are met by the appropriate transportation mode. However, US DOT's modal administrations have varying priorities, processes and timelines for completing projects. These variations lead to unnecessary project delay. Under this structure, State DOTs must go through multiple review, approval and revision processes for each project document and decision.

Requiring that one USDOT agency be designated as lead agency to approve plans, studies and/or projects with multiple agency involvement would greatly streamline the project development and delivery process. Other impacted USDOT administrations would then participate as cooperating agencies.

V. Time and Cost Savings

Our experience with SAFETEA-LU's environmental streamlining provisions clearly demonstrates that progress is possible. Just to take two examples -- the Section 6002 process has cut average EIS timeframes by about 3 years, and the delegation program has cut nearly 2 years from the average timeframe for preparing an EA in California. These reforms were met with some skepticism and even opposition when they were first proposed, but we now see that they have yielded significant time savings, without compromising environmental protection. By saving time, these reforms have saved money as well. While it is not easy to quantify the total cost savings, we know that shaving years off the project delivery schedule reduces the cost of environmental reviews and also reduces total project costs, by reducing the effects of inflation on construction costs.

We have made real progress since SAFETEA-LU, but there is still much to be done. We have developed a series of proposals that can yield substantial additional reductions – by making the SAFETEA-LU reforms even more effective, and by introducing new reforms that can yield even greater reductions. While it is difficult to project time savings associated with each of our recommendations, we are confident that our proposals have the potential to yield time and cost savings comparable to – or even greater than - those achieved with the SAFETEA-LU provisions.

VI. Summary

Thank you for the opportunity to testify. The environmental streamlining provisions in SAFETEA-LU have been effective in helping to expedite project delivery but we can do more to improve on those provisions and we can implement new innovations to further accelerate project delivery. We look forward to working with the committee and USDOT to develop and implement further measures to streamline the environmental review process, so that we can achieve our overall goal of reducing project delivery times.

APPENDIX A

HTTP://WWW.ENVIRONMENT.FHWA.DOT.GOV/STRMLNG/NEPATIME.ASP.

ESTIMATED TIME REQUIRED TO COMPLETE THE NEPA PROCESS

Environmental Impact Statement (EIS) projects for which FHWA signed a Record of Decision (ROD) in each of the following fiscal years (FY) (October 1-September 30) — FY99, FY00, FY01, FY02, FY03, FY04, FY05, FY06, FY07, FY08, FY09 and FY10 were used to provide the following baseline information. The time reported is the time period from the signing of the Notice of Intent (NOI) to the signing of the ROD.

For the **29 projects in FY99, the average** amount of time from the NOI to the ROD is **72.4 months.** The **median value is 79 months.**

For the **35 projects in FY00, the average** amount of time from the NOI to the ROD is **67.2 months.** The **median value is 60 months.**

For the **31 projects in FY01, the average** amount of time from the NOI to the ROD is **63.5 months.** The **median value is 54 months.**

For the **43 projects in FY02, the average** amount of time from the NOI to the ROD is **78.7 months.** The **median value is 80.1 months.**

For the **41 projects in FY03, the average** amount of time from the NOI to the ROD is **73 months.** The **median value is 66 months.**

For the **35 projects in FY04, the average** amount of time from the NOI to the ROD is **78 months.** The **median value is 55 months.**

For the **39 projects in FY05, the average** amount of time from the NOI to the ROD is **77 months.** The **median value is 61 months.**

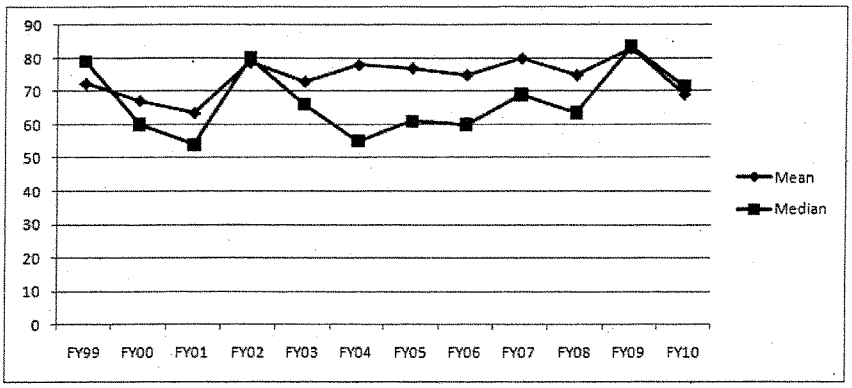
For the **37 projects in FY06, the average** amount of time from the NOI to the ROD is **75 months.** The **median value is 60 months.**

For the **30 projects in FY07, the average** amount of time from the NOI to the ROD is **80 months.** The **median value is 69 months.**

For the **28 projects in FY08, the average** amount of time from the NOI to the ROD is **75 months.** The **median value is 63.5 months.**

For the **32 projects in FY09, the average** amount of time from the NOI to the ROD is **83 months.** The **median value is 83.5 months.**

For the **30 projects in FY10, the average** amount of time from the NOI to the ROD is **69 months.** The **median value is 71.5 months.**



FHWA records for the Fiscal Years 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010:
Times are from the signing of the Notice of Intent to the signing of the Record of Decision.

Testimony of

Michael Replogle
Global Policy Director and Founder
Institute for Transportation and Development Policy

Before the

United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Highways and Transit

Hearing on

Accelerating the Project Delivery Process: Eliminating Bureaucratic Red Tape and Making Every Dollar Count

Tuesday, February 15, 2011
10:00 am
2167 Rayburn House Office Building

Chairman Duncan, Congressman De Fazio, members of the subcommittee, my name is Michael Replogle and I am Global Policy Director and Founder of the Institute for Transportation and Development Policy, a 25-year old non-profit organization that works world-wide to support implementation of more environmentally sustainable and equitable transportation and urban development. A civil engineer with more than three decades of experience in transportation policy, planning, and project development, I am a member of the U.S. Advisory Council for Transportation Statistics, and recently served as a member of the U.S. Intelligent Transportation Systems Advisory Council. I am an advisor to the Environmental Defense Fund, where I served as Transportation Director from 1992-2009.

ITDP is actively engaged in helping dozens of cities worldwide plan, design, implement, and operate billions of dollars of transportation improvements. ITDP played a key role in the development of the recently opened Bus Rapid Transit (BRT) projects in Guangzhou, China, Capetown, South Africa, Ahmedabad, India, Jakarta, Indonesia, and several cities in Mexico, which together carry nearly half a billion passengers annually. Working with local governments to plan and develop public bike systems, bicycle and pedestrian networks, and smarter traffic management, ITDP seeks to expand affordable and low-emission travel options that support equitable economic development. ITDP is advising selected U.S. local governments developing BRT projects and smarter parking management.

ITDP works closely with the Climate Works Foundation, The Rockefeller Foundation, the Partnership for Sustainable Low Carbon Transport, Asian Development Bank, Inter-American Development Bank, U.S. Green Building Council, Urban Land Institute, national governments, and other institutions that share the goal of taking to scale successful models for cost-effective, timely, sustainable urban infrastructure development. ITDP is also a member of Transportation for America (T4A), a coalition of housing, business, environmental, public health, transportation, equitable development, and other organizations, whose staff assisted in the preparation of my testimony today, but I am not representing the position of that coalition in this testimony.

Project Delays Can Be Reduced. It is a generally agreed that U.S. federally funded transportation projects take longer to complete than non-federally funded projects, due to various planning, design, procurement, and implementation requirements administered by multiple agencies under dozens of statutes. Thus, when transportation agencies are in a rush to implement, they may find it advantageous to find ways to get the job done quickly with state, local, and private funding. That said, the current federal planning and project review process often improves the quality of transportation projects in important ways.

Federal transportation funding is a valuable asset that can help communities and states do more to meet national mobility, economic development, environmental, health, and energy resource management goals than they could accomplish on their own. Federal transportation law since the mid-20th century has been a work-in-progress to establish a more effective incentive and accountability framework serving these broad goals in exchange for support from scarce federal transportation and general tax revenues.

Nonetheless, unnecessary bureaucratic delays to the planning and delivery of sound transportation projects harm taxpayers, the economy, and the environment. A new transportation authorization bill should include reforms to simplify the project development process and improve planning and project delivery, while retaining safeguards designed to protect the environment and ensure adequate opportunity for informed public involvement in transportation planning and decision-making. A well-designed reform initiative would reduce duplication, increase cost-effectiveness of planning and project reviews, lead to more effective investment and operations, and support needed innovation in transportation systems. But for reform to succeed, resource agencies need to be adequately funded so they can participate effectively in the transportation planning process.

What Causes Project Delays? There is a lack of consensus about what specifically delays federally funded projects. It is clear, however, that some of the largest causes of delays in federally supported transportation project delivery are related to a lack of funding or a lack of consensus about what specific project investment is needed and how projects should be designed. Delays related to environmental laws, such as the National Environmental Protection Act (NEPA) or historic and parks protection statutes (Section 106 and 4(f)), account for only a small share of total transportation project delays, and in most cases these delays arise in relation to a few highly controversial and complex projects that entail large unmitigated adverse impacts.[1] Of all highway projects that received federal funds in 2001, only 3 percent of projects, accounting for 9 percent of funds, had a significant enough impact on the environment to require preparation of an Environmental Impact Statement (EIS).[2] Indeed, nine out of ten federally supported transportation projects underwent little or no formal environmental review, as they were eligible for Categorical Exclusions (CEs) or Findings of No Significant Impact (FONSIs).

SAFETEA-LU Has Helped Avoid or Reduce Delays. SAFETEA-LU contained several provisions intended to improve project delivery. Many of these sought to address the largest causes of project delay with efforts to improve administrative processes and ensure more effective coordination early in the planning process between transportation agencies, resource agencies, and stakeholders. States have reported that because of SAFETEA-LU Section 6001, the environmental, land management, and natural resource agencies are now routinely invited to participate in all planning studies and that the Act has increased involvement of environmental planners in pre-NEPA planning studies, with 20 of 27 state DOTs reporting revisions to their practices.[3]

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[1] Jennifer Dill, "What Influences the Length of Time to Complete NEPA Reviews? An Examination of highway Projects in Oregon and the Potential for Streamlining," Portland State University, Submitted for Presentation at the 85th Annual Meeting of the Transportation Research Board, 2005. Accessed 2/13/11 at: www.dot.state.ak.us/stwddes/desenviron/assets/.../nepareviewtime.pdf

[2] U.S. General Accountability Office, "Highway Infrastructure: Perceptions of Stakeholders on Approaches to Reduce Highway Completion Time," GAO-03-398, 2003. Accessed 2/13/11 at: www.gao.gov/new.items/d03398.pdf

[3] National Cooperative Highway Research Program, "Legal Research Digest 54: Practice Under the Environmental Provisions of SAFETEA-LU," Transportation Research Board, December 2010. Page 19.

This remains the major area where further progress in reducing project delays is most promising. While experience with the SAFETEA-LU reforms has been short, in a recent survey by the Transportation Research Board (TRB), more than a third of all responding State DOTs reported that SAFETEA-LU has prevented or reduced delays. One state DOT commented that:

> *Early involvement and dialogue has led to earlier issue identification and discussion to resolve important issues collaboratively with partnering agencies. Critically flawed projects are identified and have been removed from consideration, thus saving funds and reducing costs... In addition, early collaboration has identified the type and level of environmental studies needed on a project during project development.*[4]

Other reported state DOT responses included such statements as:

> *there is "better resource agency input earlier into the development of alternative alignments that might have delayed the project in the permitting phase"; and "...getting local entities, state, federal and the public engaged early and often has got to reduce delays later in a project."* [5]

Cuts in Resource Agency Budgets Threaten to Increase Project Delays. Cuts in resource agency budgets pose an increasing risk to progress in reducing project delays. As GAO said in a recent report to the Senate Committee on Environment and Public Works:

> *State DOTs, resource agencies, and other transportation stakeholders we contacted recognized some potential benefits of post-SAFETEA-LU changes in environmental reviews, including*
> *• improved project management,*
> *• increased likelihood of weeding out flawed alternatives early, and*
> *• better informed and more involved resource agencies.*
>
> *According to FHWA, these changes institutionalize more disciplined project management, essentially "tightening up" the environmental review process. In addition, these changes put FHWA in a stronger management role. State DOTs and resource agencies cited four main challenges in their efforts to implement the post-SAFETEA-LU changes in environmental reviews.*
>
> ***(1) Resource agency resources are limited. Resource agencies cited their core regulatory duties as their main responsibility and told us that resource constraints hamper their ability to take on extra responsibilities. These constraints may limit their ability to fully participate in the early stages of environmental reviews.*** *[emphasis added]*
>
> *(2) Resource agencies' and local public authorities' knowledge of post-SAFETEA-LU requirements is incomplete.*
>
> *(3) Existing processes must be adapted to meet the revised requirements.*[6]

When resource agencies are undergoing sharp budget cutbacks, as is the case for most

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[4] Op.cite. Page 17.

[5] Op.cite., page 17.

[6] U.S. Government Accountability Office, "Highways and Environment: Transportation Agencies are Acting to Involve Others in Planning and Environmental Decisions," April 25, 2008, GAO-08-512R Highways and Environment.

state and federal resource agencies today, their capacity to participate during the planning process is sharply curtailed, as it is not a part of their mission and can represent a change in practice from focusing on project specific issues. Even prior to recent budget cuts, resource agencies expressed concern over how limited staffing resources limited their ability to respond to requests for engagement from multiple Metropolitan Planning Organizations (MPOs) as well as the state DOT. As GAO pointed out, states like Ohio, North Carolina, and Texas have 17 to 25 MPOs, making it impossible for a single state resource agency to be concurrently involved in the planning process for each without new staff resources.

To reduce project delays, Congress should examine ways to ensure federal and state resource agencies are adequately funded to allow them to engage in the state and metropolitan planning process so environmental issues can be avoided and addressed earlier in the process. This could be done by creating a set aside of a fixed percentage of Highway Planning and Research (HPR) and metropolitan planning formula funds and/or other transportation formula funds to ensure land management, environmental, and resource agency involvement in state and metropolitan planning and project reviews.

Such funding could also help state natural resource agencies address problems up-front and avoid long delays later in the project development process by ensuring they can map known environmental, historic and other sensitive areas. This allows states to avoid these areas when determining corridor location. The sharing of information also saves times for DOTs as they can check corridor locations using integrated technology instead of sending information to multiple agencies and waiting for individual feedback. While such an approach is already in place in a number of states, including Florida, Massachusetts, North Carolina, and Oregon, such programs are threatened by budget cuts. Instead, they should become the state of the practice in integrated transportation and natural resource planning across America.

Proposed cuts in funding threaten to reduce the capacity of agencies to meet statutory requirements to protect the environment and support counterpart agencies, such as federal and state DOTs. EPA has taken steps to support better coordination of resource and transportation agencies with *NEPAssist,* an innovative tool that facilitates the environmental review process and project planning in relation to environmental considerations. The web-based application draws environmental data dynamically from EPA regions' Geographic Information System databases and provides immediate screening of environmental assessment indicators for a user-defined area of interest. These features contribute to a streamlined review process that potentially raises important environmental issues at the earliest stages of project development.[7]

A proposal by the House Appropriations Chair, Harold Rogers (R-KY), on February 9, 2011, would slash more than $2.4 billion from EPA's budget over the remaining 6 months of the fiscal year. This would represent a 16% cut for EPA's total budget for the year, but an effective 32% cut for the budget in the remaining months. Such cuts threaten EPA's ability

[7] For more information, see https://oasext.epa.gov/NEPA/

to support timely transportation project reviews. To reduce project delays, Congress should protect funding for the Environmental Protection Agency, the Interior Department's Fish and Wildlife Agency, and other resource agencies to ensure they can continue to support timely transportation project delivery.

Oppose Time Limits on Transportation Project Reviews by Agencies. In the face of widespread budget cuts to resource agencies, proposals for more stringent time limits on agency comments in transportation project reviews and for the imposition of financial penalties on agencies that submit comments after time limits have passed amount to veiled efforts to weaken the enforcement of environmental laws. Such time limits are inherently arbitrary, as they tend to apply to a diverse array of projects, from small and simple to massively complex and controversial. They leave little room to adapt to highly variable agency workloads, the adequacy or inadequacy of information provided as a basis for decision-making, and other factors. Interagency partnership agreements, not statutory deadlines, are the appropriate framework for expediting project delivery through effective scheduling and coordination.

Create New Incentives for Timely Project Delivery. Strong partnership and coordination among stakeholders, supported by financial incentives have been successful in engendering early project completion.[8] Congress should consider the recent proposal offered by the Brookings Institution to allow the U.S. DOT to maintain an incentive pool to reward states and metropolitan areas that consistently deliver projects on time while meeting or exceeding environmental standards.[9] Savings from more timely project delivery could potentially offset the costs of the program.

Create New Incentives for Better Transport Planning-Project Review Linkage. The Surface Transportation Project Delivery Pilot program (SAFETEA-LU Section 6005, codified as 23 United States Code (U.S.C.) 327(h)), offered California and four other states the opportunity to take on the federal role in administering the NEPA process. Only California took the necessary steps to assume the appropriate legal responsibility and institutional capacity to pursue this delegation of authority under the pilot program. It appears that California has realized significant time savings by coordinating state agency review of environmental documents. Other states have not been willing to waive sovereign immunity or to ensure appropriate agency resources to take on federal roles.

The California Environmental Quality Act (CEQA) remains a model for other states to copy, requiring not only evaluation of potential mitigation actions to protect the environment, but requiring environmental mitigation to be adopted as part of project implementation. California has also recently adopted the AB 32 and SB 375 legislation, which strengthen

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[8] As noted by Robert Puentes in a recent Brookings Metropolitan Policy Program report, "Moving Past Gridlock: A Proposal for a Two-Year Transportation Law," the American Recovery and Reinvestment Act contained a use-it-or-lose-it provision that states obligate highway dollars by a certain date, and not one state failed to meet the deadline.

[9] Robert Puentes, "Moving Past Gridlock: A Proposal for a Two-Year Transportation Law," Brookings Institution, Washington, DC, December 2010.

regional transportation and land use planning coordination to encourage reduction in the long-term growth in per capita motor vehicle travel to reduce greenhouse gas emissions.

If resource agencies are given resources and a mandate to be engaged in the planning process, they will be better able to consider alternatives and mitigation in transport investment and operation planning and analysis, reducing the need to consider these elements later in the project programming and approval process. This might be done through new kinds of Programmatic Agreements or "Program Delivery Partnering Plans".

A voluntary pilot program might be created in which US DOT, EPA, and other agencies work with certain states to determine how to accelerate project delivery through more thorough federal review of states' long range transportation plans, satisfying NEPA requirements through the planning process so that fewer NEPA requirements need to be satisfied at the project review level. In this way concerted deliberations about projects might take place much earlier in the process. States with strong environmental review and planning processes – combining such features as California's CEQA and SB 375 – might be permitted to waive steps such as the draft EIS.

Congress should not, however, take any steps to weaken the vital protections of NEPA in such a process. The 1970 NEPA law remains the *Magna Carta* of environmental law, ensuring adequate public notice and comment opportunities before major federal decisions are made, ensuring consideration of alternatives to proposed major action, and ensuring consideration of actions that might avoid or mitigate adverse impacts to the natural environment or communities. A draft EIS is often the first chance for the public to examine the detailed alternatives and characteristics of proposed major transportation actions. The public comments provided on the draft EIS enable agencies and project sponsors to consider ways to improve or modify project proposals prior to a final EIS.

Increase Use of Mitigated FONSIs and Mitigated CEs. Increased use of Mitigated Findings of No Significant Impact (FONSIs) and Categorical Exclusions (CEs) could help provide a basis for advancing some transportation projects faster. The Council on Environmental Quality (CEQ) issued Guidance on Mitigated FONSISs on January 21, 2011 (Federal Register Vol. 76, No. 14, pg. 3843-3853), discussing the framework under which many projects can be approved without requiring a more detailed EIS. Mitigation commitments should be explicitly described as ongoing commitments with measurable performance standards and adequate mechanisms for implementation, monitoring, and reporting. Agencies should provide for public participation and accountability in the development and implementation of mitigation and monitoring efforts described in their NEPA documentation. This could be done through both project level initiatives and through programmatic agreements. Mitigated Categorical Exclusions (CEs) and Mitigated Programmatic CEs, following the same principles, could also be facilitated to expedite project delivery, while still safeguarding the environment. But in each of these cases, adequate engagement of resource agency staff early in the planning process to help design and implement effective impact avoidance, mitigation and monitoring programs will be required. These approaches are likely to flounder if resource agency budgets are sharply cut back.

Congress Should Encourage Greater Transportation Project Design Flexibility. Currently the Federal Highway Administration requires all projects to meet the highest of design standards even when potential traffic volumes may never be realized – at times this results in the over-design of projects causing in community impacts and concerns, while at other times it can bog down projects in drawn out exceptions requests. Though it varies state-by-state, traffic engineers in city and state DOTs are often required to follow state design guidelines, which generally follow the AASHTO Green Book and the Manual on Uniform Traffic Control Devices (MUTCD). These manuals focus primarily on maximizing the level of service and the speed of mixed traffic vehicles, with little thought to transit priority, traffic calming, complete streets, or maximizing the number of people carried efficiently in a corridor. Traffic engineers are generally reluctant to deviate from these standard designs.

One example of delay caused by design standards is the Meadowville Interchange near Richmond, Virginia. This project would provide a new interchange on Interstate 295 to serve the Meadowville Technology Park – one of the premiere economic development sites of the state. Virginia was unable to find enough revenue to fund the preferred design of the project – however working with the federal and local government it was able to cobble together $20 million to build a scaled down version of the interchange. However, according to FHWA standards, this interchange would potentially not be able to handle traffic volumes 20+ years into the future at a passing level of service. Despite the fact that the next interchange would be failing in 20 years and that the new interchange would help improve traffic flow there, FHWA refused to approve the scaled down project. It took 10 months for FHWA to finally agree to "conditionally approve" the project – and FHWA may require that the state "revisit" the project in 10-15 years. This delay impacted access to a key economic development site and put the delicate balance of funding for the project at risk.[10] State and local DOTs have expert engineers that should be able to make these decisions without having to go to Washington to ask permission – especially when a project – while not perfect – will make things better than if nothing is built.

Inflexibly applied state DOT design standards can also get in the way of project implementation. An example of this has arisen in the still delayed effort to put a full Bus Rapid Transit (BRT) system on San Francisco's Van Ness Avenue. Van Ness Avenue is also US Highway 101, and as such, is under the control of Caltrans, the state department of transportation. Caltrans administrative procedures require the city to adhere to strict rules, such as retaining an equal vehicular throughput on Van Ness, even if automobiles are diverted or traffic is reduced by the improved transit services and changes in road configuration. This requirement would be easy to meet in the developing world, where creating a bus lane will generally increase the corridor's throughput substantially, but this is less than certain the United States. Caltrans street design requirements are also antiquated and do not easily adapt to transit- and pedestrian-friendly design. Exceptions will be necessary and moving through this bureaucracy is proving to be difficult for those involved in the project, which remains stalled.

[10] For more information, http://www.meadowville.com/mtp_news.asp.

To reduce project delays, Congress should encourage DOTs to pilot test alternative road and public transport infrastructure designs where these might solve problems effectively.

Consider Further Analysis of How to Integrate Planning and Project Reviews and Concerns About AASHTO Proposals for Expediting Project Delivery. Attached as a part of this testimony is a cover letter, dated April 9th, 2009, from the Environmental Defense Fund, National Recreation and Park Association, Smart Growth America, Southern Environmental Law Center, and the Natural Resources Defense Council, to the leadership of the House and Senate transportation committees, concerning strategies for integration of the transportation planning and project review process. The cover letter conveys a paper, "Reforming U.S. Transportation Planning Procedures to Support National Goals and a More Effective Transportation Project Review Process," dated March 26, 2009, which is also part of this testimony. This examines recent developments in the relationship between transportation planning and project level environmental reviews and recommends reforms that could help build public support for increased transportation funding, reduce legal and political conflict, and help expedite good transportation investments.

The paper also examines proposed changes to law to expedite transportation project delivery that have been proposed by the American Association of State Highway and Transportation Officials (AASHTO). Some of AASHTO's ideas merit support if implemented in the right framework, but others would weaken environmental protections and exacerbate delays, rather than improving the planning and project review process.

Thank you for the opportunity to testify today. I would be pleased to answer any questions from the subcommittee regarding these matters.

Environmental Defense Fund * National Recreation and Park Association Smart Growth America * Southern Environmental Law Center
Natural Resources Defense Council

April 6, 2009

The Honorable James Oberstar
Chairman, House Transportation and Infrastructure Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Barbara Boxer
Chairman, Senate Environment and Public Works Committee
U.S. Senate
Washington, DC 20510

Dear Chairman Oberstar and Chairman Boxer:

We are writing to convey to you concerns and ideas for needed improvements to better coordinate transportation planning, and project review requirements under the National Environmental Policy Act and other laws. Progress in this area is vital to ensuring that transportation investments not only support better mobility choices and economic development, but also address climate change, improve public health, curb dependence on oil, and protect natural resources.

Recent reports issued by the national transportation study commissions suggest a growing consensus that it will be important for the next transportation authorization to clarify national goals for transportation investment, expand funding for investment, and focus on improving overall transportation system performance and project delivery.

Accomplishing these objectives will require a more effective integration of the planning and project review process and better consideration of alternatives that might improve system performance in all its dimensions, including mobility and the environment. The attached paper identifies key strategies for accomplishing this.

The paper examines recent developments in the relationship between transportation planning and project level environmental reviews and recommends reforms that could help build public support for increased transportation funding, reduce legal and political conflict, and help expedite good transportation investments.

The paper also examines proposed changes to law to expedite transportation project delivery that have been proposed by the American Association of State Highway and Transportation Officials (AASHTO), which have been offered in the wake of recent Bush Administration actions that enabled states to reduce consideration of alternatives in both transportation planning and project reviews. Our organizations would support some of these ideas if implemented in the right framework, but are concerned that many of these recommendations would weaken environmental protections and spur additional litigation, rather than improving the planning and project review process.

We recommend that annual emissions of CO2 from the metropolitan transportation system, or State system as appropriate, be used as a metric for comparison of transportation plan alternatives. Rather than focusing only on transportation capital investments, planning scenarios should include evaluation of all strategies that have been identified as contributing significantly to reductions in GHG emissions, such as pricing strategies designed to influence travel choices, operational strategies that improve system productivity, and land use strategies designed to optimize the benefits of federal investments in transit services.

The nation and the planet can no longer afford to invest hundreds of billions on transportation facilities that interfere with national GHG reductions strategies, or that fail to achieve the optimum improvement in mobility achievable with the most cost-effective investments, or that fail to minimize the significant adverse impacts on human health. Until a process for evaluating alternatives linked to achieving national objectives is once again integrated into the planning process, the planning process will be driven solely by local political dynamics that will most likely not serve national objectives.

Thank you for considering our views. We would be pleased to discuss these ideas in greater depth with you and your staff.

Sincerely,

Michael Replogle
Transportation Director
Director
Environmental Defense Fund

Deron Lovaas
Federal Transportation Policy

Natural Resources Defense Council

Richard J. Dolesh
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Reforming U.S. Transportation Planning Procedures to Support National Goals and a More Effective Transportation Project Review Process

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I. Introduction

In recent decades, transportation planning and project review procedures in the United States have evolved considerably, shaped by shifting politics and national priorities. With the current federal transportation authorization expiring in September 2009, the U.S. Congress is considering significant modifications to transportation law. Recent reports issued by two Congressionally-established national transportation study commissions suggest a growing consensus that it will be important for the next transportation authorization to clarify national goals for transportation investment, expand funding for investment, and focus on improving overall transportation system performance and project delivery.

Accomplishing these objectives will require a more effective integration of the planning and project review process, better consideration of operational, land use, pricing, and investment alternatives that might improve system performance in all its dimensions, and facilitation of public engagement in these efforts. This paper examines recent developments in the relationship between transportation planning and project level environmental reviews, recommending reforms that could help build public support for increased transportation funding, reduce legal and political conflict, and help expedite good transportation investments.

The paper then examines proposed changes to law to expedite transportation project delivery that have been proposed by the American Association of State Highway and Transportation Officials (AASHTO), which have been offered in the wake of recent Bush Administration actions that enabled states to reduce consideration of alternatives in both transportation planning and project reviews.

II. Reforming Transportation Planning to Support National Objectives

Ever since enactment of the National Environmental Policy Act (NEPA) in 1970, Congress has required that before committing federal resources to any activity, a federal agency must: 1) explore alternatives to identify options that can achieve programmatic objectives with the least environmental impact, and 2) when the selected alternative will have adverse impacts, to investigate mitigation measures to minimize or eliminate those impacts. The role of NEPA in the planning and delivery of transportation projects has always been truncated because the courts have broadly held that NEPA only applies to federal agency actions, and not to decisions by non-federal agencies such as the State departments of transportation (DOTs) and metropolitan planning organizations (MPOs). NEPA applies to decisions by the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) to enter into federal funding agreements for highways and transit projects, but these agreements are always signed after the metropolitan and statewide planning processes have been completed. As a result, the scope of alternatives available for consideration at the project funding stage has been the subject of dispute for decades.

NEPA's contribution to informed federal decision-making does not apply in the context of transportation planning and project selection performed by MPOs and States where consideration of the most important, system-wide, regional scale alternatives should occur. The NEPA review of major transportation projects occurs only after the projects are adopted as part of the metropolitan or statewide transportation plan. During the Clinton administration, the US Department of Transportation (DOT) sought to remedy this gap in the inapplicability of NEPA's decision-making procedures to the MPO and State planning processes by issuing planning regulations that established detailed procedures requiring that alternatives to proposed projects be evaluated by the project sponsor or the MPO before any "regionally significant" project is adopted as part of the transportation plan.[1] This assessment of alternatives was also the step in the planning process when projects were to be evaluated with respect to their contribution to accomplishing the national planning objectives that were added to the law in the 1991 Intermodal Surface Transportation Efficiency Act (ISTEA). This innovative solution to the NEPA gap was intended to ensure that planning decisions would benefits from informed decision-making that derives from a careful evaluation of alternatives before the decision is made to commit scarce local and federal resources to a project.

NEPA has always applied to the federal project-level review of impacts and alternatives, but under the Bush administration US DOT sought to limit NEPA to consideration of those alternatives primarily related to localized issues affected by alignment and habitat impacts. Under the Bush interpretations, the regional, statewide and climate impacts of transportation mode choices, the selection of major service corridors, pricing and land use strategies have largely been excluded from NEPA review at the project level because those factors are usually relevant only to the choices made at the regional or statewide planning stage. While the application of NEPA is still being refined in terms of some localized, project-level impacts (hot spot air quality, water quality, and habitat protection), project-level reviews have been stripped of any role in assessing the critical impacts on climate change (CO2 emissions), large scale health impacts from regional exposure to hazardous pollutants, social impacts of providing or denying access to jobs and services, and impacts on land use, growth, and travel patterns.

US DOT's 2007 revision of the transportation planning rules eliminated the 1993 procedures requiring that planning agencies assess project impacts before projects are adopted into metropolitan or statewide plans, and also seeks to foreclose consideration of these impacts as part of the project-level review under NEPA. The failure to perform in the planning process the functions normally served by NEPA, i.e., consideration of broader regional/statewide scale alternatives and mitigation options, is a major flaw in the current transportation decision-making process. The entire planning process no longer includes a step when the most important environmental, social and economic impacts of transportation investments must be assessed, and alternatives compared based on their environmental impacts and measured against the national objectives established by Congress to be accomplished by the transportation system.

The consideration of alternatives and mitigation strategies must be restored as an essential step in the identification of metropolitan and State-wide transportation programs and projects. Any effort by Congress to add reductions in greenhouse gas (GHG) emissions as a national objective of the transportation planning process will be defeated if adequate procedures are not established

[1] 23 CFR § 450.318(c) (1995).

to ensure that the national objectives will be accomplished by MPO and State plans. The law should require that federal resources be spent only on projects that can be shown to cost-effectively meet mobility needs while accomplishing national objectives such as reducing emissions of greenhouse gases (GHGs) and other harmful air pollutants. Issues such as access to jobs and mobility services for people who do not drive, the share of family income paid for transportation, and the energy, environmental and infrastructure costs of new development can only be meaningfully addressed at the metropolitan and State-wide scale of analysis. Similarly, the benefits of strategies designed to minimize these impacts such as channeling new development into areas served by transit, congestion pricing and policies designed to promote vehicle electrification can only be assessed at the regional scale.

Currently, these factors are required to be considered under NEPA and section 109(h) of the Federal Aid Highway Act,[2] but under the Bush administration US DOT has created a planning process in which these factors are not required to be considered at any stage. The 1993 procedures adopted to implement ISTEA that required consideration of alternatives by the transportation planning agencies have been eliminated, and US DOT has all but foreclosed resort to NEPA as a meaningful planning tool. If climate impacts, mobility objectives, cost-effectiveness, and other factors relevant to making smart transportation investments are to be given proper weight in the planning process, Congress must restore the obligation to consider these important impacts before decisions are made to invest limited transportation resources. The process for giving weight to these important outcomes must be clarified at the federal level before any of these tasks can be transferred to state or regional agencies.

This truncated decision-making in the development of transportation plans also gives rise to litigation under NEPA when those major impacts are excluded from both the planning process and the project-level reviews of projects. Courts are caught trying to resolve claims by plaintiffs that regional alternatives were never fairly considered at any point in the process, and US DOT's arguments that these impacts were not considered at the project-level because it is too late once planning decisions are made in the metropolitan or State plan. This conflict in the courts will likely continue until Congress clarifies the procedures for decision-making as part of the MPO/State planning process and the role of federal agencies when making project funding decisions.

Premature, and sometimes unnecessary, litigation is further spurred by the provision in 23 USC section 139, added by Section 6002 of SAFETEA-LU, which imposes a 180-day limit for the filing of a lawsuit challenging a highway decision from the time of publication in the Federal Register of notice of issuance of a ROD. Adoption of the 180-day Statute of Limitations linked to the ROD has forced unnecessary litigation over projects for which there are no near-term prospects for further project development due to lack of local resources and lack of consensus about the proposed project. As a practical matter, agency action with respect to projects does not actually become final until federal funds are authorized in the project agreement executed with the State as required by 23 U.S.C. section 106(a), under Full Funding Grant Agreements for transit projects, or when final approvals are granted under credit programs such as the Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA). If a time bar is to apply to highway project litigation at all, it should be linked to notice of a final funding

[2] 23 U.S.C. § 109(h).

agreement to ensure that the resources to proceed with the project have actually been committed, and are not speculative.

The obligation to assess large-scale impacts such as climate, regional-scale alternatives and mitigation strategies that can only be implemented at the metropolitan scale must be re-established as part of the regional and statewide planning process before any policy can be developed regarding delegation of NEPA to the States. Delegation to the States will not be appropriate, if at all, until Congress clarifies whether NEPA or some comparable alternative process for performing the important functions of NEPA is adopted as part of the planning requirements in the Federal-Aid Highway Act. Then, once the role for analyses of climate and regional impacts and the comparison of alternatives has been clearly defined, the role for the States under NEPA must include an assessment of the resources available to the States to carry out this large, complex task.

A. Evolution of US DOT's Planning Rules.

Congress attempted to resolve the proper role of NEPA and to establish appropriate consideration of alternatives in the planning process in the Transportation Equity Act for the Twenty-First Century (TEA-21) Amendments (1998). Those amendments included a statutory declaration that NEPA did not apply to the federal review of the planning decisions made by MPOs and States,[3] but also required that with respect to the planning procedures established in 1993 that US DOT "integrate such requirement, as appropriate, as part of the analyses required to be undertaken pursuant to the planning provisions of title 23...."[4] But that effort to integrate the planning process and NEPA was defeated by the refusal of the Bush administration to implement the congressional directive.

After enactment of ISTEA in 1991, US DOT issued revised regulations in 1993 that required planning agencies to consider alternatives before adopting a "regionally significant" project into the metropolitan or statewide transportation plan. 23 C.F.R. § 450.318(c) (1995). The 1993 rule required consideration of "the direct and indirect costs of reasonable alternatives and such factors as mobility improvements; social, economic, and environmental effects; safety; operating efficiencies; land use and economic development; financing; and energy consumption." The rule also required that the "studies shall evaluate the effectiveness and cost-effectiveness of

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[3] 23 U.S.C. § 134(o).

[4] Section 1308 of the 1998 TEA-21 amendments reads in full:

> *The Secretary shall eliminate the major investment study set forth in Section 450.318 of title 23, Code of Federal Regulations, as a separate requirement, and promulgate regulations to integrate such requirement, as appropriate, as part of the analyses required to be undertaken pursuant to the planning provisions of title 23, United States Code, and chapter 53 of title 49, United States Code, and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) for Federal aid highway and transit projects. The scope of the applicability of such regulations shall be no broader than the scope of such section.*

alternative investments or strategies in attaining local, State and national goals and objectives." Id.

These national objectives were first defined in ISTEA as "the development of surface transportation systems that will serve the mobility needs of people and freight and foster economic growth and development within and between States and urbanized areas, while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning processes identified in this chapter." 23 U.S.C. § 134(a)(1). In the 2006 federal transportation law, The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Congress retained the directive that metropolitan transportation plans "accomplish" the national planning objectives defined in § 134(a)(1), 23 U.S.C. § 134(c), and extended this directive to include statewide transportation plans. 23 U.S.C. § 135(a).

In the 2007 revisions to the planning rules after enactment of SAFETEA-LU (P.L. 109-59 (2005)), US DOT eliminated both the obligation to consider alternatives and any process for evaluating whether each project selected for a metropolitan or statewide plan, or all the projects in a plan as a whole, accomplishes the national planning objectives. *Compare* 23 CFR § 450.318 (2008). FHWA explained its understanding that in TEA-21 Congress required that US DOT retain the requirements for a major investment study by integrating them into the planning and NEPA processes: "The technical structure of the law is such that this action requires a two-step process: (1) Eliminating and (2) proposing an approach for integrating what remains." FHWA & Fed.Transit Admin., 67 Fed. Reg. 59,219, 59,223 (Sept. 20, 2002). US DOT waited until February 14, 2007 to revise the 1993 regulation. 72 FED. REG. 7224, 7274 (Feb. 14, 2007) (codified at 23 C.F.R. § 450.318 (Mar. 16, 2007)). But instead of integrating the requirements of the major investment study into the planning process, US DOT eliminated these requirements.

The 2007 planning rules fail to implement the direction that Congress provided to US DOT. Section 1308 of the 1998 amendments (TEA-21) directed the Secretary to "integrate" the procedures adopted in 1993 for the consideration of project alternatives in the planning process with the procedures required under NEPA to eliminate duplication between the two programs. The 1993 planning rules created a process which required that alternatives to "regionally significant projects" (major new highway and transit projects) be considered by the MPO before a specific project was selected for inclusion in the plan. 23 CFR § 450.318. The purpose of this alternatives analysis was to ensure consideration of regionally available options that are not available after a specific mode for a corridor have been chosen, and to compare regionally available options based on an assessment of how well each option advances the national planning objectives in § 134(a)(1). If integrated as a programmatic analysis into the NEPA process for tiered review of programs and projects, this regional-scale analysis at the planning stage would eliminate the duplication that can occur under some NEPA case law where analysis of regional strategies is called for at the project implementation stage.

Instead of integrating the 1993 planning procedures with the NEPA procedures as Congress had directed, US DOT dropped any requirement for the review of alternatives. The 2007 planning rule: 1) gave the planning agencies discretion not to perform any planning studies before adopting a project into the plan, and 2) included guidance that would allow FHWA to eliminate

any consideration of regional alternatives when projects are reviewed under NEPA by relying upon the projects adopted through the planning process to define "purpose and need."[5] Therefore if the metropolitan plan prescribes a highway for a corridor without any assessment of adverse impacts, or consideration of alternatives, then for NEPA purposes only highways may be considered to satisfy the purpose and need. As a result, there is no step in either the planning process or the NEPA review process when regional alternatives to highways are required to be evaluated, and no procedure for determining whether a highway is the best option for implementing the national planning objectives identified by Congress.

The Bush administration's decision to eliminate any analysis of alternatives as part of the planning process, along with the statutory prohibition against the application of NEPA to planning, has the effect of allowing major investment decisions to be made without any rational link between the choice made and the national objectives, and without any assessment of the effects the project will have on system performance, mobility, climate or other environmental impacts. The current planning rule allows MPOs to consider only one mode and only one project without exploring other options or making any determination that the option selected will best accomplish the national planning objectives, or even accomplish them at all.

B. Recommendation For Planning Process Reform.

The federal government (all branches) must make clear that planning shall focus on an evaluation of alternatives for the purpose of identifying those investments that best accomplish the national objectives. National objectives must be clearly defined to guide the planning process. In the case of climate impacts, Congress must identify the metric to be used to compare alternatives. We recommend that annual emissions of CO2 from the metropolitan transportation system, or State system as appropriate, be enacted as the metric to be used for comparison of transportation plan alternatives. The Act should also make clear that projects are not the only alternatives to be considered. Planning scenarios must include evaluation of all strategies that have been identified as contributing significantly to reductions in GHG emissions, such as pricing strategies designed to influence travel choices, and land use strategies designed to optimize the benefits of federal investments in transit services.

The nation and the planet can no longer afford to invest hundreds of billions on transportation facilities that interfere with national GHG reductions strategies, or that fail to achieve the optimum improvement in mobility achievable with the most cost-effective investments, or that fail to minimize the significant adverse impacts on human health. Until a process for evaluating alternatives linked to achieving national objectives is once again integrated into the planning process, the planning process will be driven solely by local political dynamics that will most likely not serve national objectives.

In addition, there can be no principled discussion of the role that NEPA should play, or the role that the states should play in implementing NEPA, until the procedures and objectives governing the planning process are clearly defined. These procedures should include the assessment of environmental, economic and social impacts, consideration of alternatives, and the development of cost information so that planning agencies, stakeholders and the public are presented with the

[5] See 40 C.F.R. § 1502.13 (Purpose and Need).

information they need to make fully informed decisions before a project is adopted as part of a metropolitan or State-wide plan.

C. FHWA's Application of the 2007 Planning Rules.

In the two years following adoption of the 2007 Planning Rules, FHWA has sought to avoid any consideration of the climate impacts of highway projects through the Environmental Impact Study (EIS) process by arguing that the climate impacts of GHG emissions should be evaluated at the regional level because few options remain available for reducing emissions once a highway project has been adopted into the MPO plan. For example, in its Record of Decision (ROD) for the Inter-County Connector (ICC), an 18-mile 6-lane outer beltway north of Washington, DC, the FHWA defended the failure to consider climate impacts in the project EIS on the grounds that GHG emissions data at the project level were not "informative."

> *FHWA does not believe it is informative at this point to consider greenhouse gas emissions as part of the project-level planning and development process. Greenhouse gases are quantitatively and qualitatively different from other motor vehicle emissions, and their magnitude and breadth appear to require a different approach to address their potential climate impacts. First, HC and other criteria pollutant emissions are of concern, and thus regulated, in individual metropolitan or smaller areas. The climate impacts of CO2 emissions, on the other hand, are global in nature. From a NEPA perspective, it is analytically problematic to conduct a project level cumulative effects analysis of greenhouse gas emissions on a global-scale problem. Secondly, criteria pollutant emissions last in the atmosphere for perhaps months; CO2 emissions remain in the atmosphere far longer - over 100 years - and therefore require a much more sustained, intergenerational effort. Finally, due to the interactions between elements of the transportation system as a whole, project-level emissions analyses would be less informative than ones conducted at regional, state, or national levels. Because of these concerns, FHWA concludes that we cannot usefully evaluate CO2 emissions in the same way that we address other vehicle emissions. The NEPA process is meant to concentrate on the analyses of issues that can be truly meaningful to the consideration of project alternatives, rather than simply "amassing" data. In the absence of a regional or national framework for considering the implications of a project level GHG analysis, we feel that such an analysis would not inform project decision-making, while adding administrative burden.* ICC ROD, Responses to Comments, # 415.

FHWA is correct that strategies for reducing GHG emissions are best evaluated at the regional scale as part of the MPO planning process. But FHWA has also not required MPOs to consider GHG emissions when developing regional plans because the requirement to consider project environmental impacts, alternatives and mitigation strategies was dropped from the planning rules in 2007.

Congress needs to provide direction regarding the national objectives for reducing GHG emissions from the transportation system, and how those objectives are to be integrated into the transportation planning process. Once the national GHG reduction objectives are established, then Congress should affirm the directive in TEA-21 that the planning requirements under the Federal Aid Highway Act include the evaluation of impacts, alternatives and mitigation prior to

adoption of a project as part of a transportation plan. The planning process created by US DOT's current planning rules must be revised to ensure that the transportation systems designed through the planning process will lead to the selection of the programs, projects and strategies that will most cost-effectively reduce climate impacts and greenhouse gas emissions.

D. Adequate Planning Tools Are Needed to Make Well-informed Decisions.

In addition to establishing clear national planning objectives and planning procedures that ensure a rigorous investigation of options before investment decisions are made, national criteria should be established to ensure that the state-of-the-art scientific tools are applied to estimate emissions of GHGs and air pollutants, and the impacts that alternatives will have on system performance, user costs and other metrics of important factors.

It is not good national policy to allow States to assume responsibility for assessing the GHG emissions impacts of transportation plans, programs and projects without clear, consistent nationally uniform methods for modeling future traffic and emissions. Uniform national guidance is essential to ensure that the methods for measuring baseline emissions and estimating future emissions from vehicles, and the modeling tools to be employed in projecting future traffic and the impacts of capacity improvements, induced demand and land use decisions are scientifically reliable and credible. Without national guidelines to ensure that the best scientific measurement tools are applied, turning planning assessments and NEPA reviews over to the states would wreak havoc on the system of environmental assessment that has developed over the last 40 years, result in a patchwork of state methods and procedures, invite litigation and conflicting state court decisions, and severely impair the ability to assess and compare the performance of transportation systems from state to state.

III.AASHTO Recommendations for Expediting Project Reviews: Response by Environmental Groups [6]

A. Expand Existing Pilot Program for NEPA Responsibility Delegation to States

AASHTO Recommendation: Expand State Environmental Roles in Delivering Projects and Programs - Expand and refine programs under which state transportation agencies can assume USDOT responsibilities under NEPA and related environmental laws by making the environmental delegation program a permanent program, allowing all States the option to participate in this program, and by establishing a new pilot program that allows states to assume expanded environmental responsibilities without waiving sovereign immunity. Also clarify that a State can assume USDOT's responsibility for making project-level conformity determinations under the Clean Air Act, along with all other project-level environmental review responsibilities.

Section 6005 created a pilot program allowing five States to assume full USDOT responsibilities for environmental reviewed for all types of projects. Under current provisions, when states

[6] These AASHTO recommendations are drawn from *AASHTO Authorization Policy*, October 2008. http://www.ontrackamerica.org/files/AASHTO%202008%20Authorization%20policy.pdf

assume additional responsibilities under Section 6004 or 6005, they must waive their sovereign immunity. AASHTO cites the requirement that states waive sovereign immunity as an impediment to states assuming these additional responsibilities. AASHTO states that limited experience to date suggests that delegation is effective at ensuring faster environmental reviews.

Response: No delegations to states to implement NEPA beyond that provided in current law are appropriate until the obligation to evaluate regional-scale alternatives is clearly defined by Congress, and uniform national guidance is developed for the assessment of emissions of GHG and harmful air pollutants along with other regional impacts that can be expected in all metropolitan areas, as discussed above.

The reasons for eliminating the federal role are not demonstrated. In 1976, Congress amended NEPA to explicitly authorize state transportation agencies to prepare environmental documents subject to review by the applicable federal agency. At that time the States alleged that projects were being delayed because they had to wait for the responsible federal agency to complete the environmental documents. The states insisted that they could solve these delays so long as they could prepare the environmental documents. They did not expect that federal agency review of completed documents would cause delays. The states have not explained why that 1976 authorization for the states to prepare EISs continues to cause delay that would be eliminated if there were no federal oversight of the final product.

Eliminating federal oversight from the process is unnecessary and inappropriate. The federal transportation program is the largest infrastructure investment program, with vast impacts on the environment, public health and climate. The federal agencies responsible for administering this program have important responsibilities to ensure that these funds are invested in a manner that does not impair the health of the American people or the environment. Most states have not adopted environmental review programs similar to NEPA, and have not committed the resources or developed the agency experience to implement such a program. It is especially inappropriate to delegate authority to states that have not demonstrated a commitment to environmental protection that is comparable to NEPA.

US DOT has not performed any publicly available analysis of the performance of those states that were authorized to implement NEPA under the pilot program enacted in SAFETEA-LU. Until a thorough analysis of state performance is available to ensure that the pilot program states are meeting NEPA's policy and mandates, there is no experience that would justify expanding this program to other states.

Section 6004 of SAFTEA-LU 2005 authorized states to assume full USDOT responsibility to determine if an action falls within a Categorical Exclusion (CE). This is a hefty responsibility for a State to assume due to the nature of a CE. If an agency determines that an action will not individually or cumulatively have a significant effect on the environment, that agency may forgo the preparation of an environmental impact statement (EIS) or environmental assessment (EA). 40 C.F.R §1508.4. Further, an agency is not required to inform or involve the public in the application of a CE.

When used appropriately, CEs can save an agency time and resources. However, CEs comprise the majority of reviews for the vast majority of capital projects funded with federal transportation monies. Without a notice and comment opportunity, the public is shut out of the decision

making process and significant actions may be undertaken without proper environmental review. As of this date, minimal information has been made publicly available that informs us how States have handled the additional responsibilities outlined in SAFETEA-LU. Before the program is expanded, it is important to have this information about how specific project reviews were conducted and how projects were assessed in order to determine if this State/CE program should continue and/or be expanded. Additionally, the environmental document quality control program that CalTrans put in place under Section 6004 and 6005 must be examined from a federal perspective to guarantee that it has actually complied with all federal environmental laws and regulations.

If a thorough analysis demonstrates that States have not abused the authority granted in 2005, such analysis would provide no justification for the AASHTO request that the program be expanded without any waiver of state immunity to suit. The immunity provision was required in 2005 to ensure that any State violations of NEPA would be subject to judicial review in federal court. This is critically important because the jurisprudence developed by the federal courts is now well developed after 40 years of litigation. It would not be appropriate to abandon that well-developed body of case law by allowing the state courts a free hand to re-define the requirements of NEPA.

Other important features of NEPA would also be lost if the program were transferred to the states without any federal agency oversight. EPA would have no role under section 309 of the CAA to review the adequacy of EISs prepared exclusively by the states, and CEQ would have no role in resolving issues raised by EPA with respect to inadequate EISs. Removing highway projects from EPA and CEQ oversight would eliminate the procedures under NEPA that assure the use of the best science, and consideration of major impacts such as the health impacts of highway emissions with respect to which most states have no expertise. The EPA and CEQ oversight roles play an important part in ensuring that the program agencies give full consideration to adverse impacts, alternatives and mitigation options. Delegation to the states without federal agency review would seriously undermine procedures that ensure NEPA compliance.

Publication of notice of the availability of an EIS in the Federal Register would be another protective procedure lost if the program were delegated entirely to the states. Issues such as the public health impacts caused by exposure to hazardous air pollutants are scientifically complex and have been addressed in the past only by national organizations with Ph.D. scientists on staff. These issues cannot effectively be addressed by lay citizens without expertise in the field of health impacts attributed to toxic air pollution. If notices of availability for project EISs are not published in the Federal Register the organizations with expertise in these scientifically complex fields will have no way of knowing that project EISs are available for comment. States may not publish any notices, or publish only in agency publications that cannot possibly be tracked for all 50 states.

For all these reasons, eliminating federal agency responsibility for the review and approval of final environmental review documents is not justified and would likely undermine important environmental protections long established under U.S. law.

B. Create New Pilot Program for State Delegation of EAs and EISs

AASHTO Recommendation: AASHTO recommends the creation of a new pilot program, as an alternative to Section 6005, that allows a state DOT to assume expanded responsibilities for Environmental Assessments (EAs) or EISs without waiving sovereign immunity and while keeping the flexibility to acquire Right-of-Way (ROW) and perform design work prior to the completion of the NEPA process. A State DOT and FHWA would enter into a programmatic agreement under which FHWA would retain final decision-making authority, but the State DOT would be authorized to: (1) act on behalf of FHWA for purposes of all inter-agency coordination and public involvement during the NEPA process (e.g., consultation under NHPA and ESA); (2) oversee the preparation and issuance of environmental assessments, and draft and final EISs (subject to a 30-day, checklist-based review of the final EIS by FHWA), and all document preparation leading up to issuance of the ROD; and (3) enter into programmatic agreements with federal and non-federal agencies regarding procedures for compliance with NEPA and environmental requirements.

Response: The programmatic agreements proposed by AASHTO are permitted under current law, except for the level of FHWA oversight required. NEPA, as amended in 1976, specifically authorizes state agencies to undertake the preparation of the NEPA documents for a projects, subject to guidance from FHWA.

> (D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:
> (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
> (ii) the responsible Federal official furnishes guidance and participates in such preparation,
> (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
> (iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.
> The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.
> 42 U.S.C. § 4332.

The provisions requiring that the federal official "furnishes guidance" and "independently evaluates such statement prior to its approval and adoption" establish safeguards designed to achieve the application of nationally uniform analytical tools and procedures, and to protect against self-serving NEPA reviews prepared by states to avoid meaningful reviews of

environmental impacts. This procedure in current law can accommodate programmatic agreements between a state and FHWA that delegate much responsibility to the State. But ultimately Congress must not undermine the responsibility of the federal official for compliance with NEPA because the actions being taken are federal agency actions that, in most cases, involve the largest share of project costs.

Although current law authorizes states to undertake the NEPA review of a project subject to federal oversight, it is inappropriate to delegate the authority to undertake full NEPA preparation and review responsibilities for EAs or EISs for major federally-funded transportation capital projects in States that lack any experience with state-level NEPA procedures. CEQ lists 20 States that have enacted laws that emulate NEPA. But 30 states have no such requirement, and their agencies lack any experience with performing environmental reviews except when required to meet federal requirements. Given this lack of experience, States do not have the resources or in-house expertise to fulfill NEPA responsibilities. Some states with "mini-NEPAs" perform only perfunctory reviews with little scientific rigor. Congress should limit programmatic agreements between FHWA and the states to those states that have experience with state-level NEPA requirements, and that have demonstrated that they have the staff, expertise and resources necessary to prepare impact statements adequate to satisfy the federal NEPA process.

States have also not clamored for full environmental review responsibilities largely because they are short-staffed and resource-poor. States have come to rely on the federally-driven NEPA process to frame the transportation decision-making process as to both alternatives and outcome, after which it is the State's turn to deal with close-to-the-ground environmental permitting of a known (usually designed) project that has the stamp of a "preferred alternative." Federal agencies have staffs that are familiar with NEPA's federal law requirements and are trained in the oversight of the preparation of EAs and EISs. In addition, federal agencies also have a working relationship with CEQ which offers valuable guidance on fulfilling NEPA's requirement, a relationship that each of the 50 States would have to develop.

Proponents of State assumption of full NEPA document preparation and review responsibility have never overcome the conclusion of studies from the mid- to late-1990s and early 2000s, the underlying surveys and interviews of which demonstrated that preparation of NEPA documents was not the cause of any significant delay in project approval or construction. Other factors contributed most to project delays, including lack of local government support for DOT-preferred projects, and lack of funding.

At a minimum, the environmental document quality control program that Caltrans put in place under Section 6004 and 6005 must be examined from a federal perspective to determine that it actually ensures compliance with all federal environmental laws and regulations. California is one of the few states in the nation with a long history of implementing a NEPA-like program, and a well-developed body of state law jurisprudence. (California assumed full environmental review under Section 6004 and 6005.) Understanding how well California has implemented the program would be instructive. Some projects are stuck in political gridlock between the executive and legislative branches. Others that were approved were challenged in court based on faulty EA documents.

For instance, two trial courts in California recently rejected arguments that a project's potential to contribute towards global warming was too speculative to analyze. The agencies argued that

knowledge about global warming is still in its infancy, and that because there are no accepted methodologies, analyzing global warming impacts at the project level is not possible. The courts found that the agencies did not study the issue adequately before determining that any conclusion would be speculative. The court in *Desert Hot Springs* further ruled that recently enacted laws support the contention that California's "mini-NEPA" (CEQA) requires an analysis of a project's effect on global warming. Therefore, it is likely that devolving full environmental review to States will not only confuse the uniform application of NEPA to transportation projects, but will raise many questions about the further development of substantive state mini-NEPA law, especially in the field of global warming.

Before entertaining any broadening of the pilot program, a public notice and comment regulation should be promulgated that would apply nationwide, including to state pilot programs.

C. Eliminate Draft EIS Requirements

AASHTO Recommendation: Streamline the Environmental Review Process – AASHTO recommends eliminating procedural requirements established by the SAFETEA LU environmental review process and amending the process to allow for one Environmental Impact Statement, rather than a draft and a final. AASHTO recommends that a Draft Environmental Impact (DEIS) statement and a Final Environmental Impact Statement is not warranted. To support its contention that only one EIS is needed, AASHTO states that as early coordination has increased, an agency can often identify a "preferred alternative" in the DEIS and that the public is involved early in the process when a project is initiated.

Response: NEPA requires a two step EIS process for proposals that would have a "significant impact" on the human environment. For projects that are unlikely to have significant impacts, an EA is performed, after which it is determined whether an EIS must be developed, or a Finding of No Significant Impact (FONSI) is appropriate. Council on Environmental Quality (CEQ) regulations require that an EIS be prepared in two stages: the draft EIS and final EIS. 40 CFR §1502.9. The draft EIS must provide agencies and the public an opportunity for meaningful analysis, including a discussion of alternatives. An agency, after preparing a draft EIS and before preparing a final EIS, must request comments from the public and appropriate state and federal agencies. 40 CFR 1503.1 The public must have at a minimum 45 days to review and comment on the draft EIS. 40 CFR 1506.10(c).

The purpose of the two-step process is to identify the alternatives suitable for meeting the purpose and need, assess their respective impacts, and provide local government and public feedback to the proponent and the decision-maker before a commitment is made to a preferred alternative. The courts have made clear that the primary purpose of NEPA is to ensure that the decision-maker has all relevant information before a commitment is made to a specific outcome. After an agency receives comments on the draft EIS, the agency must assess and consider the comments it received on the draft EIS and may modify alternatives, supplement its analyses, make factual corrections and respond to comments. 40 CFR §1503.4. This process is intended to inform the agency's choice of a preferred alternative, and not follow a decision already made. CEQ regulations state that the discussion of alternatives is the heart of the EIS, allowing those interested to ascertain the clear choice between options. 40 CFR 1502.14. Having an agency predetermine the alterative that is "preferred" will skew this vital component of NEPA and limit the public's ability to meaningfully participate in agencies' decisions.

Eliminating a draft EIS from NEPA's major-impact review process will likely cause delay in the approval process for a preferred alternative, even after the project is approved as to mode, alignment or other choices. The draft EIS is the public's and local elected leaders' best and usually only chance to attend a hearing and actually see and comment on the proposed alternatives. The elimination of the draft EIS and a final EIS would severely limit other agencies' and the public's (including local elected leaders') opportunity to have a full, detailed document on which to provide comments. Environmental and citizens groups, impacted businesses and homeowners, and host communities often hire experts and provide detailed comments at the DEIS stage. This review and comment process should not be short-circuited; if it is, project proponents will proceed to final EIS at their own risk. Rather, the DEIS comment period is helpful to refining the project and issues surrounding it and to gaining public acceptance (usually after some changes are made in response to commentary).

AASHTO also cites to an agency having a "preferred alternative" identified early on in the process as a reason to limit agency discussion on a proposed action to one EIS. AASHTO states that as early coordination has increased, an agency can often identify a "preferred alternative" in the DEIS and that the public is involved early in the process when a project is initiated.

The public is generally not involved in the early planning process of transportation projects, and gets its first glimpse of the project in the DEIS. There is no requirement in NEPA or CEQ regulations to involve the public in the pre-NEPA planning process and no formal mechanism even exists to foster that interaction that we are aware of. AASHTO has not pointed to any such formal early planning/public involvement process.

If the procedures prescribed for the metropolitan and State planning processes are reformed to include a full consideration of regional alternatives which can then be used as a programmatic analysis tiered to the review of individual projects, then local officials and the public will be meaningfully involved in a NEPA-like review process that can significantly simplify the remaining NEPA review at the project level. This approach would allow the project-level review to be narrowed to corridor-scale impacts and encourage more efficient and non-duplicative coordinated planning and project review process.

D. Requirements for Notice, Coordination, and Methodology Identification

AASHTO Recommendation: AASHTO states there are unnecessary procedural requirements in Section 6002, including (1) the requirement that a project initiation notice be prepared, in addition to a Notice of Intent required by CEQ regulations; (2) the requirement that the lead agency, in consultation with participating agencies, identify the methodologies to be used and the level of detail required in the analysis of alternatives for a project; and (3) the requirement that coordination plans be prepared by the lead agency. AASHTO states that Section 6002 focuses on project-by-project reviews and that programmatic approaches are permitted but not encouraged. AASHTO believes that programmatic approached should be made the norm and not the exception.

Response: Programmatic approaches should be used by integrating the NEPA review of project alternatives into the metropolitan and State planning processes.

As discussed above, Congress in 1998 gave sensible direction that US DOT should integrate the NEPA review of projects with the planning procedures adopted by US DOT in 1993 requiring the evaluation of alternatives before projects are selected for adoption into metropolitan and State transportation plans. Such a procedure will expand the scope of impacts assessed at the planning stage, and significantly reduce the impacts to be considered as part of a project-level EIS. This will not only improve decision-making in the planning process, but also streamline and simplify the NEPA review at the project level.

SAFETEA LU's Section 6002 requires that the lead agency establish a "coordination plan" amongst agencies participating in the environmental review process, and that it "may" include a schedule for completion of important milestones. FHWA has required a schedule rather than treating it as optional. This choice ensures that the process governing project reviews is uniform which avoids the delays that arise when the process is not well-defined in advance. There is no reason to reverse FHWA's choice in this regard.

Streamlining would be assisted by the agencies' own adherence to a schedule and a coordination plan, especially one that the State DOTs and the public can use to monitor progress. AASHTO's references to this section being a "burden" and added "paperwork" is unpersuasive, especially in light of the lack of examples where rigidity has prevailed over common sense. Rather than being unnecessary procedural requirements, they are guideposts to help streamline and regularize a black-box process that AASHTO itself complains takes too long and is unwieldy.

The Project Initiation Notice to USDOT and the Notice of Intent from the CEQ regulations may easily be combined into a single document and sent to the USDOT as well as published in the Federal Register.

The development of a preferred alternative to a higher degree of detail than other alternatives defeats the purpose of comparing the impacts of alternatives to identify the least environmentally harmful in the NEPA process. The preferred alternative will axiomatically be developed to a higher level of detail ultimately in the final EIS because the preferred alternative will likely be chosen and constructed. It will be fully designed by the time it reaches the conclusion of NEPA; it will likely be preliminarily engineered by the time it reaches the environmental permitting stage. However, during the draft EIS process, it is not appropriate to pre-judge the alternatives by developing an analysis of the preferred alternative to a greater level of detail than other alternatives (depending, of course, on the type and complexity of the project). However, if the 1998 congressional directive to integrate NEPA into the transportation planning process is implemented, the preferred mode and facility-type for development in a corridor will have been resolved after consideration of regional-scale alternatives, which will allow a much narrowed array of alternatives remaining to be selected during the project-level review.

Litigation against a project is based on the failure to assess significant impacts, inadequacy of the alternatives analysis (of the rejected alternatives) and/or the failure to do an EIS (as opposed to an EA) – these are the primary causes of litigation delays under NEPA. When agencies do not attend to the detailed impacts or benefits of alternatives because they have pre-judged the choice of the preferred alternative, the risk is enhanced of "wrong NEPA document/wrong level of review" litigation, reversal and remand to the agency, and thus delay.

When agencies invest more effort, time and resources in examining alternatives even if they think they are not feasible or prudent in the planning stage, and show—in detail—why these alternatives are not prudent or feasible, then construction of the preferred alternative is likely to occur more quickly. The project will gain public acceptance, and proceed to construction; the risk of NEPA litigation will be reduced. Sometimes, the project proponent will rethink its choices based upon the greater (equal) scrutiny of alternatives that it initially believes will not work.

E. Integrated and Programmatic Approaches to NEPA

AASHTO Recommendation: Promote Integrated Planning and Programmatic Approaches - Streamline the NEPA process by providing assurances that environmental decisions made in the planning process will be carried forward into the NEPA process. Provide clear statutory authorization and encouragement for programmatic approaches (rather than project-by project reviews) and strategies that focus on integrated planning, ecological banking, and flexibility in environmental mitigation.

Response: Provided that the programmatic review of alternatives occurs before projects are adopted into a metropolitan or State plan, and the procedural safeguards of the NEPA process are also integrated into the planning process, this approach generally makes sense.

Historically, except in California where CEQA has applied to metropolitan and State transportation plans, the environmental "reviews" that have occurred in the development of a metropolitan or State transportation plan have generally failed to consider alternatives or the interactive impacts of transportation investments with comprehensive land use or zoning plans, natural resources plans, conservation plans. As a result, most transportation planning documents do not satisfy the NEPA requirements for a programmatic EIS. Even after Congress added the requirement in SAFETEA-LU (2005) that transportation plans include consideration of mitigation,[7] US DOT did not include this requirement in the 2007 planning rules. Most MPOs and States continue to omit any consideration of mitigation in their plans. At best, such regional or statewide plans focus on one or more natural resources through which development is then judged—protecting water quality of trout streams, or aquifers, or preventing loss of habitat of certain species, etc. That plan can and should be used to inform preliminary project planning and modify alternatives choices and decisions such as alignment or even mode. But these "decisions" or plans certainly cannot be treated as satisfying the programmatic analysis required by the NEPA process because they do not include a comprehensive assessment of impacts and alternatives.

AASHTO's recommendation to incorporate a programmatic review of alternatives is sound if that review is performed to inform the selection of projects into the metropolitan or State plan, and the programmatic review meets the obligations under NEPA to assess all significant impacts, compare all reasonable alternatives based on their impacts and their contribution to accomplishing the national planning objectives, and the NEPA procedural safeguards apply.

[7] 23 U.S.C. §§ 134(i)(2)(B)(i), 135(f)(4)(A) and (B).

F. Integrated Planning Pilot Program

AASHTO Recommendation: Integrated Planning Pilot Program -- Authorize an "Integrated Planning Pilot Program" to assess alternative approaches to the evaluation of natural and cultural resources in transportation planning and delivery.

Response: An integrated planning process was the objective of the 1993 planning rules adopted by US DOT.

A pilot program is not needed to test this idea. The approach defined by the 1993 planning rules worked well where the rules were applied, and comprehensive assessments of proposed projects and alternatives were performed before the planning decision was made. Restoring that process and integrating it with the NEPA review of projects would be a sound direction for the future.

G. Detailed Design Prior to NEPA Completion

AASHTO Recommendation: At-Risk Detailed Design Prior to NEPA Completion - Project and Program Development and Delivery- Allow states to use federal funds to begin detailed design prior to final NEPA approval under specified circumstances. AASHTO recommends amending laws and regulations to provide states with the option to use federal monies to begin detailed design on a project prior to NEPA approval if an announcement on a preferred alterative has been made, the public has had a chance to comment on the draft document, and the state is willing to pay back any federal funding used for the detailed design of the non-selected alternative if a different alternative is ultimately chosen.

Response: States should not be allowed to use federal money on a proposed action prior to a final NEPA approval. Allowing States to use federal funding prior to a decision, would give States and FHWA a financial incentive and agency momentum to go forward with an action regardless of its environmental impacts or the results from public participation. This approach undermines the long-standing NEPA requirement that federal agencies may not commit resources to a project that could prejudice the evaluation of alternatives before the NEPA review has been completed.

H. Streamline NEPA Process Where States Have Approved Natural Resource Plans

AASHTO Recommendation: Allow states that have approved watershed, balanced growth or similar type plans to streamline the NEPA process. Decisions that are consistent with these plans should be afforded deference in the NEPA process and in project permitting.

Response: This recommendation puts the cart before the horse. We need holistic, rational, constructive programmatic approaches to natural resources protection at the statewide, regional or metropolitan planning level, **and** detailed project level reviews. When agencies proposing major capital projects plan for the least impact to the natural and human environment before a project is added to the metropolitan or State transportation plan, especially by incorporating measures to achieve reduction in trip demand or to shift travel onto less polluting modes, then project level reviews can rely on the review of alternatives at the planning stage and project-level reviews will become more focused on corridor-level impacts, thereby simplifying the project EIS. Even more projects will qualify for CE status.

Will Kempton

Subcommittee on Highways and Transit
Hearing on Accelerating the Project Delivery Process:
Eliminating Bureaucratic Red Tape and Making Every Dollar Count
February 15, 2011

Responses to Questions for the Record

Question # 1. In your testimony you mention that your interviewees found that the current process fails to penalize delay, or reward innovation at the Federal, state and local level. Does OCTA have a proposal to penalize delay and reward innovation?

Answer # 1. Yes. OCTA proposes that the federal, state and local funding and project implementation partners enter into a project or program partnership agreement that sets out a specific schedule of critical actions and deadlines for decisions. Such an agrement would establish a binding blueprint for actions on the project or program of projects. Failure to agree on a mutually binding timetable ,or failure to meet the deadlines established in such an agreement, would trigger a statutory penalty requiring action within a set amount of time. Failure to meet the statutory requirement could result in the waiver federal objections, and/or the automatic elevation of the action to a high level department official, such as the Administrator or Secretary. This proposal would bring projects to construction more quickly and expedite the creation of jobs.

Question # 2. In your testimony you mention that there is a risk-averse attitude associatied with Federal oversight. What exactly do you mean by risk-averse attitude? What can Congress do to change this attitude and focus efforts on moving projects forward?

Answer # 2. There are risks associated with all major infrastructure projects. These risks may relate to areas such as funding constraints, technical challenges, litigation threats or the availability of resources. While these kinds of risks need to be worked through as part of project implementation, in successful private sector construction projects, they are dealt with by clearly identifying the risk, allocating the risk, mitigating the risk to the extent possible, and moving forward to construction and job creation. Too often in major public infrastructure projects, risks are not confronted, allocated and mitigated, but rather become the basis for delaying project implementation in the hopes of creating an iron-clad perfect risk mitgation strategy, or in the hopes that the situation will change with time, or that the project will simply go away.

Congress can begin to change this attitude by directing that all parties promptly deal with project risks and partner to share these risks in order to move the project forward. States such as California have been willing to share project risks by taking on the environmental review of highway projects through the SAFETEA-LU

demonstration delegation of NEPA review. Just this simple action alone has expedited the project implementation process by as much as ten to fourteen months.

Question # 3. Streamlining project delivery seems to be an ongoing topic for prior and current reauthorization bills. What is different about today's climate versus previous authorization bills that indicates we should make some substantial movement in acccelerating project delivery?

Answer # 3. The current economic climate has led to double digit unemployment, with many construction companies unable to stay in business. Moving projects more quickly to implementation will create jobs now, without expanding existing funding. Major federally funded projects now take as much as 14 years from funding availability until project completion. Expediting project delivery can create jobs now for these types of projects. In addition, the infusion of projects into the economy at this particular time carries an added benefit, since bids on construction projects at OCTA and nationwide are coming in between 25 and 40 percent below engineering estimates. In the past year OCTA has saved $138 million from construction bids below engineering estimates. These funds have been allocated to additional projects creating even more jobs.

Question # 4. The Anaheim Regional Transportation Intermodal Center. or ARTIC, is a major transit rail and intermodal facility in downtown Anaheim that will cost a total of $184 million. Only $11 million of the project's budget is coming from federal transit funds. How does the use of these Federal funds affect the programmatic requirements that must be met and the project development timeline?

Answer # 4. The ARTIC project is one of many examples of projects which could move more quickly to project implementation and job creation by expediting project decision-making. Moreover, this could be accomplished without circumventing any of the existing programmatic federal requirements. The City of Anaheim and OCTA, as governments answerable to their own taxpayers, are prepared to share with the federal government, any of the risks associated with the project. Yet the relatively small portion of federal funding dictates a more cumbersome and time consuming federal project development process, that is out of proportion to the 6% of federal funding in the project.

Response of
Thomas Margro, CEO
Transportation Corridor Agencies
To
Questions for the Record
Subcommittee on Highways and Transit
Hearing on Accelerating the Project Delivery Process:
Eliminating Bureaucratic Red Tape and Making Every Dollar Count
February 15, 2011
Submitted March 31, 2011

Question 1:

You mention in your testimony that TCA had done an environmental impact report required under California environmental law before you started the NEPA process. Were you able to use the information from the state process during the NEPA process?

Answer to Question 1:

No, TCA was not able to use the California Environmental Impact Report information during the NEPA process. All field work and environmental impact analysis was started over for the NEPA process. The reasons that the TCA was not able to use the state EIR information in the NEPA process included the following:

- The federal agencies required the TCA to evaluate 24 alternatives. NEPA standards require that the methodology, mapping, field work and impact analysis be consistent across all the alternatives. Therefore, all the work, on all the alternatives, was new work conducted for the NEPA process. Even some initial biology field work that was completed after the federal Notice of Intent was published in 1993, became outdated and could only be used as background information.

- NEPA requires the evaluation of certain topics using very specific federal methodologies. Thus, even though these topics were addressed in the state EIR, for practical purposes, new studies had to be completed.

- The NEPA process took so long that much of the information in the state EIR required updating. FHWA initiated the NEPA process in 1993, but the Draft Environmental Impact Statement was not published until May, 2004. By the time the Draft NEPA document was published, information from the state environmental process was over ten years old. In addition, federal agency regulations, analytical methods and policies constantly evolve. The longer the process takes, the greater the likelihood that changes in the environment, regulations, analytical approaches and policies will require additional analysis or re-analysis.

Question 2:

In your testimony, you mentioned that the collaborative agencies evaluated and screened nine alternatives to identify a practicable alternative. This took an additional six years for this evaluation. Do you believe that this is a reasonable number of alternatives?

Answer to Question 2:

The range of alternatives evaluated in the draft EIS far exceeded the reasonable number required under NEPA. The range of alternatives required by the federal environmental agencies was excessive and resulted in significant delays and increases in project costs.

The state and federal agency participants[1] in the collaborative process initially identified 24 alternatives (19 toll road alternatives, 3 non toll road alternatives, and 2 "no action" alternatives). The TCA then spent 2 years preparing technical studies to document the environmental impacts of the 24 alternatives.

Based on the results of the technical studies, the collaborative agencies selected 10 alternatives for more detailed evaluation in the Draft EIS (6 toll road alternatives, 2 non toll road alternatives, and 2 "no action" alternatives. The 10 alternatives also exceeded NEPA requirements to evaluate a reasonable range of alternatives. For example, the 10 alternatives included an alternative including widening of Interstate-5 despite the fact that the TCA did not have the legal authority to widen Interstate-5 and the absence of any realistic source of funding for an I-5 widening.

The TCA and FHWA agreed to evaluate 10 alternatives in detail in the Draft EIS because TCA/FHWA concluded that we would not be able to advance the NEPA process unless we agreed to do so. The collaborative operated pursuant to an MOU between FHWA and the federal environmental agencies that essentially provided the Corps of Engineers and EPA with effective control over the range of alternatives included in the Draft EIS. The objective of the collaborative process was to have the Draft EIS satisfy the requirements of the Clean Water Act and the Endangered Species Act (ESA) in addition to NEPA. If the TCA and FHWA did not agree to evaluate alternatives requested by one of the environmental agencies, the Corps of Engineers and EPA would likely require a supplemental EIS and further delay the project.

One of the problems that apply to most projects is that under the NEPA regulations and case law there is considerable uncertainty regarding what constitutes a "reasonable range" of alternatives. This uncertainty has resulted in legal challenges to hundreds of

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[1] Federal Highway Administration, U.S. EPA, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, U.S. Marine Corps, California Dept. of Transportation, Transportation Corridor Agency.

projects. Environmental agencies take advantage of this uncertainty to push for a range of alternatives that is not reasonable.

The range of alternatives also depends on the purpose and need of the project. In the case of our project, the federal environmental agencies insisted on a very broad purpose and need statement. The federal agencies' requirements regarding the project purpose and need, in turn, triggered the evaluation of an extremely broad range of alternatives.

While provisions in SAFETEA-LU (giving FHWA and FTA authority to define the purpose and need and the range of alternatives[2]) attempt to address some of the above issues, significant problems remain. For example, it is not common for the U.S. Army Corps of Engineers and the U.S. EPA to require the evaluation of a different set of alternatives (and at higher levels of detail) than were evaluated in the EIS in order to comply with section 404 of the Clean Water Act. The Fish and Wildlife Service may also require evaluation of other alternatives to comply with section 7 of the Endangered Species Act. The federal Coastal Zone Management Act process also may trigger evaluation of a different set of alternatives. In fact, the California Coastal Commission (CCC) relied on a "new" alternative that was not proposed by project opponents until after the preparation of the Draft EIS.

Where the Draft EIS includes a broad range of alternatives, it is often not feasible to complete the very detailed alternative studies necessary to comply with the EPA's section 404(b)(1) Guidelines or section 7 of the ESA until a preferred alternative is selected. The TCA and the FHWA attempted to address this problem by including the federal environmental agencies in every decision at each step of the NEPA process. As I indicated in my testimony, this approach did not work because the environmental agencies (EPA and the Corps of Engineers) changed their position and argued for the analysis of additional alternatives after the very same agencies had agreed on the preliminary least environmentally damaging practicable alternative (LEDPA).

Question 3:
While the MOU to improve interagency coordination seemed to be working initially, what caused the Federal resource agencies to change their thought process and abandon the preferred alternative – "Green Alternative"? As the lead agency, what could USDOT have done to keep this project moving?

[2] 23 U.S.C. § 139(f).

Answer to Question 3:
As you indicated above, the six year collaborative process with the Federal resource agencies initially accomplished the goal of selecting a preliminary LEDPA agreed to by all parties. However, just a few days before the TCA went to the California Coastal Commission (CCC) in February of 2008 for the project's Federal Consistency Certification, EPA backed away from its earlier decision and submitted a letter to FHWA indicating that EPA believed a report issued by Smart Mobility, Inc., of Norwich, Vermont, commissioned by the plaintiff environmental groups in the then pending litigation against the project, represented new information that FHWA needed to review. Contrary to the detailed analysis in the Draft EIS, the report claimed that widening of Interstate-5 and improvements to some arterial roads was a feasible alternative to the project and that I-5 and arterial improvements could be widened with minimal environmental and economic impacts on the coastal community of San Clemente. Technical analyses by FHWA, Caltrans and the TCA demonstrated that the claims in the Smart Mobility report were not supported by the facts and that the alternative proposed by Smart Mobility did not comply with FHWA and California highway design standards.

It seems clear that the timing of the letter from EPA, just days before the CCC hearing, was purposefully orchestrated to negatively impact the decision of the Commission. Curiously, TCA did not receive a copy of that letter from EPA (a collaborative member) but instead was first notified of the EPA letter by the CCC. In their opening arguments at the hearing, CCC staff citied the Smart Mobility letter as reason to deny consistency for the final 16 miles of SR 241.

I believe the decision by EPA to back away from their original agreement was two-fold. First, staff turnover at EPA resulted in a new member of the collaborative process after EPA had identified the preliminary LEDPA. This individual had not participated in the six years of exhaustive analysis of project alignments that included more than 60 day-long meetings among the collaborative.

Second, it became clear that EPA had been influenced by the environmental opposition. After the 2005 decision that resulted in the selection of the LEDPA, EPA representatives were doing everything possible to distance themselves from their previous decision to select the "Green Alternative" as the LEDPA.

Attached are two letters that are significant to this issue. The first is EPA's letter to FHWA and the second is FHWA's review of the Smart Mobility report finding it to be without merit, FHWA concluded:

> "We have determined in our technical design review that Smart Mobility, Inc.'s recommendations to change the design or scope of the AIP alternative improvements are not reasonable and feasible."

As the lead agency, FHWA continued to support the preliminary LEDPA. However, given the current regulations that provide EPA tremendous latitude to reverse its position, even after years of study, I do not believe FHWA had the legal tools to prevent EPA's action and keep the project moving. The MOU under which the collaborative operated allowed FHWA to elevate issues that could not be resolved at lower levels. As a result, TCA has the following recommendations to prevent future projects from experiencing such a setback:

A. Prohibit a federal agency from rescinding its previous concurrence or approval if the decision was made as part of a coordinated environmental review or Collaborative process of federal agencies absent the discovery of new facts.

B. Limit resource agency determinations to issues within their own jurisdiction and expertise.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

February 1, 2008

Gene K. Fong, Division Administrator
Federal Highway Administration (FHWA), California Division
650 Capitol Mall, Suite 4-100
Sacramento, CA 95814

Subject: Additional Information Regarding Alternatives Analyzed for South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), Orange County, California

Dear Mr. Fong:

On October 4, 2007, the U.S. Environmental Protection Agency (EPA) received a report titled "An Alternative to the Proposed Foothill South Toll Road – *The Refined AIP Alternative*" submitted by Smart Mobility Inc. and Philip William & Associates on behalf of the Endangered Habitats Leagues (EHL) et al. The report addresses the feasibility of a modified AIP alternative and specifically, rebuts many of the engineering design (interchanges) and real estate (displacements) assumptions provided in the Final Subsequent Environmental Impact Report (SEIR).

Upon review of the new information, we corresponded with your staff via email on October 26, 2007 our desire for members of the SOCTIIP Collaborative to further examine the document and requested FHWA to take the technical lead in assessing and responding to the new information. Our agency has an interest in knowing how this new information will be viewed by FHWA and/or whether it could substantively impact the alternatives analysis to an extent where this AIP-R alternative is fully analyzed under National Environmental Policy Act (NEPA).

Your email response to our request indicated that FHWA would respond to the Smart Mobility Report after receiving the amended version from EHL. On January 24, 2008 EPA received the revised version of the Smart Mobility Report along with peer review of the report completed by Bergmann Associates that stated a refined AIP alternative should be presented in the SEIR.

The purpose of this letter is to reiterate our concerns regarding the new information and encourage FHWA to convene a meeting of the Collaborative to address how this new information will be incorporated into the Final Environmental Impact Statement (EIS). We are looking for FHWA to take the technical lead in assessing and responding to this information and would like to better understand how this will occur.

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We note that our letter dated November 8, 2005 (Concurrence on the Preliminary Least Environmentally Damaging Practicable Alternative) as well our comments dated March 19, 2007 on excerpts of the Administrative Draft Final EIS were completed without consideration of this new information. We expect that the Final EIS will fully address and incorporate this information as relevant to a full alternatives analysis.

We look forward to continued coordination on this project. Please contact Susan Sturges (415-947-4188 or sturges.susan@epa.gov) or Eric Raffini (415-972-3544 or raffini.eric@epa.gov), the lead reviewers of this project, to schedule a time to meet. Also, when the Final EIS is released for public review, please send three hard copies and two electronic copies to the address above (mail code: CED-2).

Sincerely,

Connell Dunning

FOR Nova Blazej, Manager
Environmental Review Office

cc: Sylvia Vega, California Department of Transportation, District 12
Larry Rannals, Camp Pendleton
Tay Dam, Federal Highway Administration, Los Angeles
Susan Meyer, U.S. Army Corps of Engineers
Karen Goebel, U.S. Fish and Wildlife Service, Carlsbad Office
Paul Bopp, Transportation Corridors Agency

U.S. Department of Transportation
Federal Highway Administration

Office of the Administrator
1200 New Jersey Avenue, SE.
Washington, DC 20590

October 7, 2008

In Reply Refer To:
HEPE

Vice-Admiral Conrad C. Lautenbacher, Jr., USN, Retired
Under Secretary of Commerce for Oceans
and Atmosphere and Administrator
National Oceanic and Atmospheric Administration
Washington, DC 20230

Dear Admiral Lautenbacher:

This letter is in response to your agency's September 16 request for additional comments on the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), a proposed toll road project in southern Orange County and northern San Diego County, California. The Federal Highway Administration (FHWA) is pleased to offer these supplementary comments on the coastal zone management consistency appeal by the Foothill/Eastern Transportation Corridor Agency (TCA) regarding the SOCTIIP.

Background

The FHWA's mission is to meet our Nation's transportation needs with solutions that are safe, efficient, and in the "best overall public interest" (23 U.S.C. 109(h)). When advancing these transportation solutions, the FHWA and its State and local agency partners must consider a broad range of social, economic, and environmental factors (23 C.F.R. 771.105(b)). The purpose of the SOCTIIP is to improve Southern California's severely congested transportation infrastructure system by helping alleviate current and future traffic congestion and accommodating the need for mobility, access, goods movement, and future traffic demands on Interstate 5 (I-5) and the arterial network in the area.

A number of transportation projects are under development in Southern California, including several in the I-5 corridor, to address current and growing transportation needs that together have national impacts to freight and passenger vehicle movement, mobility, and the economy. The SOCTIIP is included in the 20-year transportation plan for the region. The acts of Congress on the SOCTIIP (Pub. L. 102-240, §1065, and Pub. L. 105-261, §2851) also speak to the national interest of this project, which improves transportation connectivity and redundancy in one of the most important corridors in the Nation.

The Continuing Environmental Review Process

As noted in our comments on May 23, 2008, the ongoing FHWA-led National Environmental Policy Act (NEPA) process for the SOCTIIP will continue to include public and

agency input on all project issues, including coastal concerns. This is a longstanding process going back to the early 1990's and includes more than a decade of agency and public coordination and collaboration that led to the issuance of the draft environmental impact statement (DEIS) in May 2004.

An extraordinary number of comments were received on the DEIS, and much additional analysis and agency coordination is ongoing on all alternatives to address the many concerns expressed regarding social, economic, and environmental issues. This complicated process has taken more than 3 years and, therefore, under FHWA's NEPA implementing regulations (23 CFR 771.129(a)), a re-evaluation of the DEIS is now underway to determine if a supplemental EIS is needed to ensure the environmental evaluation remains current. As the NEPA process proceeds, opportunities for public and agency comment will continue, including on any future supplemental EIS, or final environmental impact statement (FEIS).

Alternatives

All the alternatives evaluated in the DEIS remain under consideration (see below) and the FHWA must consider a broad range of issues before making an informed decision to select a preferred alternative for the project. For this process to be successful, the merits and impacts of all the alternatives retained for detailed study must be evaluated. The FHWA strongly believes that taking any of the remaining alternatives out of consideration would skew this important discussion and consideration of factors that determine the overall net impact of each alternative. All the alternatives will be assessed after consideration of mitigation for adverse impacts; this assessment provides for appropriate comparison of all reasonable alternatives that meet the purpose and need. This process is not complete until FHWA issues a Record of Decision completing the NEPA decision-making process.

As part of the NEPA re-evaluation process, and in response to recent public comments and revisions proposed for the so-called "Smart Mobility" alternative (also known as the "AIP-R," short for "Arterial Improvements Plus HOV and Mixed-Flow Spot Lanes on I-5 – Refined"), the FHWA is conducting a second technical review of the original AIP ("Arterial Improvements Plus HOV and Mixed-Flow Spot Lanes on I-5") and AIP-R alternatives. The AIP alternative previously was eliminated from further analysis due to its very high cost and substantial community impacts. This second FHWA review of the AIP alternative is intended to evaluate the reasonableness of the underlying analysis. For the AIP-R alternative, the second review is to determine whether that alternative would, as claimed by its proponents, substantially reduce environmental and community impacts as compared to the AIP. The FHWA expects the second technical review of the AIP and AIP-R alternatives to be completed by the end of October.

"Availability" and "Reasonableness"

The September 16 letter inviting additional FHWA comments noted that a key factor for the Secretary of Commerce to consider when deciding whether to override the California Coastal Commission's (CCC) objection to the SOCTIIP is whether a particular alternative is "available"

to the appellant (TCA in this case). The letter states that under the Coastal Zone Management Act (CZMA), an alternative would be available if:

- TCA could implement it ("whether there is a technical or legal barrier to implementing the alternative"); and
- It would achieve the primary or essential purpose of the project.

In this regard we note that one of the alternatives under consideration, the AIP (and, by extension, the AIP-R) would not meet the "available" test as described in the letter. The TCA, a toll road agency, does not have the legal authority to toll I-5, making all such I-5 tolling or AIP alternatives "unavailable" to them as the appellant.

The September 16 letter also noted that under the CZMA, an alternative must be "reasonable," which is defined as one for which "the advantages to the resources and uses of the state's coastal zone exceed the alternative's increased costs, if any." As noted in our May 23 comment letter:

> A number of Federal, State, and local statutes affect project decision-making. All of these factors play into what alternatives are reasonably available to be conducted in a manner that is consistent with the enforceable policies of the CCC's coastal zone management program. We believe that as lead agency with broadest statutory authority with respect to the proposed activity, FHWA's view on the reasonableness and viability of alternatives should be given significant weight. Although the NEPA process is not yet complete, we are optimistic that further collaboration with the CCC and others could lead us to an appropriate alternative.

Unfortunately, the FHWA cannot definitively answer the question as to the "availability" of a "reasonable" alternative unless and until we are able to complete the NEPA process. We continue to believe the collaborative process that is underway is the appropriate forum for such an analysis. As part of the NEPA process, the CCC's concerns are being considered and will be addressed as the FHWA decision-making process proceeds. The FHWA is committed to making a full and complete comparison of the project alternatives and their impacts, including potential effects to the coastal zone, in its consideration of the "best overall public interest." To do this, the FHWA believes that all the draft EIS alternatives must remain available for comparison.

With respect to alternatives, the FHWA would like to note that in our May 23 letter we incorrectly stated that the "Arterial Improvements Only" (AIO) alternative was the only one that would avoid encroaching on the coastal area. In fact, two other alternatives (designated CC-ALPV and A7C-ALPV) would also avoid the coastal zone, but would have other serious environmental, social, and cost impacts. The FHWA apologizes for the inaccuracy in our original letter.

As discussed in these comments, our goal is to advance workable solutions to the pressing transportation needs of southern California—needs that affect the entire Nation— while bearing in mind the important social, economic, and environmental concerns and the overall public interest. We, therefore, respectfully reiterate our recommendation that Secretary of

Commerce Carlos M. Gutierrez override the CCC's consistency objection under the CZMA and allow us to continue to collaborate, under the auspices of the NEPA process, to reach a fully informed decision.

Thank you for the opportunity to comment further on this matter. The FHWA is pleased to offer these supplementary comments on the coastal zone management consistency appeal by the TCA regarding the SOCTIIP. If you have any questions or require additional information, please do not hesitate to contact Ms. Carol Braegelmann of our Office of Project Development and Environmental Review at 202-366-1701 or Mr. Brett Gainer of our Office of Chief Counsel at (916) 498-5891.

Sincerely,

Thomas J. Madison, Jr.
Administrator

cc:
Mr. Thomas Street
Attorney-Advisor, NOAA

FHWA Design Review of the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP) Arterial Improvements Plus HOV and Mixed-Flow Spot Lanes on I-5 (AIP) Alternative and SMI Recommendations

As part of an independent Federal Highway Administration (FHWA) review of the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), the Office of Infrastructure has reviewed the design of the "Arterial Improvements Plus HOV and Mixed-Flow Spot Lanes on I-5" (AIP) alternative to address questions that have been raised by the U.S. Environmental Protection Agency (EPA).

The SOCTIIP National Environmental Policy Act (NEPA) review is being conducted by the FHWA, the Transportation Corridor Agencies (TCA) and the California Department of Transportation (Caltrans) with participation by the SOCTIIP Collaborative in deliberations and reviews. In the project development process TCA and Caltrans followed in developing the SOCTIIP, they evaluated the performance and potential impacts for a range of possible alternatives. The AIP alternative, along with the other project alternatives, underwent a detailed analysis to assess and quantify the project's performance, expected impacts, and estimated total project cost for each alternative. This assessment provided the basis to compare and determine which alternatives were considered reasonable and feasible to advance further in this process, ultimately leading to the selection of a locally preferred alternative by TCA.[1] Based on the estimated total project cost, projected performance, and other impacts in comparison to other alternatives, in our technical design review we determined that it was reasonable and appropriate for TCA and Caltrans to eliminate the AIP alternative from further evaluation.

The scope of the AIP alternative included the addition of one HOV lane in each direction, one general purpose lane in each direction, auxiliary lanes, adjustments in the I-5 alignment, modifications to interchanges, and limited improvements to the adjoining surface street to accommodate these interchange modifications. The initial design of these improvements is consistent with Caltrans' adopted design standards. These proposed improvements were also designed to accommodate other improvements which would impact this corridor that are included within the Six-year Transportation Improvement Program (TIP) of the Southern California Association of Governments (SCAG consists of six counties and 187 cities). The modeling analysis that was conducted to assess and evaluate the AIP alternative utilized SCAG's regional transportation models that include the projects in the 20-year long range plan.

Smart Mobility, Inc., (SMI) submitted comments and reports after the formal public comment period associated with the NEPA Draft Environmental Impact Statement (EIS) for this project, questioning the design of the AIP alternative along with the TCA and Caltrans decision to dismiss the AIP alternative from further consideration without additional refinement to reduce expected adverse impacts. SMI is advocating revisions to the scope and design of the AIP alternative, which SMI refers to in their reports as AIP-R, short for "Arterial Improvements Plus HOV and Mixed-Flow Spot Lanes on I-5 – Refined (AIP-R)". These recommendations propose improvements similar in scope to the AIP alternative, including one HOV lane, one general purpose lane, auxiliary lanes, and new freeway interchanges. These recommendations

[1] TCA, *SOCTIIP, Foothill South, Final Subsequent Environmental Impact Report, December 2005* (http://www.thetollroads.com/home/finalseir.htm), 2-58.

included reducing the scope of various AIP improvements, reducing design standards, and adding improvements outside of the proposed SOCTIIP and plans of local communities. They assert these proposed modifications would result in substantive changes in the cost, performance, and impacts associated with their recommendations, and that these changes would allow a revised AIP alternative to be further considered in the NEPA review and potentially considered the preferred alternative for the project.

The Office of Infrastructure design review relied on existing reports previously prepared in support of the Draft EIS and the SMI recommendations. This review evaluated the geometric design, traffic analysis, estimated cost, project impacts, proposed improvements, and overall assessment of both the AIP alternative and SMI alternative recommendations. The objective of this review was to assess the feasibility and implications of the SMI alternative recommendations to determine their reasonableness for more detailed consideration. This design review assessed the:

- Reasonableness of the SMI recommendations (AIP-R),
- Reasonableness of the design and analysis conducted on the AIP alternative, and
- Potential for the proposed SMI recommendations to substantially change the magnitude of the AIP alternative impacts (e.g., total project cost, safety, traffic flow) to the point where it could be considered a viable alternative.

Assessment of the SMI (AIP-R Alternative) Recommendations

We have determined in our technical design review that the SMI recommendations to change the design or scope of the AIP alternative improvements are not reasonable and feasible. This finding is based on the expected influence these recommendations would have on the total project cost, performance (e.g., safety and traffic operations), and other impacts (e.g., right-of-way, drainage, and environment).

The SMI report recommends changes in the geometric design and type of improvements to be made with the AIP alternative without providing an adequate rationale or any supporting analysis or evaluation to assess their impacts and estimated costs. While SMI asserts its recommendations will not adversely impact travel and result in substantially lower total project costs and impacts, there is no reasonable rationale or technical basis provided upon which these recommendations are founded. We have determined in our technical review that the SMI recommendations would result in an alternative with a higher total project cost, diminished traffic capacity and flow, and greater adverse impacts than was suggested by the SMI reports.

This technical assessment considered the potential implications of the key SMI design recommendations for the AIP alternative which could positively or negatively impact the safety, traffic flow, environment, total project cost, and key factors and issues. This assessment identified that many of the SMI recommendations would not be reasonable and/or feasible due to their expected adverse impacts on travel performance within the I-5 corridor, the environment, and total project cost; or they would provide only small overall improvements. Based on this assessment we have determined the SMI recommendations do not justify altering the AIP alternative, nor should they affect the decision to dismiss the AIP alternative from further consideration in the development of the SOCTIIP.

Examples of the SMI recommendations we consider to be unreasonable and/or infeasible involve the geometric design of I-5, the connecting interchanges, and portions of the connecting surface street network. These recommendations also involve detailed design issues appropriately considered in later stages of the project development when advanced preliminary or final design is conducted on the preferred alternative selected for the project. The technical review and assessment of these SMI recommendations (e.g., reducing the number of lanes on arterial streets, selecting different types of interchanges, using retaining walls, shifting the I-5 alignment) are provided below.

Assessment of the AIP Alternative

We determined in our technical design review that the process, methodology, level of design, and issues that TCA and Caltrans considered in developing, evaluating, and making a decision on the AIP alternative were appropriate. The key factors in TCA's and Caltrans' decisions to eliminate the AIP alternative were the substantial impacts to the right-of-way, safety and traffic operations, environment, and total project cost.[2] The number and size of the right-of-way impacts significantly influenced this cost and associated community impacts, with an estimated cost associated with acquiring or impacting approximately 1200 right-of-way parcels in excess of $1,000,000,000.[3]

The level of effort and detail that went into developing the proposed improvements and geometric design of the AIP alternative was appropriate for the evaluation and comparison of the alternatives in NEPA. The data compiled, analysis conducted, evaluation performed, and costs estimated were also commensurate with this phase in the project development process. Sufficient information was available and used by TCA and Caltrans in support of making an informed, context-sensitive decision regarding the overall reasonableness and feasibility of the AIP alternative. We determined, based on a review of the information that was developed by TCA and Caltrans, that their decision to eliminate the AIP alternative from more detailed evaluation in the development of the SOCTIIP was reasonable and well-founded.

The level of analysis and design conducted was appropriate to assess and compare the feasibility, performance, and impacts of the AIP and all other SOCTIIP alternatives. Additionally, there was sufficient information available from the level of design completed for TCA and Caltrans to make decisions on alternatives to further evaluate in the NEPA and project development process.

Design Review of the AIP Alternative and SMI Recommendations (AIP-R)

In our review, we determined that TCA and Caltrans followed a context sensitive process in developing the SOCTIIP. Context sensitive solutions (CSS) involves the concept and principles associated with reaching out to, identifying, and integrating the concerns and issues of interest for a variety of different stakeholders who may be impacted by a transportation

[2] TCA, *SOCTIIP, Foothill South, Final Subsequent Environmental Impact Report, December 2005* (http://www.thetollroads.com/home/finalseir.htm), page 2-84.
[3] SMI, "An Alternative to the Proposed Foothill South Toll Road", January 2008, page ix; and TCA, *SOCTIIP Draft Relocation Impacts Technical Report, Final, December 2003.*

project.[4] This involvement and consideration of these issues and concerns should occur throughout the process of developing and designing a project. In our design review, we found that the interests and concerns of stakeholders were appropriately identified and considered in the decision-making that occurred throughout the development of the SOCTIIP.

Design exceptions are one tool for implementing design flexibility and CSS. When conditions warrant, design exceptions may be appropriate for project designs not conforming to the minimum criteria as set forth in the standards, policies. and standard specifications.[5] The potential to pursue design exceptions is evaluated based on their expected benefits or impacts to the environment, traffic, safety, and other considerations specific to each project.

Design exceptions may be considered throughout the process of developing and designing a project. The conditions specific to each project will determine the need for design exceptions and when it may be appropriate to consider design exceptions in the project development process. Key determinants in deciding when it may be appropriate to consider design exceptions are the level of analysis that has been conducted, overall impacts of the project, influence each design exception may have on these impacts, project's performance, and cost.

Agencies do not typically consider design exceptions in the initial phases of planning or designing a project when multiple alternatives are being considered which vary in scope and potential impacts. Agencies develop the design of the alternatives to obtain an estimate of the expected impacts and benefits in support of making an informed decision to select a preferred alternative based on their relative merits. Design exceptions typically do not reduce the impacts significantly enough to influence the comparison and decisions about the viability of project alternatives. It is not reasonable and feasible for agencies to fully design, analyze, and evaluate the impacts of design exceptions until a preferred alternative has been selected.

We also determined that it was reasonable and appropriate for TCA and Caltrans not to include design exceptions in the initial alternatives evaluated and compared to make decisions among SOCTIIP alternatives. This is especially true given the significant impacts that were identified for the I-5 corridor alternatives along with the constraints which exist (e.g., severe terrain, existing development, drainage). We also found that the SMI recommendations proposing design exceptions are more appropriate to consider in later stages in the project development process when a full consideration of their implications on the preferred alternative would be analyzed and evaluated. Additionally, while we found these design exceptions may lead to somewhat reduced impacts, collectively they would not substantively reduce or change the overall total project cost, impacts, or performance to where the AIP alternative should be evaluated further.

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[4] FHWA, CSS Web site, http://www.fhwa.dot.gov/context/index.cfm.

[5] FHWA, Federal Aid Policy Guide Non-regulatory Supplement (http://www.fhwa.dot.gov/legsregs/directives/fapg/0625sup.htm), 23 CFR 625.

Technical Design Review

During our technical design review, we assessed the geometric design of the AIP alternative and proposed SMI recommendations to the adopted standards[6] of both the FHWA and Caltrans. We also reviewed the supporting documentation associated with the analysis, evaluation, and assessment of the AIP alternative that was conducted for the Draft EIS and Final Subsequent Environmental Impact Report. In addition, we reviewed the SMI reports, recommendations, and correspondence between SMI and the SOCTIIP Collaborative regarding the AIP alternative and SMI's recommendations.

Since the primary factors for eliminating the AIP alternative from further evaluation were the significant right-of-way impacts and their associated costs and community impacts, our review focused on the following design elements that have the greatest potential to influence the amount of right-of-way and that may adversely impact travel or environment within the I-5 corridor:

- Number of lanes
- Width of lanes
- Roadside slopes
- Types of interchanges
- Alignment
- Storm water detention basins

Number of Lanes

The number of lanes needed on I-5 and local streets in the study area for the AIP alternative was determined from the projected travel demand and the expected performance of the transportation network. As stated in the environmental document, Level-of-Service (LOS) "E...is the adopted performance standard for freeway/tollway mainline segments and ramps. LOS D...is the performance standard for most intersections in the study area."[7] The traffic analysis showed that the AIP alternative failed to meet the established traffic operations threshold against which all alternatives were being evaluated.[8]

TCA and Caltrans utilized regional transportation models to forecast and evaluate the impacts of the design-year traffic demand on the performance of the alternatives. Projects are required to be designed for the traffic demand that is projected to occur 20 years in the future.[9] The design year utilized for the SOCTIIP is 2025. Reducing the number of lanes on any roadway will either decrease the overall performance within the study area or increase the number of lanes needed on another roadway. As a result, reducing the number of lanes on any of the roadways included in the study area for the AIP alternative will diminish the safety and flow of traffic, thereby limiting the degree to which the alternative satisfies the purpose and need for the project.

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[6] 23 CFR 625.4 and http://www.dot.ca.gov/hq/oppd/hdm/hdmtoc.htm.
[7] TCA, *SOCTIIP, Foothill South, Final Subsequent Environmental Impact Report, December 2005* (http://www.thetollroads.com/home/finalseir.htm), p. 1-11.
[8] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, 5-21.
[9] 23 CFR 450.216, 23 CFR 450.220, and American Association of State Highway Transportation Officials (AASHTO), *A Policy on Design Standards Interstate System, January 2005*, p. 1.

As an example, SMI recommended reducing the number of lanes on El Camino Real from 4 to 3 lanes, with one lane in each direction separated by a center auxiliary lane. This SMI recommendation would reduce the right-of-way required for El Camino Real, providing additional space to accommodate the I-5 widening, thereby reducing the amount of additional right-of-way that may be required along I-5.

El Camino Real is at a four lane roadway carrying an average of 17,000 vehicles per day, which is currently operating at a LOS A.[10] The SOCTIIP alternatives, including the AIP alternative, did not identify any need to expand the number of lanes on El Camino Real based on a projected LOS A operation in the design year. While this roadway is expected to operate at LOS A in the design year, other key factors influenced why it would not be reasonable and appropriate to reduce the number of traffic lanes from four to three on El Camino Real in all of the SOCTIIP alternatives.

El Camino Real has been designated as a secondary arterial in Orange County's Master Plan of Arterial Highways (MPAH).[11] Orange County plans secondary arterials to serve as collectors, "distributing traffic between local streets and Principal, Major and Primary Arterials."[12] The designation or classification of El Camino Real as a secondary arterial has even more significance given that it is the only north-south arterial serving the community between Avenida Pico and Cristianitos Road.[13] The Orange County design standards require that roadways classified as a secondary arterials have four traffic lanes.[14]

With I-5 projected to operate at LOS D and F in the design year,[15] when severely congested travel conditions are encountered on I-5, travelers will more frequently divert off of I-5 and use El Camino Real. These conditions will increase the frequency of non-recurring incidents (i.e., vehicle break-down, accidents, adverse weather conditions) that will disrupt and cause severe delays to I-5 travelers throughout the typical day or week. Based on this review, we agree with the decision that El Camino Real should remain a four lane roadway in the SOCTIIP.

Lane Widths

The width of lanes for the AIP alternative meets FHWA and Caltrans adopted roadway design standards. The standard for lane width on the Interstate is 3.6 meters (or 12 feet).[16] SMI proposed a reduced lane width of 3.3-meters (or 11 feet) which would result in a savings of 3.6 meters (12 feet) in total based on the 12-lanes proposed on I-5 for the AIP alternative. This same standard for lane width was applied to all the alternatives initially considered in the NEPA process, ensuring a balanced assessment and comparison of their impacts.

The use of 3.3 versus 3.6 meter lanes on I-5 is considered to be minor and would not substantially reduce the overall width of the right-of-way that would need to be acquired for the AIP alternative. Additionally, this reduction in the width of right-of-way is not expected to

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[10] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. F-156 to F-163.
[11] Orange County, "Response to Smart Mobility Report, The Refined AIP Alternative", January 2008, p. 21.
[12] Orange County, "Highway Design Manual", (http://www.ocroad.com/docs/OCHDM.pdf), June 2005, p. 100-3.
[13] Orange County, "Response to Smart Mobility Report, The Refined AIP Alternative", January 2008, p. 21.
[14] Orange County, "Highway Design Manual", (http://www.ocroad.com/docs/OCHDM.pdf), June 2005, p. 100-3.
[15] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-111 to D-114.
[16] AASHTO, *A Policy on Design Standards Interstate System, January 2005*, p. 3.

reduce the number of complete parcels that would need to be acquired. The next section contains the details of how these right-of-way needs were estimated.

We determined in our review that the use of a 3.6 meter lane width on I-5 allowed for a balanced assessment and comparison of the expected impacts for all of the SOCTIIP alternatives, allowing TCA and Caltrans to make an informed decision to eliminate alternatives from further study that were determined not to be reasonable and feasible. The consideration of narrower lanes is an appropriate design exception to evaluate and consider in the advanced preliminary or final design of a preferred alternative once selected. This design exception would allow for any benefits that may be realized with reducing the right-of-way to be considered along with any adverse impacts it could have on the safety and flow of traffic along I-5. However, we determined that any net benefits realized by this reduction in right-of-way width would not be of sufficient magnitude to substantially change the potential impacts of the AIP alternative.

Roadside Slopes

The width of the roadside slopes along the I-5 corridor varies greatly based on topography, soil conditions, and retaining walls. The right-of-way impacts identified for the AIP alternative were based on the width needed to transition from the I-5 roadway to the surrounding terrain. This transition in grade can be done with a wider and flatter slope, a narrower and steeper slope, or with the installation of a retaining wall. Steeper roadside slopes are inherently less stable than flatter slopes. Depending on the soil conditions, steep slopes may require special design considerations; require soil reinforcements; or be determined not to be feasible from a design, construction or maintenance standpoint. Retaining walls have structural supports that extend into the soil behind the face of the wall and require additional drainage considerations.

The construction of retaining walls is more costly than modifying the grade of a roadway or its roadside side slopes. For example, a simple 3.0-meter-tall stabilized earth retaining wall would cost on the order of $1,870 per linear meter of wall. [17] A rough, order of magnitude, estimate of the cost to construct a 3.0 meter retaining wall along both sides of the corridor would be approximately $100 million. If the design of the 3.0-meter wall required pile foundations and tiebacks, the cost would increase to approximately $250 million.[18] These estimated costs are exclusive of the any costs that may be needed to acquire right-of-way or easements, special drainage needs, and access that may be needed to construct and maintain these walls.

It is important to note that the cost to construct taller retaining walls would not be an incremental increase above the estimated cost to construct walls 3.0 meters in height. The average cost per meter construct higher retaining walls is expected to increase substantially as the height increases. If retaining walls that may be needed along the I-5 corridor were significantly higher than 3.0 meters, the cost to install these walls may be cost prohibitive, or could be determined to be not feasible to construct. Even with retaining walls, the reduction in right-of-way impacts would be limited by the width needed for the structure or base of each retaining wall that may be installed.

[17] Values calculated from data in CalTrans, "Memo to Designers", 1989; and California's escalation rate for capitol improvement projects, http://staffnet.fhwa.dot.gov/hep/staffepp/fcmatrix/fccalif.htm.
[18] Values calculated from data in CalTrans, "Memo to Designers", 1989; and California's escalation rate for capitol improvement projects, http://staffnet.fhwa.dot.gov/hep/staffepp/fcmatrix/fccalif.htm.

TCA and Caltrans based the estimated right-of-way needed for the AIP alternative on the use of unstabilized roadside slopes. Based on our technical review of the 1200 residential and commercial parcels of land identified as needing to be acquired for the AIP alternative,[19] the installation of retaining walls may be reasonable and feasible to avoid the need to acquire 10-20 percent of these parcels. This estimate was based on our review of locations where TCA and Caltrans had identified impacts to property parcels. We assessed whether these impacted property parcels could potentially be avoided by using retaining walls as mitigation for side slopes. Even with retaining walls, many locations would not be avoided. In some locations, the parcels would be impacted by the easement needed to construct the retaining walls. In other locations, other design elements of the AIP alternative, such as configuration of a reconstructed interchange, is the cause for the impacts to the parcel.

TCA developed a methodology for estimating how much of an impacted parcel would need to be acquired or if the entire parcel would need to be acquired. The following criteria were used to determine if an entire parcel needed to be acquired:

1.) "the parcel is entirely within the limits of disturbance,
2.) the parcel is over 90% within the limits of disturbance,
3.) the parcel is a single family residence and any portion falls within the limits of disturbance,
4.) the parcel is developed non-residential and any portion of the building falls within the limits of disturbance,
5.) the parcel is developed non–residential and more than 25% of the site parking falls within the limits of disturbance, or
6.) access to the parcel is cut off."[20]

TCA and Caltrans applied these same criteria consistently to estimate the number of parcels and total right-of-way that would need for each SOCTIIP alternative, enabling a comparison of their impacts. Their criteria reasonably assumed a partial taking of a seemingly small percentage of right-of-way from a parcel would significantly impact the value of the remaining property, making such partial takings impractical on smaller parcels. Additionally, they also reasonably assumed that to avoid the complete taking of a single-family residence, the entire parcel would need to be outside the proposed new right-of-way limits for each alternative.

A detailed analysis and design that is appropriately conducted in the advanced preliminary and final design of a preferred alternative would determine if it would be cost effective to use retaining walls to reduce the number and impact of these right-of-way takings. This analysis and evaluation would allow the issues and factors for every parcel to be considered. The detailed engineering and design would consider locations for walls based on geological and cost analyses, consultation with the property owners. drainage. and other issues.

Our review determined that the methodology used to estimate the quantity of right-way needed for the AIP alternative was appropriate. Additionally, SMI's recommendation to use retaining walls to reduce the number of parcels needed to be acquired would not be feasible. Our review also determined the magnitude of using retaining walls to mitigate the right-of-way impacts would not be sufficient to substantially change the overall impacts of the AIP alternative.

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[19] TCA, *SOCTIIP Draft Relocation Impacts Technical Report, Final, December 2003*, 1-20 and 1-21.
[20] TCA, *SOCTIIP Draft Relocation Impacts Technical Report, Final, December 2003*, 1-19.

Types of Interchanges

Given the high traffic volumes projected for I-5, existing development, terrain, and the intersecting local streets, partial cloverleaf A (ParClo-A) interchanges would be an appropriate choice along this corridor. Diagrams depicting the configuration of the freeway interchanges referenced in this review are attached to this document. ParClo-A interchanges would be able to accommodate more vehicles and provide better performance (e.g., increased travel speeds, reduced travel time, reduced delays, and improved safety) on the local streets and on I-5 than other interchange types.[21] Additionally, this interchange type allows for safer accommodation of pedestrians and bicyclists. Using other interchange types would further degrade the operation of the AIP alternative, which fails to meet the established SOCTIIP performance threshold. Specific interchange modifications suggested by SMI are discussed below.

Avenida Pico

At the Avenida Pico interchange, SMI recommended a single-point urban interchange (SPUI) to reduce the impacts and asserted, without supporting analysis, that it will provide sufficient capacity for the design year traffic.[22] SPUI's do not, in general, have as much traffic capacity as the ParClo-A interchanges, have higher construction costs, and make it difficult to provide access for pedestrians through the interchange. Construction costs are higher for SPUI's because of the need for a wider and longer bridge to provide space for single intersections. The capacity of a SPUI is affected by the size of the intersection, the proximity of adjacent intersections and driveways, and the balance of left-turn to through movements.[23] Providing guidance to motorists maneuvering through the intersection can be problematic due to the long elliptical path of the left-turn movement and the size of the intersection.[24]

The existing I-5 interchange with Avenida Pico is a diamond interchange with the I-5 ramps terminating at closely-spaced intersections and five through-lanes on Avenida Pico. Under current conditions, the northbound on-ramp and southbound off-ramp are operating at LOS F. The northbound off-ramp and southbound on-ramp are operating at LOS A and LOS B. The intersection for the southbound ramps is operating at LOS E and the intersection for the northbound ramp is operating at LOS B. The freeway has eight lanes in this area and is operating at LOS C and D during peak hours.[25]

The no-action alternative at this interchange would maintain the same configuration with the addition of auxiliary lanes to improve operations for the northbound on-ramp and the southbound off-ramp. However, the traffic projection and analysis conducted for the no-action alternative also include other committed and funded transportation improvement projects that will "address some of the...projected traffic demand in south

[21] Institute of Transportation Engineers, *Freeway and Interchange Geometric Design Handbook*, 2005, 210; and AASHTO, *A Policy on Design Standards Interstate System, January 2005*, pp. 776-804.

[22] SMI, "An Alternative to the Proposed Foothill South Toll Road", January 2008, p. 21.
[23] CalTrans, "Single Point Interchange Planning, Design and Operations Guidelines", June 2001, pp. 2-3.
[24] AASHTO, *A Policy on Geometric Design of Highways and Streets*, 2004, p 783.
[25] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-6, D-7, E-5, F-37, and F-41.

Orange County."[26] Even with these improvements, analysis of the 2025 traffic demand on the local street network indicates that the northbound on-ramp and the southbound off-ramp would be operating at LOS F and D. Additionally, the southbound on-ramp and the freeway through-lanes would be operating at LOS F. The northbound off-ramp would be operating at LOS A. The intersection for the southbound ramps with Avenida Pico would be operating at LOS A and the intersection for the northbound ramp would be operating at LOS B.[27]

The ParClo-A interchange proposed in the AIP alternative would add loop ramps to eliminate the left-turn for vehicles entering the freeway for both the eastbound-to-northbound and westbound-to-southbound movements. The AIP alternative would also add to the freeway auxiliary lanes for all of the ramps where they join the freeway and add high-occupancy vehicle lanes (two lanes northbound and one lane southbound). With these improvements, the freeway lanes would be operating at LOS D and F. The addition of the loop-ramps would improve operations on all of the intersections and interchange ramps into the range of LOS A-C, with the exception of the southbound on-ramp loop, which would be operating at LOS E.[28]

The SPUI would not provide the same improvements in the flow of traffic on the ramps, ramp intersections with Avenida Pico, or I-5. The heavy demand for the westbound-to-southbound movement is evident from the LOS E for the southbound on-ramp loop in the AIP alternative and the LOS F for the intersection of Avenida Pico with the southbound on-ramp for the no-action alternative. Eliminating the loop ramps would result in heavy left-turn demand at one intersection, would diminish the flow of traffic due to the longer green-time required to clear these left-turn movements and accommodate the through traffic on Avenida Pico.

Since the southbound on-ramp loop of the AIP alternative would be operating at the established performance threshold, the absence of that loop in the SPUI alternative would result in an alternative that does not meet the established SOCTIIP performance threshold. The high left-turn demand and unbalanced movements of traffic demand through the interchange would further compound the ineffectiveness of a SPUI at this location. Finally, the commercial and school properties near the interchange would indicate pedestrian traffic, which is poorly accommodated in a SPUI. Our review determined that the SPUI at Avenida Pico would result in an alternative that does not meet the purpose and need for the project.

Crown Valley Parkway

The existing interchange at Crown Valley Parkway is a partial cloverleaf with a single loop for the eastbound-to-northbound on-ramp for traffic entering I-5. Under current conditions, the freeway lanes are operation at LOS D and E. The southbound on-ramp and the westbound-to-northbound on-ramp are operating at LOS B and C. The northbound loop on-ramp and the northbound off-ramp are operating at LOS D. The

[26] TCA, *SOCTIIP, Foothill South, Final Subsequent Environmental Impact Report, December 2005* (http://www.thetollroads.com/home/finalseir.htm), p. 1-10.
[27] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-10, D-11, E-10, F-37, and F-47.
[28] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-113, D-114, E-121, F-37, and F-162.

southbound off-ramp is operating at LOS F. The intersections of the ramps with the Crown Valley Parkway are operating at LOS B for the northbound ramps and LOS D for the southbound ramps.[29]

For the no-action alternative, the freeway would be operating at LOS D through F in the design year. The southbound on-ramp would be operating at LOS C. The northbound loop on-ramp would be operating at LOS D. The northbound off-ramp would be operating at LOS E. The northbound-to-westbound on-ramp and the southbound off-ramp would be operating at LOS F. Both of the ramp intersections would be operating at LOS F.[30]

The AIP alternative would add a westbound-to-southbound loop ramp from Crown Valley Parkway to I-5, removing the left-turn movement from the southbound on-ramp intersection and making this a ParClo-A interchange. The loop ramp removes the necessity for a left-turn movement at the intersection and allows that movement to be made from the right side of Crown Valley Parkway, eliminating the need for a left-turn phase at the signal and improving operations of that intersection. The southbound on-ramp and the new southbound on-ramp loop would be operating at LOS A, and the intersection would be operating at LOS D. However, southbound off-ramp would be operating at LOS F and the southbound ramp intersection would be operating at LOS D.[31] The southbound off-ramp would fail to meet the project's performance threshold. Omitting the southbound loop-ramp from the alternative would further degrade operations of this intersection and ramp.

Instead of adding a southbound loop on-ramp, SMI proposed adding a fly-over southbound off-ramp. This fly-over would cross under Crown Valley Parkway, cross over I-5, and then require a 180 degree curve to connect with the northbound off-ramp at the intersection with Crown Valley Parkway.[32] This proposal eliminates the southbound-to-eastbound left-turn movement from the southbound off-ramp intersection and relocates it to the northbound off-ramp intersection as a right-turn movement. A detailed operational analysis would be needed to determine if this would improve the operations of the southbound intersection sufficiently without degrading operations of the northbound intersection.

While this concept is possible from an operational standpoint, the alignment provided by SMI ignores several geometric constraints that would negatively affect the operations, safety, and cost to construct this ramp. For the fly-over ramp to have sufficient vertical clearance as it crosses under Crown Valley Parkway and over I-5, it would require a longitudinal grade of approximately 10 percent followed immediately by a 180 degree curve. This non-standard design would affect the speed differential between trucks and passenger cars, decrease sight distance, and severely impact the safety and operation of trucks that would complete this movement.[33]

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[29] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-6, D-7, E-4, F-35, and F-41.
[30] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-10, D-11, E-9, F-35, and F-47.
[31] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-113, D-114, E-120, F-35, and F-162.
[32] SMI, "An Alternative to the Proposed Foothill South Toll Road", January 2008, page 19.
[33] AASHTO, *A Policy on Geometric Design of Highways and Streets*, 2004, pp. 279-283, 828-829

The distance between the southbound-to-westbound off-ramp and the fly-over southbound off-ramp would be less than a third of the 300-meter minimum design standard required for the spacing for ramps on freeways. This spacing provides room for motorists to comprehend the sign messages, make a decision, and make a safe maneuver while crossing the path of other traffic.[34] Finally, with the fly-over ramp and the northbound off-ramp joined at one intersection, drivers maneuvering from the northbound off-ramp to the right turn lanes at the intersection would have poor sight distance and insufficient distance to make this maneuver.

For the interchange configuration proposed by SMI to be safe and to operate well, the ramps would need to be redesigned to provide sufficient length for grade changes, sight distance, and lane change maneuvers. Changing the design in this way would significantly increase the right-of-way needs and construction costs beyond what was estimated by SMI. Our review determined that SMI's recommendations are not reasonable and feasible based on this non-standard design of the ramps. Additionally, this design would adversely impact the safety and traffic of the ramp, resulting in an overall impacts that are expected to be greater than what was estimated for this interchange in the AIP alternative.

El Camino Real

El Camino Real is a north-south secondary arterial running nearly parallel to I-5, ultimately intersecting at a severely skewed angle. The existing interchange is a diamond; however, the ramps are offset, creating four discrete intersections. Approximately 600 meters south of the diamond interchange, there is a partial interchange serving northbound I-5 only with an additional on-ramp and off-ramp. The ramps and intersections at this interchange are operating at LOS A, and the freeway is operating at LOS C and D.[35]

The no-action alternative would result in a LOS of E and F on the freeway in the design year. The ramps and ramp intersections would be operating at LOS A and B.[36] El Camino Real is projected to operate at a LOS A in the design year.

The AIP alternative would modify the southbound off-ramp to eliminate the short weaving section between this ramp and the on-ramp at the next interchange to the north. Weaving sections are locations where motorists entering the freeway must cross paths with motorists exiting the freeway. Short weaving sections result in turbulence in traffic flow and negatively impact safety and operations. The AIP alternative would correct this by extending the off-ramp to the north using a structure where it crosses over the on-ramp.

Even with this improvement substantially improving the safety and operation of the freeway, it would be operating at LOS F at this location.[37] Other improvements proposed at this interchange in the AIP alternative include: realigning the southbound

[34] AASHTO, *A Policy on Geometric Design of Highways and Streets*, 2004, pp. 843-844.
[35] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-6, D-7, E-5, F-37, and F-41.
[36] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-10, D-11, E-10, F-37, and F-48.
[37] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. D-114.

ramps to tie into a single intersection with Avenida Valencia; closing the northbound ramps which are 600 meters south of the interchange; and realigning the northbound ramps, adding a loop for the southbound El Camino Real to northbound I-5 maneuver.

SMI recommended that the southbound ramps to El Camino Real remain in their existing configuration. They recommended the closing of the northbound ramps at the interchange and the preservation of the northbound ramps that are 600 meters to the south, creating two partial interchanges that would function together.[38] These recommendations do not provide any safety or operational improvement for the southbound lanes of the freeway that would be operating below the performance threshold for the project. Additionally, they do not address any potential safety issues related to sight-distance at the skewed intersections, deceleration length for ramps as they approach intersections, and curves on the ramps that may not be appropriate for the vehicle speeds. Partial interchanges are discouraged and only considered in extreme situations since drivers expect to find all movements at one interchange.[39]

Since the ramps and intersections would be operating at LOS A and B and the northbound freeway lanes would be operating at LOS D in the AIP alternative,[40] there may be an opportunity to evaluate minor modifications to the design of the ramps and the intersection of the ramps with El Camino Real. If these modifications were determined to be feasible in the advanced preliminary engineering, they may only have the potential to slightly reduce the number of parcels need to be acquired by 25 to 75, without adversely impacting the safety and flow of traffic, reductions which would not be significant when compared to the parcels needed for the AIP alternative. A detailed analysis of the viability and potential of these modifications would be appropriately conducted in the advanced preliminary or final design of a preferred alternative. Therefore, the AIP alternative provides a reasonable estimate of the impacts of the improvements at this interchange.

Our review determined that the SMI recommendation to maintain the existing configuration of the southbound ramps at the El Camino Real interchange would further degrade the safety and traffic operations for the southbound lanes of I-5. We also determined that some of SMI's recommendations associated with the northbound exit ramps at the El Camino Real interchange may be reasonable. However, these modifications would have no influence on the overall estimate of the right-of-way needed to be acquired, other impacts or the cost to construct the AIP alternative. Additionally, our review determined these SMI recommendations would not affect the TCA and Caltrans decision to eliminate the AIP alternative from further consideration.

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[38] SMI, "An Alternative to the Proposed Foothill South Toll Road", January 2008, page 22.
[39] AASHTO, *A Policy on Geometric Design of Highways and Streets*, 2004, pages 770.
[40] TCA, *SOCTIIP Traffic and Circulation Technical Report, December 2003*, pp. E-121, F-37, and F-162.

La Paz Road

This interchange and section of I-5 was designed and built in the 1960s[41] using design standards that are now out of date and no longer utilized. These facilities were also designed to accommodate a significantly lower volume of traffic. As a result, the ramps have sharper curves and limited sight distance, which may affect the safety and operation of motorists traveling on these facilities.

The La Paz Road interchange in its current configuration is a ParClo-A. The freeway is operating at LOS F under current conditions. The ramps are operating at LOS A with the exception of the southbound off-ramp, which is operating at LOS D. The intersection for southbound ramps with La Paz Road is operating at LOS D, and the intersection for the northbound ramps is operating at LOS C.

With the no-action alternative, the freeway would be operation at LOS F more frequently and for longer periods of the day. The on-ramps would be operating at LOS A and the off-ramps would be operating at LOS B and C. The operations of both interchange intersections with La Paz Road would be LOS E.

The AIP alternative maintains the current configuration of the interchanges with improvements to the ramp alignment, removing sub-standard curves. The freeway lanes would be operating at LOS E with the addition of an HOV lane in each direction. The on-ramps would be operating at LOS A, and the off-ramps would be operating at LOS C. The ramp intersections with La Paz Road would be operating at LOS C and D.

SMI recommended keeping the existing alignment of the ramps rather than improving them to current design standards, asserting that "the existing configuration has not resulted in safety or operations problems."[42] Since the on- and off-ramps and their intersections with La Paz Road have some available capacity, there may be an opportunity to evaluate minor design modifications. If these modifications were determined to be feasible in the advanced preliminary engineering, they may only have the potential to slightly reduce the number of parcels need to be acquired by 15 to 25, without adversely impacting the safety and flow of traffic, reductions which would not be significant when compared to the parcels needed for the AIP alternative. A detailed analysis of the viability and potential of these modifications would be appropriately conducted in the advanced preliminary or final design of a preferred alternative. Therefore, the AIP alternative provides a reasonable estimate of the impacts of the improvements at this interchange.

Our review determined that the SMI recommendation to maintain the existing configuration of the off-ramps at the La Paz interchange would not have significantly affected estimated right-of-way impacts and construction costs of the AIP alternative. We also determined that these modifications, if included in the AIP alternative, would not have affected the comparison of the SOCTIIP alternatives, or TCA and Caltrans decisions to eliminate the AIP alternative from further consideration.

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[41] FHWA, "Quarterly Report on the Federal-Aid Highway Program", 1969, on file with Richard Wiengroff.
[42] SMI, "An Alternative to the Proposed Foothill South Toll Road", January 2008, page 18.

In summary, the SMI recommendations to modify the proposed AIP alternative interchange improvements would not meet the performance thresholds for the SOCTIIP, would have greater right-of-way impacts than stated by SMI, or would have little significance to the overall estimate of impacts of the AIP alternative. We have determined that the SMI recommendations, if implemented, would not have affected the comparison of alternatives and the decision to eliminate the AIP alternative from further evaluation.

Alignment

SMI suggested the AIP alternative could be improved by shifting the alignment to avoid right-of-way impacts along one side of the corridor. Shifting the corridor may minimize the impacts to one side; however, the shift may instead lead to an increase in the severity and number of properties affected on the other side. Other factors further offset the benefits of this suggestion. Shifting the alignment would make it much more difficult to utilize existing I-5 and local street infrastructure, thus increasing design and construction costs.

The density and location of the developments and location of open space along both sides of the corridor would render a wholesale shift of the alignment to one side ineffective in reducing the overall impacts of the AIP alternative. The transition to shift the I-5 alignment 10 meters would need to begin 500 to 2000 meters in advance of the area to be avoided. The length need for the alignment shift would depend on the alignment, speed, and constraints along the roadway (e.g., existing structures, location of development, environmental constraints, and topography). Thus, shifting the alignment to one side at one location would increase the impacts to the other side.

Based on our review of these factors, we have determined that TCA and Caltrans did develop a reasonable and feasible alignment for the AIP alternative. This alignment shifts off of the original centerline at several locations along the corridor to reduce the number of parcels and amount of right-of-way that would be impacted. The location and density of development, location of open space, environmental constraints, and traffic demands would limit the feasibility of any additional alignment shifts beyond those included in the AIP alternative.

Storm Water Detention Basins

TCA and Caltrans developed a preliminary storm water management plan for each of the SOCTIIIP alternatives. The plan developed specifically for the AIP alternative estimated sizes and identified initial locations for the storm water detention basins determined necessary to capture the run-off expected to occur within the I-5 right-of-way and intersecting local roadways. We have determined, based on a review of this preliminary storm water management plan, it provided TCA and Caltrans with the information to identify and assess the impacts associated with the proposed configuration and location of these drainage facilities. [43]

SMI recommended that these basins be relocated or adjusted to better utilize the space available within and adjacent to the I-5 right-of-way, thereby minimizing the impacts and right-of-way that may be required. For example, at the Avenida Pico and Ortega Parkway

[43] TCA, "SOCTIIP Runoff Management Plan", December 2003, page 1-3.

interchanges with I-5. SMI recommended the interchanges be realigned to accommodate and minimize the impact the proposed detention basins would have at this location. [44]

Based on our review of this recommendation, we have determined that TCA and Caltrans' proposed design of these interchanges and initial consideration of the detention basins was reasonable and feasible. The location and configuration of the basins did not affect the design of the interchange. Instead, the design of the interchanges affected the size and location of basins. [45] Additionally, we determined the alternate locations SMI identified for these detention basins were not reasonable and feasible due to the steep topography and associated impacts that would occur with constructing and maintaining these basins in these locations.

If the AIP alternative had been carried forward in the SOCTIIP, the additional, more detailed analysis and consideration of the impacts of these detention basins in the advanced preliminary or final design stages of the project would refine further their configuration and location. This additional analysis at a later stage in the project development process is where it would be appropriate to fully consider the full impacts of the cost, environmental, right-of-way, constructability, and maintenance issues that should be considered in arriving at the optimum configuration and location of the needed drainage facilities and basins.

We have determined in our review the SMI proposed refinements would not have led to any substantial changes in the overall impacts or cost to construct the required drainage facilities and basins or the right-of-way that would need to be acquired. Additionally, we determined that any net benefits that may be realized from any additional analysis or change in the location of the subject drainage basins would not be of sufficient magnitude to affect the TCA and Caltrans decision to eliminate the AIP alternative from further evaluation.

Conclusion

Based on an evaluation of the total project cost, performance, and impacts, TCA and Caltrans decided to eliminate the AIP alternative from further consideration. The independent FHWA technical design review that was performed determined that the SMI recommendations to change the design or scope of the AIP alternative improvements are not reasonable and feasible. This finding is based on the expected influence these recommendations would have on the total project cost, performance (e.g., safety, and traffic flow), and other impacts (e.g., right-of-way, drainage, and environment). While SMI asserts its recommendations will not adversely impact travel and result in substantially lower project costs and impacts, there is no reasonable rationale or technical basis provided upon which these recommendations are founded.

Our review of SMI's recommendations to modify the AIP alternative determined that they would not result in an alternative that meets the performance thresholds established for the SOCTIIP. We further determined that only a limited number of SMI recommendations may be reasonable and feasible to implement after further study and analysis which would appropriately be conducted in the later stages of the advanced preliminary or final design of a

[44] , "An Alternative to the Proposed Foothill South Toll Road", January 2008, pags 20-21.
[45] SMI, "An Alternative to the Proposed Foothill South Toll Road", January 2008, pags 20-21, and TCA, "SOCTIIP Runoff Management Plan", December 2003, Figures I-5-1 through 1-5-23.

project. Additionally, these potential modifications would not have sufficiently affected the impacts quantified for the AIP alternative to where they could change the comparison between SOCTIIP alternatives.

We have determined based on our review that the SMI recommendations would result in an alternative with a higher total project cost, diminished traffic levels of capacity and traffic flow, and greater adverse impacts than was suggested in the SMI reports. Based on this assessment we have determined the SMI recommendations do not justify altering the AIP alternative, nor should they affect the TCA and Caltrans decision to eliminate it from further consideration in the development of the SOCTIIP. The SMI recommendations also involved detailed design issues that are appropriately considered in later stages of the project development when advanced preliminary or final design is conducted on the preferred alternative selected for the SOCTIIP.

We have determined in our review that TCA and Caltrans followed a context sensitive process to appropriately develop and make an informed decision regarding the feasibility of the AIP and other SOCTIIP alternatives. A sufficient level of design was conducted, and information was analyzed, evaluated and used by TCA and Caltrans in support of making informed, context-sensitive decisions regarding the feasibility of the AIP alternative. Our review did not identify the need to conduct any additional study and analysis of the AIP alternative and the recommendations made by SMI. We determined, based on a review of the information that was developed by TCA and Caltrans, that their decision to eliminate the AIP alternative from more detailed evaluation in the development of the SOCTIIP was reasonable and well-founded.

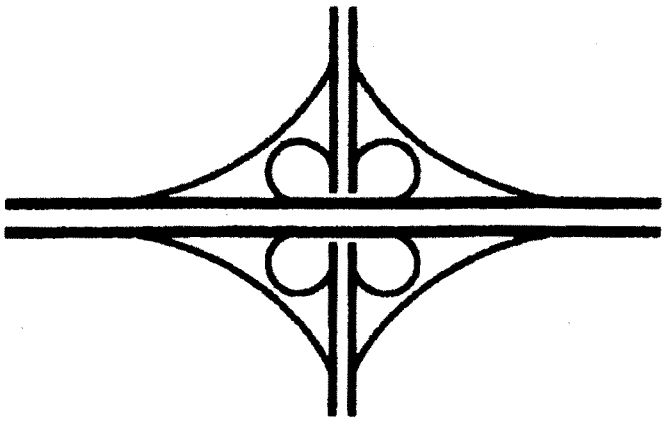
This technical design review was completed by the following individuals on October 24, 2008:

Brooke Struve, P.E., P.M.P.
Design Program Manager

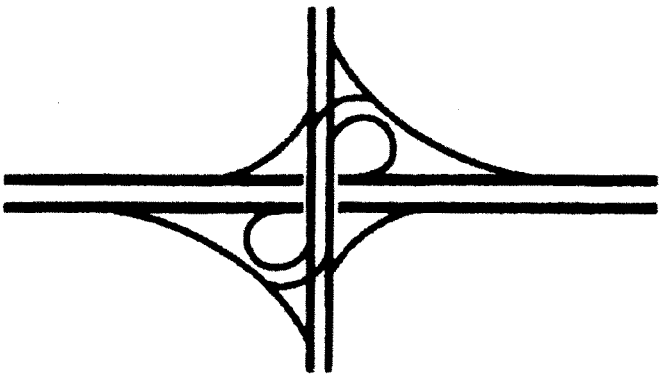
Jon Obenberger, Ph.D., P.E.
Preconstruction Team Leader

Office of Program Administration
Office of Infrastructure
FHWA

Attachment: Interchange Configurations



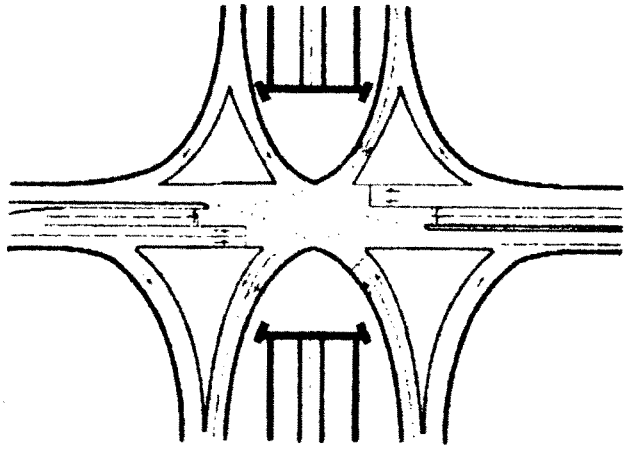
Full Cloverleaf



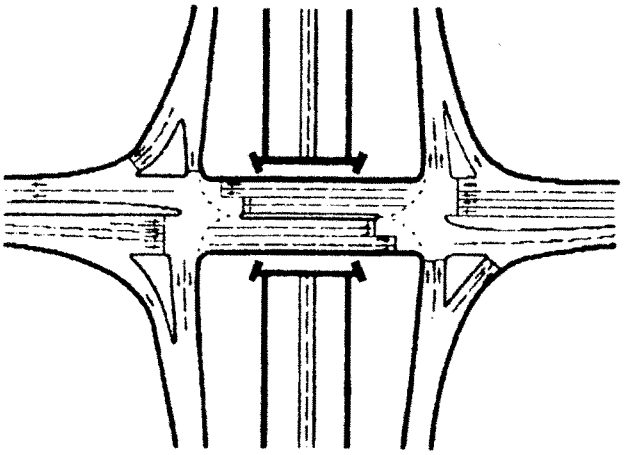
Partial Cloverleaf Type A (Parclo A)

Source: Joel P. Leisch/PBS&J (ITE Freeway and Interchange Geometric Design Handbook)

Attachment: Interchange Configurations



Single Point Urban Diamond (SPUI)



Tight Urban Diamond

Source: Joel P. Leisch, Thomas Urbanik II, and James P. Oxley. "A Comparison of Two Diamond Interchange Forms in Urban Areas." ITE Journal (May 1989)

QUESTIONS FOR
VICTOR M. MENDEZ, ADMINISTRATOR
FEDERAL HIGHWAY ADMINISTRATION
HEARING ON
ACCELERATING THE PROJECT DELIVERY PROCESS
BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
UNITED STATES HOUSE OF REPRESENTATIVES
FEBRUARY 15, 2011

General

Question #1: Has FHWA been able to document and quantify any time or cost savings so far with your Every Day Counts Initiative? What are those savings?

Response: Within the Every Day Counts (EDC) Initiative FHWA has identified a number of processes and technologies that reduce costs and accelerate project delivery. Examples include Warm-Mix Asphalt (WMA), which is a generic term for a variety of technologies that allow the producers of hot-mix asphalt pavement material to lower the temperature at which the material is mixed and placed on the road. In most cases, the lower temperature results in significant cost savings and reduced greenhouse gas emissions because 30 to 35 percent less fuel is required. Additional benefits include: reduced CO2 emissions by 30 to 40 percent, reduced asphalt production costs, reduced fossil fuel consumption, an extended paving season, improved compaction during lay-down which improves performance, and lowered life-cycle costs.

With the use of Prefabricated Bridge Elements and Systems (PBES), many time-consuming construction tasks no longer need to be accomplished sequentially in the work zone. Instead, PBES are constructed concurrently, off-site, and brought to the project location ready to erect. Because PBES are usually fabricated under controlled climate conditions, weather has a smaller impact on the quality, safety, and duration of the project. Through the use of standardized bridge elements, PBES offers cost savings for both small and large projects.

Geosynthetic Reinforced Soil (GRS) integrated bridge system technology uses alternating layers of compacted fill and sheets of geotextile reinforcement to provide support for a bridge. This bridge system alleviates the "bump at the bridge" problem caused by differential settlement between the bridge abutment and approaching roadway. The technology offers unique advantages in the construction of small bridges. For example, the Stevers Road Bridge over the Tiffin River in Defiance County, Ohio used the GRS technology to replace their existing steel truss bridge. The county was able to build vertical abutments close to the river, avoiding a two span replacement bridge with a center pier located in the middle of the river. Having a pier in the river would have created a long term maintenance issue due to potential debris build up causing channel blockage. The county realized a $180,000 or 23% cost savings and a two month reduction in construction time. The savings the county achieved using the GRS-IBS helps stretch the limited funds they receive for their bridge program.

The Enhanced Technical Assistance for Stalled Environmental Impact Statements initiative provides additional FHWA technical assistance to identify major challenges on ongoing environmental impact statement (EIS) projects and implement solutions to resolve project delays where feasible. Candidate projects are ideally those where 60 months have elapsed since issuance of the Notice of Intent (NOI) without issuance of a Record of Decision (ROD). The first project under this initiative was the Knik Arm Crossing in Anchorage, Alaska. FHWA teams were deployed to Alaska in mid-2010 to focus on facilitating interagency coordination and development and completion of the required documentation under Section 7 the Endangered Species Act and the Marine Mammal Protection Act. This initiative resulted in resolution of the outstanding issues with NOAA within a few months, clearing the way for the issuance of the FHWA Record of Decision. While it is not possible to calculate how much delay might have occurred in the absence of FHWA's initiative, it is likely that the disputes would have continued and the environmental review process would have taken longer. The project owner estimated that delays to the project's schedule amounted to a daily cost of $65,000.

Wetland mitigation banks, wildlife conservation banks, and in-lieu fee (ILF) environmental mitigation programs provide State DOTs with the opportunity to meet ecological mitigation needs while avoiding costly and time consuming processes of identifying, designing, constructing, and managing individual mitigation sites. The purpose of this initiative is to broaden the use of banking and ILF programs to expedite Federal-aid highway project delivery. A current case example of successful implementation is the Stutsman County Roadway in Stutsman County, North Dakota. A team of state and federal agencies in North Dakota developed a Wetland Mitigation Banking Guide that provides a consistent and clear set of procedures for wetland banking specific to North Dakota's unique wetland resources. As a result, Stutsman County consolidated the wetland impacts from multiple projects and mitigated them into one wetland mitigation bank, which allowed them to complete all the grade raise projects in the 2010 construction season. Without the bank, rural residents would have been left with long detours for about an additional nine months. The estimated cost avoidance to these projects was $75,200 or 4.7%.

Another approach identified by EDC is Planning and Environment Linkages (PEL). PEL represents an approach to transportation decision-making that considers environmental, community, and economic goals early in planning and carries them through project development, design, and construction. This leads to seamless decision-making that minimizes duplication, promotes environmental stewardship, and reduces delays in project implementation. The application of PEL was used to forward the Montana Highway 567 Pipe Creek Road project in the Kootenai National Forest of northwest Montana. Montana Department of Transportation (MDT) engaged with resource agencies and the public in planning to understand their values and discuss roadway improvement options. This led to a significant change in the original scope of the project - from a full reconstruction of the roadway down to a minor widening and alignment change – which led to much less environmental impact and a decision to proceed with a Categorical Exclusion rather than an EIS. The estimated time savings were projected to be at least 2 years.

These technologies and processes are just a few examples of initiatives under EDC set for deployment over the next couple of years. At this time, examples of cost and time savings are illustrative of project specific benefits, but more national data will become available as these processes and techniques are deployed into mainstream use.

Question #2: Under the Council on Environmental Quality (CEQ) regulations, the environmental review process begins with a Notice of Intent to be published in the Federal Register. In addition, SAFETEA-LU requires a project initiation notice to be submitted to USDOT. This seems to be a duplication in effort. Can the requirement for a project initiation notice be eliminated?

Response: Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) requires that the project sponsor notify the Department of Transportation (DOT) about the type of work, termini, length, and general location of the proposed project to initiate the environmental review process for a transportation project. The intent of the project initiation notification was to confirm that the project sponsor was ready to proceed with the NEPA phase of project development by devoting appropriate staff, consultant services, financial resources, and leadership attention to the project. This confirmation would no longer be required if the notice is eliminated. FHWA's section 6002 guidance does allow notices of initiation to be consolidated or batched into a multi-project notice. From the FHWA monitoring of section 6002, it was reported that the content in the project initiation notice was included in the Notice of Intent. Therefore, efforts are focused on aligning the notices to avoid duplication.

The CEQ regulations require a Notice of Intent only when the environmental review process is an Environmental Impact Statement (EIS). The EIS is the NEPA environmental review process least used by FHWA. In November of 2010, FHWA gathered estimates of the number of projects processed by FHWA on an annual basis and it is estimated that almost 10,000 projects a year (96.5%) are processed through a Categorical Exclusion (CE), about 316 projects a year (3.2 %) are processed through an EA and about 37 projects a year (0.3%) are processed through an EIS.

Question #3: In reviewing your Every Day Counts Initiative, it appears you focused on what changes can be made within the current framework. When you had the State DOTs and transportation experts together, did you discuss their ideas for changing the law or regulations that might lead to a more accelerated process? If so, what ideas were put forward?

Response: The focus of EDC was on what FHWA can do under current statute and regulation and what tools are available that provide more flexibility, such as doing more in the preliminary design phase. To launch EDC, FHWA held ten regional innovation summits. During the plenary session of each summit, time was allotted for the participants to ask questions and make comments on topics related to transportation. Some specific changes to the law or regulations suggested by the audience included: raising the minimum requirements on value engineering studies; creating a funding set aside for the environmental review process; scaling back laws to

help improve project delivery and reduce the work load; and broadening funding eligibility for traffic signal optimization.

FHWA has also launched the EDC website which includes an "Innovation Box" where members of the public can submit their thoughts, ideas, and suggestions in more detail. Finally, FHWA is working with AASHTO and other stakeholders to develop a sustainable approach to managing the deployment of innovation and technology, on an ongoing basis, to state, local and industry partners across the nation involved in project and program delivery for the Federal-aid system.

Question #4: Will the Administration's authorization proposal include concepts for accelerating project delivery?

Response: FHWA is committed to helping the highway community deliver projects more quickly. The longer it takes to deliver a project, the more the project ultimately will cost, and the longer the public will have to wait to enjoy the project's benefits. The Administration's proposal will include provisions that will accelerate and improve project delivery for Federal-aid projects.

Question #5: The Surface Transportation Project Delivery Pilot Program in SAFETEA-LU allows FHWA's NEPA responsibilities to be delegated to 5 states eligible to participate in the program. California was the only state that gained consent of its legislature and completed the application process. California has documented time savings of almost seventeen months for completing the environmental process for routine documents (such as environmental assessment or findings of no significant impact). What changes can Congress make to the pilot program to get more states to participate?

Response: As noted in the question, California is the only state that is participating in the pilot program authorized by Section 6005 of SAFETEA-LU. The California Department of Transportation (Caltrans) has stated that as a result of their participation in the pilot, they have seen time savings of "almost seventeen months for completing the environmental process for routine documents (such as environmental assessments (EA) or findings of no significant impact (FONSI))." There is to-date no similar documented time savings on the more complex projects that require environmental impact statements (EIS). FHWA believes it is too early in the process to determine, overall, what time savings have resulted from the pilot program. More time is needed to gather information on the various projects that have been completed in California under the program, especially the more complex and controversial projects.

Over the past 5 years, FHWA has surveyed the States on multiple occasions to determine interest in the pilot program. No additional States have expressed interest in participating. The States surveyed were primarily concerned with the waiver of sovereign immunity that is required in order to participate. States were also concerned that they would no longer be able to conduct "at risk" State-funded right-of-way and other activities prior to the completion of NEPA. Such pre-decisional activities have been upheld by several courts where FHWA served as an independent NEPA decision-maker. Under the pilot, FHWA would no longer be involved as the unbiased final decision-maker and courts could then view the State, having expended its funds on right-of-way and other project implementation activities, as having an inherent conflict of interest in the

NEPA decision-making process because the NEPA decision would be nothing more than a rationalization of a decision the State had already made about the project.

DeFazio

Question #1: Administrator Mendez, can you provide the Committee a breakdown of the projects by class (e.g. CE/EIS/EA) processed annually by the Federal Highway Administration (FHWA)? Has FHWA looked at the timeframes for completing these various actions? Are there any trends worth noting?

Response: In November of 2010, FHWA gathered estimates of the number of projects processed by FHWA on an annual basis and the timelines associated with completing each of those actions. It is estimated that almost 10,000 projects a year (96.5%) are processed through a Categorical Exclusion (CE). The average time to process a CE is 6 months. It is estimated that about 316 projects a year (3.2 %) are processed through an EA. The average time to process an EA is 20 months. It is estimated that about 37 projects a year (0.3%) are processed through an EIS. Before the enactment of SAFETEA-LU, the average time to process an EIS was 73 months. After SAFETEA-LU, the average time required for processing an EIS was 43 months.

Question # 2: In your written testimony, you mentioned progress since passage of the environmental streamlining provisions of SAFETEA-LU. Has FHWA been monitoring the specific impacts of the various provisions on SAFETEA-LU on project delivery? Can you share with us the timelines for the various class of action (Categorical Exclusions, Environmental Assessments, and Environmental Impact Statements)?

Response: FHWA has monitored, on a biannual basis, the impacts of the various aspects of the SAFETEA-LU environmental provisions on project delivery. The environmental review procedures of Section 6002 of SAFETEA-LU are only required for EIS projects. As a result, information regarding time changes for EAs and CEs has not been included in the FHWA monitoring of the process.

FHWA has identified provisions as being effective at improving project delivery, including: the 180-day Statute of Limitations; *de minimis* Section 4(f) findings (Section 6009); identification and involvement of participating agencies; opportunity for agency and public input in purpose and need statement and alternatives development; and development of a project coordination plan.

FHWA has closely monitored the timelines for EIS projects completed under the Section 6002 environmental review process. For 18 EIS projects initiated and completed after SAFETEA-LU, the average time to complete the process (from the Notice of Intent to Record of Decision) was 43 months. In comparison, in the 6 years prior to SAFETEA-LU, the average time to complete the process was 73 months.

Question # 3: In the testimony at the hearing, we heard a lot about the delays facing projects and proposals to address these concerns. Aside from problems with resource agencies, we do not hear much talk about the causes of delays in project delivery. Has

FHWA looked at the causes of delays on projects requiring an EIS or EA and, if so, what are those causes? What role do other issues, such as lack of funding or project redesign, play in project delays?

Response: FHWA has looked at the causes of delay on projects requiring an EIS. In a 2000 survey of FHWA Division Offices, major causes of delay included: lack of funding; local controversy; and the complexity of the project(s). More information on this survey is available at: http://environment.fhwa.dot.gov/strmlng/eisdelay.asp.

Question # 4: In their written testimony a number of witnesses discuss "programmatic agreements" for carrying out Categorical Exclusions. Some states have agreements with FHWA to carryout CEs in their state under these programmatic agreements. Can you provide the Committee more detail on the development of these programmatic agreements? How is the process under programmatic agreements different than review of actions not under the programmatic agreements? What percentage of projects or actions are processed under programmatic agreements? How many states have these agreements with you? Can you talk about FHWA's oversight of these agreements?

Response: Programmatic agreements establish a streamlined process for handling routine environmental requirements for commonly encountered project types. Programmatic agreements generally set procedures for consultation, review, and compliance with one or more Federal laws. They allow repetitive actions to be considered on a program basis rather than project by project. Programmatic agreements have been effective in producing time savings in the project delivery process in the following ways: (1) specifying clear roles and responsibilities of those involved; (2) standardizing coordination and compliance procedures; (3) facilitating the development of greater trust relationships among DOT and regulatory agency staff; and (4) allowing limited staff and resources to be more focused and effective.

Programmatic Categorical Exclusion (PCE) Agreements are one of the most widely used programmatic approaches. Forty-two FHWA Division Offices have developed PCE Agreements with their State departments of transportation to streamline the approval of CEs. While the projects that are subject to review under the terms of the various PCE Agreements vary, about 75% of all CEs are processed under these types of PCE Agreements. FHWA Division Offices work with the States in the development and oversight of the programmatic agreements. Many agreements include annual reporting of results. FHWA is placing increased emphasis on annual performance evaluation and QA/QC measures which should provide process improvements for streamlining.

FHWA also promotes the use of programmatic approaches which include, but are not limited to: Section 4(f) programmatic evaluations; "no potential to affect historic properties" memos; Memoranda of Agreements/Understandings (MOA/MOU); or other time-saving procedures.

Johnson

Question #1: Based on what I heard from my District, it seems as though local project sponsors and state Departments of Transportation are often caught unaware of the Federal

Highway Administration's requirements for an Environmental Impact Statement until well into the environmental review process. Is there a way for your Agency to provide clearer guidance earlier in the process?

Response: FHWA will continue to provide access to its guidance for addressing required NEPA analysis and documentation earlier in the project development process (extensive resources are available on-line in the Environment section of FHWA's Office of Planning, Environmental & Realty web site at http://www.fhwa.dot.gov/hep/). FHWA environmental regulations and associated guidance and training courses provide information on typical project classes of action described at 23 CFR 771.115, including EISs. Early coordination procedures, described in more detail at 23 CFR 771.111, apply when a project is identified which involves Federal funding or requires a Federal decision. Based on the information available concerning the nature of a project and the likely environmental impacts, the probable class of action and required environmental studies are generally determined at that time. The class of action could change later in the process if the analysis of the results indicates a different level of impact, resulting in either a higher or lower level of required documentation. Early and continuing involvement, as new information becomes available, allows for FHWA to provide timely guidance on a case-by-case basis.

FHWA coordinates with the State departments of transportation in support of training for local public agencies on Federal-aid project requirements. FHWA is also currently developing an extensive series of online training modules for local public agencies to increase their awareness of the environmental requirements associated with NEPA compliance.

Question #2: In her written testimony, Ms. Miller made a number of recommendations to help further reduce project delivery times. One of them is to give state Departments of Transportation more decision-making authority? Can you please comment on Ms. Miller's suggestion?

FHWA supports efforts to maximize decision-making at the State level as permitted by law. Examples include the pilot program authorized by Sections 6004 and 6005 of SAFETEA-LU. Through Section 6004, FHWA assigns to a State department of transportation the responsibility for determining whether certain highway projects meet the criteria to be classified as categorically excluded from the requirement to prepare either an EA or an EIS. This is currently being utilized only in California, Utah, and Alaska. As noted by Ms. Miller's testimony, there are issues that need to be addressed, such as sovereign immunity.

Question #3: Given that there are more and more multi-modal projects being developed, do you have suggestions for streamlining the environmental review process within DOT for these projects, so that several agencies aren't repeating work already completed by another agency?

Response: For multi-modal projects involving the Federal Transit Administration (FTA) and FHWA, joint environmental regulations with identical procedures enable either agency to adopt the other's NEPA process documentation without requiring additional information. For all other DOT modal administrations, FHWA regulations address early coordination procedures (23 CFR

771.111) which allow for the concurrent development of NEPA documentation and environmental review as well as the development of a mutually acceptable process. The majority of multi-modal projects involve FHWA and FTA. However, with the increase in passenger rail project funding for the Federal Railroad Administration (FRA), there has been an increase in multi-modal projects involving FHWA and FRA. Issues that are unique to high-speed passenger rail are addressed during a coordinated environmental review process. While it is rare for FHWA to be involved in multi-modal projects involving other DOT modal administrations, the coordinated procedures would be used to develop a NEPA process which meets the needs of all agencies involved without duplication.

Answers to Questions Submitted by Congressman John J. Duncan, Jr. to Debra L. Miller, Secretary, Kansas Department of Transportation

Committee on Transportation, Subcommittee on Highways and Transit
U.S. House of Representatives
Hearing on "Accelerating the Project Delivery Process: Eliminating Bureaucratic Red Tape and Making Every Dollar Count"
February 15, 2011

Question #1: In your testimony, you state that the environmental review process has grown new requirements over the past 40 years, but rarely are old requirements scaled back. What old requirements should be eliminated to streamline the process?

1. The environmental review process has grown to include new requirements over the past 40 years, but rarely are old requirements scaled back. The following are a few examples of requirements that should be changed to streamline the environmental review process.

   Overlap Planning and NEPA Processes
   Streamlined project delivery requires maximizing the opportunity to overlap planning and NEPA processes. A long-standing dilemma for transportation agencies is the tendency for decisions made in the planning process to be re-opened in the NEPA process – in essence, starting over – rather than using the planning decisions as the starting point for the NEPA review. This issue was addressed to a limited extent in Section 6002 of SAFETEA-LU, which states that (1) the project initiation notice shall specify the "type of work, termini, length and general location of the proposed project" – reflecting an assumption that these issues will be defined at the outset of the NEPA process, and (2) the purpose and need can include "achieving a transportation objective identified in an applicable statewide or metropolitan transportation plan." Following SAFETEA-LU, FHWA provided further clarification by adopting regulations that specifically encourage use of the planning process to determine mode and corridor for transportation projects. Despite the progress in SAFETEA-LU and in the FHWA regulations, there remains a deeply engrained reluctance by FHWA staff (and many State DOTs) to adopt the mode and corridor decisions from the planning process as the basis for the Purpose and Need in NEPA documents. Legislation should establish a presumption that decisions made in the planning process on corridor, facility type, and mode will be adopted in the NEPA process.

   Designating One Lead USDOT Agency
   Transportation projects are becoming increasingly multimodal. However, US DOT's modal administrations have varying priorities, processes and timelines for completing projects. These variations lead to unnecessary project delay. Under the current structure, State DOTs must go through multiple review,

approval and revision processes for each project document and decision. Legislation should require that one USDOT agency be established as lead agency to approve plans, studies and/or projects with multiple agency involvement. Other impacted USDOT administrations would participate as cooperating agencies.

Simplify the Steps in the NEPA Process for EIS Projects
In the 1970s, when the CEQ environmental process regulations were written, the preparation of an EIS was a largely internal agency process, with minimal opportunities for the public to provide input until after a Draft EIS was published. Aside from submitting written comments, the public had few other opportunities to provide comments, except for those who could spare the time to attend an informational meeting in person. Today, the process of public engagement starts earlier and provides many more opportunities for involvement. By the time a Draft EIS (DEIS) is published, the community has often been engaged for many years. The DEIS is viewed as nearly the culmination, not the beginning, of the process.

As early coordination has increased, it is often possible for an agency to identify a preferred alternative in the DEIS. In these situations, there is little additional benefit in publishing a separate Final EIS (FEIS) before issuing the ROD. The environmental review process could be greatly expedited by allowing the preparation of a single EIS rather than the current process of publishing of a DEIS followed by the FEIS prior to issuance of the ROD. If a single EIS is prepared, the ROD itself would include responses to comments on the EIS. This process would closely parallel the process that is used for an EA/FONSI today, where a single EA is issued and the FONSI includes responses to comments on the EA.

Question #2: In your testimony, you propose a new pilot program that you describe as "delegation-lite". How many states would be willing to participate in this program? Do you see this as a stepping stone for states to take on the full delegation authority in the Surface Transportation Project Delivery Pilot Program originally authorized in SAFETEA-LU?

2. The SAFETEA-LU delegation programs have been implemented by USDOT in a way that makes many State DOTs highly reluctant to seek delegation. Three of the five states authorized to seek SAFETEA-LU delegation (Ohio, Texas and Oklahoma) indicated that the requirement to waive sovereign immunity was a barrier to pursuing delegation. This barrier would be overcome by establishing a new pilot program that would allow a State DOT to assume expanded responsibilities for EAs and EISs without waiving sovereign immunity ("delegation-lite"). The language establishing this program should clarify that states can assume USDOT's environmental responsibilities without giving up any of their existing flexibility to undertake design and right-of-way activities during the NEPA process on an at-risk

basis. This program would provide an important steeping stone to full delegation by giving States the opportunity to enhance the capabilities that would eventually enable them to assume full delegation and help states to overcome their reluctance to take on the responsibilities involved in full delegation. Many state DOTs would be interested in this new pilot approach.

Question #3: What can we do to speed up review of projects by non-transportation agencies, whether the review is for the purposes of a permit or for comment? Are hard deadlines of a given number of days a practical approach in at least some cases? And, how can we fashion a deadline to be truly "hard"? Some have discussed the idea that failure to comment or failure to issue a decision within a set time frame should mean that the project is approved, at least as to that area of review. Please comment on how to speed up reviews and decisions by non-transportation agencies.

3. To expedite project reviews by non- transportation agencies, legislation should address the following topics:

Reducing Project-by-Project Review

The environmental review process is not just a single process: it involves compliance with an array of federal statutes and regulations, each with separate procedures, which must be woven together for each project into a single coordinated process. Each of these laws and regulations sets forth a process for approving an "action," which is typically defined as a specific project. Current law assumes that each project will receive separate environmental documentation, consultation, and approval. This project-by-project approach is not only inefficient; it also hinders strategic decision making by impeding efforts to consider alternatives, impacts, and mitigation on an ecosystem level. There is a solution: addressing environmental concerns programmatically, through integrated planning. This concept has been embraced by a broad range of environmental and transportation agencies. But little progress has been made in the real world, because most agencies' regulations are geared toward project-by-project reviews, not programmatic decision-making. New legislation is needed to delete the provisions requiring federal project-by-project reviews and empower and direct agencies to embrace programmatic approaches as the norm – not the exception.

Integrated Planning Pilot Program

Congress should establish an Integrated Planning Pilot Program. Similar to FHWA Special Experiment Program (SEP) authority, this program would authorize USDOT to establish a pilot program in which federal transportation and environmental agencies would have the authority to waive regulatory requirements for projects that are developed through an integrated planning process at an ecosystem scale. This program would empower individual agencies to develop truly innovative practices that achieve better environmental and transportation outcomes in less time.

Deadlines

The Environmental review process remains vulnerable to delay because federal agencies often have divergent views and there is no effective mechanism for resolving those differences. While the process does require agencies to provide comments within 30 days, there are no consequences if an agency fails to meet this deadline. As such, agencies feel no urgency to participate at the early stages of a project and often wait until closer to potential permit issuance or needed approvals to engage and raise new objections to the project. Raising new objections this late in the project, particularly in the absence of any new information or changed circumstances, greatly delays the project development process and requires the project sponsor to do a great deal of re-work.

Legislation could increase accountability and efficiency in the environmental review process by creating a presumption of concurrence with lead agency determinations (purpose and need, range of alternatives, methodologies, preferred alternative) if the participating agency does not object within a defined period following the opportunity for comment. If the participating agency concurs or does not object within the defined time period, the participating agency would adopt the lead agency's determination for purposes of any reviews, approvals, or other actions taken by the participating agency as part of the environmental review process for the project. This change would not remove or reduce any agency's authority, but would create an urgency to participate in the environmental review early in the process.

Question #4: You mention in your testimony the need to simplify the environmental review process by removing unnecessary paperwork. Can you elaborate? It seems like we continue to hear from states about how much paper work is required. What are your thoughts on states self-certifying to USDOT? (A couple possibilities where this may work are the coordinating plans as you referenced or the paperwork attached to the Davis Bacon requirements).

4. The following steps may be taken to simplify the environmental review process by removing unnecessary paperwork:

- Project Initiation Notice. The environmental review process is required under the CEQ regulations to begin with a Notice of Intent published in the Federal Register. Section 6002 creates an additional requirement for a project initiation notice, which is submitted by the project sponsor to the USDOT. This initiation notice is superfluous and does not contribute to streamlining the process. To remedy this duplication in effort, the requirement for the project sponsor to submit a project initiation notice should be eliminated.

- Coordination Plan and Schedule. Section 6002 requires the lead agency to establish a "coordination plan" for a project, and provides that the plan "may"

include a schedule. FHWA has effectively required inclusion of a schedule in all coordination plans. While agency coordination clearly is an important aspect of streamlining, the "coordination plans" themselves have become more of a paperwork exercise than an effective tool for improving coordination. In addition, many states have adopted plans and procedures for inter-agency coordination prior to the implementation of SAFETEA-LU. Preparing an additional project-specific coordination plan adds little value, and becomes another paperwork burden, when effective program-wide coordination procedures are already in place. The coordination plan requirement should be amended to allow a State DOT to meet this requirement by adopting program-wide coordination procedures, rather than developing a separate coordination plan each time an EIS is prepared.

- Unnecessary paperwork could also be reduced by allowing the preparation of a single EIS rather than the current process of publishing a DEIS followed by an FEIS prior to issuance of the ROD as described in the response to question one above.

- The use of a "condensed" or "abbreviated" EIS format should be encouraged to reduce the amount of detail necessary in the EIS. In addition, simple and understandable text and graphics should be required both to reduce paperwork and to make the environmental documents more readable and understandable.

Question #5: In Kansas, do all projects go through the Federal process? Do any state or local projects just go through a state process? If so, do you see a time or cost savings when you don't have to go through the Federal process?

5. All major Kansas DOT projects go through the federal process, including the federal environmental review process. Light preservation projects are funded wholly with state dollars and go through a state process, not the federal process. Light preservation projects include: HMA overlays, seals, pavement patching, small culverts replacements and minor bridge repairs. Kansas lets to contract approximately $250 million light preservation projects per year.

   Progressing light preservation projects through the state process rather than the federal process yields time savings. Time savings are primarily related to the state having the ability to quickly assemble bidding packages without FHWA review or additional federal requirements. In addition, if the scope of a light preservation project expands and the project becomes subject to the federal process, time and costs will increase due to FHWA even further expanding the project scope and the time required for FHWA review of the project. In the current market, progressing a project through the state process would not provide construction cost savings as bid prices are generally low.

Question #6: The Federal review process always has to include a no-build option. Do you believe that is necessary? Are there cases where a no-build option is not possible, and therefore this requirement only adds to the time or the cost of a project?

6. The NEPA no-build alternative describes the circumstances under which the project sponsor undertakes no or very little action (continues ongoing maintenance, etc). The no-build alternative establishes an important baseline to compare against the potential impacts of the other build alternatives and evaluates the results of not taking the proposed actions in the build alternatives over a period of time. The no build alternative does not add a great deal of time or cost to the environmental review process.

Michael Replogle response to follow up questions from Subcommittee on Highways & Transit regarding accelerating project delivery

March 30, 2011

Questions from Committee Chair Duncan

1. I realize the guidance from the CEQ on the use of Mitigated Findings of No significant Impact and Categorical Exclusion (CEs) just came out, but do you have some examples of states that have used the Mitigated CEs or Mitigated Programmatic CEs.

RESPONSE:

The best example I can cite is the Oregon Bridge Program, which resulted from a Programmatic Agreement between the Oregon DOT and natural resource agencies. This enabled hundreds of bridge improvements to go forward in an expedited manner, mostly with little environmental review, so long as Oregon DOT honored the terms of the agreement, which ensured mitigation of adverse impacts and impact avoidance techniques as a standard business practice. Many of the sites could include threatened and endangered species and habitat, significant historic and cultural resources, and other resources that could potentially be significantly impacted. As long as it can be demonstrated that significant impacts would be avoided, completing a mitigated CEs, rather than EAs on a significant number of projects will be much more efficient. For a subset of bridge projects under the state's program, extraordinary or unusual impacts could be anticipated. For these, the parties agreed to more rigorous examination of alternatives and mitigation measures through environmental assessments or environmental impact studies. This enabled review resources to be targeted where they would provide the greatest value in addressing uncommon problems and issues, while expediting project delivery. For more information on this program and how it has worked to comply with NEPA requirements using a Programmatic Categorical Exclusion see: http://www.obdp.org/partner/environmental/nepa/.

Using Mitigated CEs or Mitigated Programmatic CEs can results in substantial time and money savings by consolidating and streamlining the processes. Both can also result in better environmental protection because it commits to specific environmental performance, rather than to a design or construction prescription that may or may not achieve the intended environmental protection.

2. Your testimony states that Ohio, North Carolina, and Texas have 17 to 25 Metropolitian Planning Organizations (MPOs). Do you believe having this many MPOs allows for effective regional planning within our states? In SAFETEA-LU, the Governor's discretion to combine MPOs was taken away. Should we evaluate giving the Governor's this flexibility again?

RESPONSE:

The number of MPOs in a state or region is not a barometer of regional planning effectiveness. In some regions, development patterns and geographic and topographic characteristics may call for multiple MPOs to be organized, while in other regions of similar size, settlement patterns and geography may call for fewer MPOs. Effectiveness can be strong or weak in either case. Effectiveness depends upon the MPOs' and other local leaders' commitment to collaboration and early communication, their level of support for regional planning, technical capacity and professional competence of the agency, and the degree to which there is a spirit of cooperation in advancing regional goals together. MPOs were created to represent a specific area and are often best suited to make decisions for the regions they represent.

Coordination between MPOs should be encouraged to promote better regional and overall state planning. Providing a Governor with unilateral authority to consolidate adjacent MPOs may or may not improve the quality of transportation planning in a particular region.

I believe that there are larger problems with our current planning process that plays a larger role in the quality of transportation planning. Today, states and regions develop 20-year long range transportation plans to guide transportation investments and meet future development needs. Point-in-time predictions are made about how and where development will occur. However, the location and type of development change over time due to market demands, while transportation plans typically remain largely unchanged. And the planning process remains focused on large capital investments in infrastructure, paying little attention to the quality of system management and operations, pricing strategies, the impacts of urban design, street design, parking standards, and the like. Thus, the planning process often neglects attending to the most cost-effective strategies that might advance system performance.

Current practice often leads to the selection and construction of costly and ineffective projects that may be rewarding for construction interests, but less beneficial for travelers, shippers, communities, the environment, and long-term economic development. Plans are often not fiscally sound or tied to achievable goals and cost taxpayers dearly. By developing transportation plans with demand predictions that often become outdated, elected officials and the public are constantly forced into a reactive decision-making mode – basing their decisions on information that does not adequately evaluate the benefits and consequences of different policies and investment decisions – instead of proactively moving forward toward a shared regional vision.

Re-empowering governors to consolidate MPOs would not address this more fundamental problem. The Committee should seek to first address the larger problems with the planning process through the upcoming transportation authorization. This could be done by fostering a more performance-oriented transportation planning process; ensuring the planning process considers operational, management, and pricing measures; and tying an increasing share of federal transportation funds to reward regions that

enhance the operational effectiveness of existing transportation systems with performance-focused, cost-effective transport initiatives.

Questions from Ranking Member DeFazio

1. **Mr. Replogle, in her written testimony Secretary Miller suggested that eliminating the Draft-EIS requirement could save significant time. In your written testimony you state that you view this as weakening the protection of NEPA.**
   - ***Do you believe that eliminating the Draft-EIS would undermine the ability of the lead agency to address concern, or – more importantly – for the public and resource agencies to understand the effects of the proposal?***
   - ***Do you believe that the project sponsors could develop a Draft EIS that "answers all of the questions," particularly for more complex or controversial projects?***
   - ***What impact do you think this proposal would have on transparency?***
   - ***Do you have suggestions for how best to condense the NEPA review process?***

RESPONSE:

This is a difficult question to answer in a vacuum. If the question is whether or not the draft environmental impact statement could be eliminated without any additional modifications to the environmental review or planning process and not have a negative impact on transparency and the ability to address comments the answer is no.

The primary purpose of environmental review process is to ensure that the decision-maker has all relevant information before a decision that will impact taxpayers is made on a project. The draft EIS provides the lead agency with the opportunity to gather comments from the public and resource agencies on a proposed course of action. This process is intended to inform the agency's choice of a preferred alternative, and not justify a decision already made.

The information available and provided to the public during the development of a draft EIS evolves over time as additional analysis is completed. While the public engagement process may have changed over time there is still a need for the public and resources agencies to be able to view completed analysis of alternatives to provide meaningful comments to the lead agency.

I am concerned that eliminating the draft EIS without other modifications to the planning process could ultimately slow project completion, not speed it up. As so much research has shown, the earlier a lead agency consults with interested parties— the public or other agencies—the more likely that areas of conflict can be resolved without delaying a

project. The draft EIS offers the public the first formal chance to review project details and provide comment or raise concerns. The final EIS allows the lead agency to respond to public and other agency requests for adjustments to the project. Without the opportunity to provide meaningful timely feedback, there may be a higher likelihood that interested public or interested agencies could and would interrupt a project's progression through lawsuits claiming a lack of appropriate consultation.

It would be quite difficult for a project sponsor to develop a draft EIS that answers all of the questions. People and organizations do not approach problems with the same perspective, point of view or goals. As such I believe it would be a rare instance where a project sponsor would be able to answer all the questions that the public and elected officials may have regarding a project. If this were possible there would not be a need for an environmental review or public participation process as the project sponsors could unilaterally take into account and balance competing points of view. Successfully building large infrastructure projects – like many government actions – requires working with all parties to find common ground and compromise.

The purpose of the two-step EIS process is to identify the alternatives suitable for meeting the purpose and need, assess their respective impacts, and provide local government and public feedback to the proponent and the decision-maker before a commitment is made to a preferred alternative.

In order to condense the NEPA review process lead agencies should bring other agencies and interested public into the planning process well before the EIS is drafted. This would allow areas of concern to be identified and addressed early. It would increase the likelihood that a draft EIS would draw few requests for adjustments, and this lack of requests would, in turn, reduce the time required to prepare the final EIS. In addition as I mentioned in my testimony to the committee more project sponsors should partner with resource agencies to map sensitive areas allowing for the narrowing of potential alternatives up front. This practice has saved times in the states where it has been implemented.

Another option could be to encourage efforts by project sponsors to use the state or metropolitan long-range transportation planning process to contribute towards satisfying NEPA draft EIS requirements. Currently, the NEPA review of major transportation projects occurs only after the projects are adopted as part of the metropolitan or statewide transportation plan. The transportation planning process could be the appropriate time to determine the 'purpose' and 'need', including mode and scale, of potential transportation improvements for a 4-5 year period. In many instances – particularly urban areas – it makes sense to consider a set of network and operational or system management improvements rather than analyzing a single corridor, as travel is rarely isolated to a single corridor. This type of analysis is best suited for the planning process and could allow for pre-approval of a suite of projects. An integrated Tier I NEPA review of multiple projects could be performed concurrently with the update of a state or metropolitan transportation plan, advancing both simultaneously. This might provide for quicker, more efficient, and potentially better consideration of alternatives and

identification of direct, indirect, and cumulative impacts of transportation projects, with a more time and resource effective consolidated process for involvement of the public and resource agencies.

While making these determinations during the planning process holds promise for accelerating project delivery – the transportation planning process must be reformed. I discuss this concept in more detail in my answer to question #3.

2. **You mentioned in your written testimony that some of AASHTO's ideas to expedite transportation project delivery would weaken environmental protection and exacerbate delays.**
   - ***Can you elaborate? Which of AASHTO's proposals merit support?***

RESPONSE:

My testimony at the February 2011 subcommittee hearing concerning AASHTO's proposals for project delivery were based on a review of AASHTO's statements from early 2009, prepared when I was employed at Transportation Director at the Environmental Defense Fund. I do not have access to AASHTO's full set of current proposals in this arena.

But let me address your question in reference to AASHTO's latest public statement about expediting project delivery. AASHTO Executive Director John Horsley spoke at a US DOT public meeting on regulatory review on March 14, 2011 (see: http://www.aashtojournal.org/Pages/031811regs.aspx).

Based on my review of this, I agree with AASHTO that the FHWA Victor Mendez's "Every Day Counts" initiative is worthwhile as it seeks practical ways to reduce project delivery.

I agree with AASHTO that programmatic agreements should be encouraged and become a more widespread practice for transportation projects. In the environmental arena, such agreements are supportable when they improve environmental stewardship by building in mitigation and impact avoidance as a standard business practice, as has been done with the Oregon Bridge Program.

Delegation can help expedite project delivery, but needs to be designed with appropriate safeguards to ensure ongoing compliance with federal laws that protect public health, welfare, and prudent management of public resources.

It would make sense to provide more flexibility for delegation of design exceptions.

It would make sense to allow the use of proprietary methods, materials, and equipment to foster more rapid innovation in transportation project delivery, as AASHTO advocates, but not only to advance safety, but in cases where these might increase cost-effectiveness

or environmental performance related to system development, operations, and maintenance.

Greater flexibility in the bridge program merits consideration, but I would caution that allowing Highway Bridge Program funds to be used for construction of new bridges on new alignments would surely raise more significant environmental issues than reconstruction of existing bridges, and thus may impede rather than contribute to expedited project delivery.

Privatization of rest areas should be encouraged as a way to help states deal with budget shortfalls, as AASHTO suggests.

3. **AASHTO has called for the greater integration of planning documents and products into project level environmental reviews. Your testimony recognizes the merit of better integration of the planning and environmental reviews.**
   - ***Can you elaborate on what you believe is necessary to achieve better integration?***
   - ***Are there impediments to more integration? Are there limitations to integration of planning products into the environmental review process?***
   - ***Do planning documents and products normally have the necessary level of rigor and detail to be utilized in the NEPA process? Are there other limitations to current planning process, and products developed during this process, that could undermine or weaken environmental reviews?***
   - ***What states and/or MPOs are you familiar with that provide early public engagement, including with the environmental community? What have been the benefits of early public engagement to project delivery?***

RESPONSE:

As I mentioned above I believe there is significant potential for the planning process to play a role in determining the 'purpose' and 'need' of a suite of projects. In addition, the concept of studying the purpose and need of a project during the environmental process after a project has been identified during the transportation planning process raises questions about whether or not an unofficial determination of the purpose and need for a project has already been made by the sponsor.

I believe that a reformed planning process could allow for an analysis of regional suites of projects for a 4-5 year period. This up front, pre-approval of the 'purpose' and 'need' of a suite of projects can help accelerate project delivery and narrow the number of alternatives that would need to be considered during the environmental review as the mode and scale of the project could be selected during the planning process.

This would build on the concept of "tiering," which is a staged approach to satisfying NEPA, described in the Council on Environmental Quality's (CEQ's) *Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act* (40 CFR 1500–1508) and in the Federal Highway Administration's (FHWA's) *Environmental Impact and Related Procedures* (23 CFR 771). Tiering addresses broad programs and issues in initial (Tier 1) or systems level analyses, and analyzes site-specific proposals and impacts in subsequent tier studies. The tiered process supports decision-making on issues that are ripe for decision and provides a means to preserve those decisions.

However, the current planning process is not sufficient to allow for this type of accelerated project delivery. In many instances, long-range transportation planning fails to adequately consider alternatives as the planning process revolves around a single assumption regarding the future transportation problems that will exist. Better integration of planning into project level reviews will require that planning consider multiple scenarios for the future and seek public input on a preferred scenario. The current practice of selecting projects based on a single set of demand assumptions – where the businesses and citizens are told by government bureaucrats 'that we need these projects because the model said so' without presenting other options – limits the utility of using programmatic planning products in project review.

To realize this potential, the transportation planning process must be improved. As any successful business owners who create jobs can tell you, success starts with a good plan. Poor planning means wasted money and resources, and lost time and opportunity. Today states and regions are required to develop 20-year plans to help guide transportation investments to meet future development needs. Predictions are made using data from the previous 20-years about how and where development will take place in the future, however, the location and type of development frequently change over time due to market demands. This flaw in the current planning practice can result in bad project choices because the lack of information about available choices.

There are examples of regions that have started to do to the type of planning that could allow for better integration of planning documents into project review. In 2000, the Cumberland Region in Middle Tennessee discovered it had become one of the most congested mid-size regions in the country. Expecting by 2020 a 22% increase in residents and a 33% increase in jobs, the region faced a significant problem – how to continue to grow without having unacceptably longer commutes and increased infrastructure costs.

To meet this challenge and make the best use of infrastructure funds, the Cumberland Region Tomorrow, a private, non-profit, regional organization began working with regional planning organization, private business and citizens to create a strategic plan. As a part of this process four different growth scenarios were analyzed. The – "Base Case", business-as-usual revealed that if policies and investments were not changed, most growth would be low-density development and the region would need an additional $7 billion in transportation improvements. During planning process businesses and residents worked to develop three additional scenarios - each contained potential growth patterns

assuming varying levels of development within and adjacent to existing population centers.

Ultimately, attributes from two of the three additional scenarios were used to develop a preferred scenario with public input and comment. This scenario was able to reduce transportation costs to $3.4 billion and reduce congestion. By comparing four different scenarios, the region was able to provide several options to the communities affected by the plan and show how each would impact taxes, infrastructure investments, congestion and development. This preferred scenario is now helping to guide the region's transportation investments.

This type of planning can help a region identify the purpose and need for a suite of projects for a 4-5 year period as the region has analyzed different investment suites and determined which set of projects for a time period represent the 'preferred network alternative' of projects. By considering these factors up front and selecting the suite of projects that advances regional goals we can find ways to reduce the need for this type of analysis on a project-by-project basis.

Below are some additional examples of early public engagement:

Linking NEPA and Planning: A Case Study in Central Texas
http://pubsindex.trb.org/view.aspx?id=874557

The Capital Area Metropolitan Planning Organization initiated a series of workshops defined as "Linking NEPA and Planning" summit to initiate discussions with Stakeholders and share information on how transportation planning can be integrated with NEPA. The summit began a dialogue with agencies not typically involved in long range planning. CAMPO brought together resource and regulatory agencies, non-traditional stakeholders such as members of the Save Our Springs Alliance, the state department of transportation and others for a meaningful dialogue that resulted in greater understanding among all parties.

The workshops led to a sharing of data that can then be used in developing long-range transportation plans. Overall, the attendees found the summit not only informative and useful but interesting as well. Several relationships were forged and everyone left with a commitment to work together more proactively. The participants were also asked to forward any data and/or maps and long-range or strategic plans to the MPOs for inclusion in their documentation. This information would also serve to focus transportation planning for the future.

CAMPO has revised their long-range plan to include the charge of SAFETEA-LU in linking the planning process with NEPA. By mapping areas of significant concern, planning efforts can attempt to avoid these areas. If this area cannot be avoided a more feasible and effective mitigation strategy can be planned.

INTEGRATING PLANNING AND NEPA: LINKING TRANSPORTATION AND LAND USE PLANNING TO INDIRECT AND CUMULATIVE IMPACTS
http://pubsindex.trb.org/view.aspx?id=777256

North Carolina Department of Transportation (NCDOT) has developed a process to integrate the multi-year Planning process and the data and decisions that are apart of that process with the decision made in the NEPA process. The goal of the process is to identify, through data driven decision-making, long-range transportation solutions that can be evaluated, detailed, and permitted for construction.

In Phase1 the traditional thoroughfare planning process was redesigned to create a state-of-the practice Comprehensive Transportation Plan (CTP) process. The process analyzed environmental impacts associated with potential land use scenarios and/or land use changes associated with potential long-range plan transportation alternatives. The CTP was designed specifically to raise issues earlier in the process that have been persistent "show-stoppers" during NEPA. The CTP provides a solid foundation for establishing integration with NEPA by creating a process that is multi-modal, integrated with land use planning, and is designed to incorporate robust stakeholder involvement and environmental considerations. The explicit consideration natural and cultural resource impacts during long range planning is the primary critical success factor in establishing a link between planning and NEPA.

Phase 2 of the Integration Project is identifying how the new CTP process can be linked to the NEPA process. Through a series of discussions and workshops the department has identified nine potential linkages where work that is done during the CTP process could inform, enhance or serve as the starting point for NEPA. One of these nine linkages is the connection between land use planning done in support of the CTP and the project level indirect and cumulative impact assessment required during NEPA.

They have taken a very comprehensive approach to education. Rather than a single overview presentation the Team has designed a process that includes an overview presentation, but also allows more tailored education appropriate to the individual step in the CTP and land use process. This on-going and targeted education helps to assure that the technical staff and policy makers truly understand how ICI issues are important to developing both land use and transportation plans.

4. **In your written testimony you talked about how FHWA often requires projects to be overbuilt to meet the highest design standards and that involving the public earlier in the process can reduce project delivery time. That sounds a lot like you're proponent of practical design and context sensitive solutions (CSS), a topic on which this subcommittee held a hearing last summer. Do you think Congress could provide incentives to encourage states to use CSS and not overbuild projects? What would those incentives look like?**

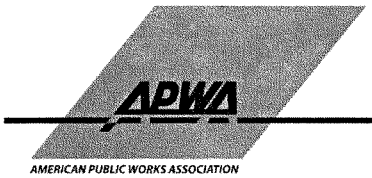
RESPONSE:

This is an important issue that often does not receive adequate attention in discussions on accelerating project delivery. A major cause of project delay today is the lack of funding to advance a project. While there is a need for additional money, as my previous testimony noted, there are times when there are cheaper alternatives that can improve mobility and accessibility for taxpayers that are 'off-limits' because they do not meet the design standards set by the Federal Highway Administration (FHWA). In the example, I gave of the Meadowville Interchange in Chesterfield, Virginia it was not the environmental process that held up this economic development project but FHWA's demands that the project be built to ensure that any driver using the interchange in 20+ years not be subjected to a modest delay.

In this instance it was not the state that needed incentives to move forward with a practical design – rather it was FHWA. The problem lies with the design standards that FHWA has developed for federal-aid projects under the authority in section 109 of title 23 and the corresponding federal regulations (23 CFR 625).

These standards require that projects meet a certain level of performance 20+ years in the future in a manner that does not consider the context of the improvement or the type of travel that will be accommodated by the project. Currently the focus of the standards is on the speed of travel without regard to the typical distance traveled by users of a corridor or other community values. It makes sense in most cases to give strong weight to travel time and speed when designing facilities with a primarily service function of providing long-distance, intercity mobility. But many federal-aid transportation facilities serve a more complex mix of purposes and need to balance multiple objectives. Context-sensitive design enables other attributes to be valued, such as the affect of a facility design on community livability, noise, safety, public health, local access, and environmental justice.

The Committee should instruct FHWA to promote context-sensitive design through more flexible application of design standards and by developing additional measures of performance for projects that serve metropolitan travel, where travel time or other context-sensitive factors, *not* speed, might more appropriately be used to weigh the merits of alternative project designs.



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Accelerating the Project Delivery Process:
Eliminating Bureaucratic Red Tape
And Making Every Dollar Count

Statement of

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For the American Public Works Association

House Committee on Transportation and Infrastructure's
Highways and Transit Subcommittee Hearing

February 15, 2011

Chairman Duncan and members of the Subcommittee, thank you for the opportunity to submit this testimony for the Highways and Transit Subcommittee's hearing on accelerating project delivery.

I am John Davis, Chief Engineer, Jacksonville Transportation Authority, Jacksonville, Florida, and a member of the American Public Works Association's (APWA) Transportation Committee. APWA is an organization dedicated to providing public works infrastructure and services to millions of people in rural and urban communities, both small and large. Working in the public interest, APWA members plan, design, build, operate and maintain our vast transportation network, as well as other key infrastructure assets essential to our nation's economy and way of life. I submit this testimony on behalf of APWA's 29,000 members.

Local governments own approximately 75 percent of the nation's nearly four million mile roadway network and nearly 51 percent of the nation's bridges (nearly 300,000 bridges are under local control) and manage about 90 percent of the transit systems.

RECOMMENDATIONS FOR STREAMLINING AND ACCELERATING THE FEDERAL TRANSPORTATION PROJECT DELIVERY PROCESS

A review by the Federal Highway Administration (FHWA) of "The Administration of Federal-aid Projects by Local Public Agencies" in 2006 indicated that locally administered projects represent approximately 20 percent of the overall annual federal-aid program. Yet, a recent FHWA "Domestic Scan of Noteworthy Practices: Addressing Safety on Locally-Owned and Maintained Roads" revealed that *many local governments avoid federal funding for local projects due either to actual experience with or to perceptions of "federal bureaucratic red-tape" and added costs of federal requirements.*

Those local governments, who access federal funding for local projects, usually do experience increased project implementation schedules and extra costs. With transportation funding becoming more and more limited, it is imperative that aggressive steps be taken in the near-term future to eliminate as much "red tape" and streamline the project delivery process as much as practically possible, while retaining appropriate protection of our citizens and environment, to enable the most efficient use of tax dollars for transportation projects and the earliest delivery of those projects to our citizens for their use and benefit. Streamlining the project delivery process involves not only elimination of non-value added requirements, but also clarity in the requirements which remain.

Expediting project delivery is a top priority for APWA. As managers of infrastructure projects, we understand from experience how the current process unnecessarily delays projects and wastes taxpayer money. Our members know practical approaches and cost-effective solutions that can eliminate the overly burdensome process and get projects moving more quickly to put people to work, strengthen the economy and achieve project benefits in a timely manner.

Through the work of our Transportation Committee, our SAFETEA-LU Reauthorization Task Force, input received from our members and discussions with our partners, APWA has identified several key barriers to accelerated project delivery and solutions that will achieve cost savings results. We identify the following barriers and solutions:

- **Barrier to Accelerated Project Delivery:**
  A project becomes "federalized" when any amount of federal funding is used for the project, regardless of the total amount of federal funding utilized. All federal requirements apply to the "federalized" project, regardless of the size of the project (hundreds of thousands of dollars or hundreds of millions of dollars).

  Recommendation:
  State and local projects which receive or may receive less than $5,000,000 or 25 percent, whichever is greater, of the total project funding from federal sources should be exempt from federal laws and regulations, provided such projects follow all applicable state and local laws and regulations, including laws and regulations applicable to protection of the environment and right-of-way acquisition. Furthermore, state or local projects do not become subject to federal laws and regulations ("federalized") until such time as FHWA or the Federal Transportation Administration (FTA) notifies the affected State Transportation Agency (STA) or governmental agency that the project has been approved to receive federal funding; prior work by the state or local government is to be acceptable to federal agencies, provided the work followed applicable state and local regulations.

  Discussion:
  Reliance on federal laws and regulations, to protect the public on small projects and projects in which federal funds are the minority source, is no longer necessary and is overly burdensome. All states and most local governments have stringent laws and regulations, which protect its communities' environment and its citizens' property rights, as well as other public rights. State and local laws and regulations also guard against improper expenditure of public funds. These state and local laws and regulations serve well to protect the same environmental and citizen rights on projects that federal laws and regulations were enacted to protect.

  If a project contains "one dime" of federal funding, it currently is subject to extensive federal laws and regulations in addition to state and local laws which serve many of the same purposes. There is no distinction in applicability of federal laws and regulations based on size and hence complexity of the project; requirements are the same whether the project is valued at $100,000 or $100,000,000. These requirements add from six months to more than three years to the total duration of a project from the planning stage to completion of construction, thus adding unnecessary delay to the project and delaying beneficial use of the project by citizens. The delay also results in unnecessary cost increases due to cost inflation for rights-of-way acquisition and construction. These requirements also add up to 20 to 40 percent and more in design, rights-of-way acquisition, and construction costs, with no real cost benefit to the "protected" public.

Often, state and local governments must decide if federal funding will exceed the additional costs added by acceptance of the funding. The decision is made even more difficult, since rejection of federal funding can place state and local governments at odds with elected congressional officials. Many local governments currently forego well-intended federal funding opportunities, due to "red-tape", "too many hoops", and "numerous strings attached" to federal funds. Many states spend a great amount of extra effort to segregate federal funds to fewer projects to avoid "federalizing" projects.

Currently, there is no clear identification of when a project becomes "federalized" and subject to federal laws and regulations. Different interpretations by FHWA and STA personnel vary from "when federal funding is planned to be sought" to "when federal funding is accepted." The wide variation in interpretation begs for a clear definition, to provide all involved with clear direction.

Examples:
A Duval County, Florida local bridge replacement project received $500,000 for design and $437,000 for right-of-way acquisition (total of $937,000; 1.2 percent of the total project cost), which required federal requirements be followed on the entire $78.5 million project.

The City of Tampa, Florida accepted federal funding of $1.5 million for a local bridge project, which had progressed through design prior to receipt of federal funding. The City had to re-do the project planning to federal Preliminary Design & Environment (PD&E) Study requirements, adding almost two years to the project schedule along with the resultant added project inflation costs.

The federal environmental permitting process has become duplicative of most state environmental permitting requirements. In Florida, the U.S. Army Corps of Engineers (Corps) does not begin serious review of a wetlands permit application until after receipt of state required permits, and eventually (with no required response time) issues the permit with few, if any, requirements beyond those levied by the state permitting agency.

A Martin County, Florida American Recovery and Reinvestment Act (ARRA) of 2009 turn-lane project cost approximately $70,000 to obtain Florida Department of Transportation (FDOT) approval and $40,000 for Construction Engineering and Inspection services for a total construction project cost of $89,000.

- **Barrier to Accelerated Project Delivery:**
  The environmental review and permitting process is a major contributing factor (perhaps the largest) to delays in transportation project implementation. Current federal and state agency interpretations of the National Environmental Environment Protection Act (NEPA) process are confusing, and NEPA is often applied too stringently by these agencies, resulting in excessive delays with resultant increased costs.

Recommendation:
Without compromising environmental protection or opportunities for public input, simplify the NEPA legislative language and applicable federal regulations to provide clear guidance, make the process outcome-based, provide for a national clearinghouse submittal of NEPA documents, streamline the process, allow greater opportunity for and more definitive guidance on qualifying projects as programmatic Categorical Exclusions, reduce documentation (paperwork) requirements, allow for greater, less burdensome delegation of FHWA's environmental authority to states, and increase authority for states and US DOT to use programmatic approaches for environmental compliance.

Discussion:
The environmental review process is exceptionally complex and has become more stringent and burdensome with time. NEPA requirements are interpreted with a wide degree of variation among and within agencies, often extremely conservatively (far more stringent than intended by congress) due to fear of legal challenge. An FHWA study found the average time to complete an Environmental Impact Statement (EIS) under NEPA for federal projects (between 2006 and 2010) to range from 5.75 to 7 years (and this is only for the first of 4 phases of the projects); some EISs require much longer. The results are lengthy delays, extremely long implementation schedules, numerous documents that are never reviewed in detail by anyone, and increased costs from non-productive environmental evaluations, inflation and loss of benefit to the public; in short, non-value-added, lengthy effort.

Example:
The environmental assessment of a Volusia County, Florida roadway project, which had been completed using local funds, had to be completely re-done, adding 5+ months to the project (a relatively short time extension, due to only one property owner being involved) and an additional $300,000 of costs (30 percent of the federal funding received), due to receiving $1 million of federal funds for the total $11 million project (9.1 percent of federal funding).

The City of Tucson, Arizona was required to conduct an environmental review, which required a year to complete, for a project to mill and resurface existing City streets.

- **Barrier to Accelerated Project Delivery:**
  When federal funds are used on a roadway facility, there is confusion on the limits of the roadway on which federal requirements are applicable and for what length of time the requirements are applicable.

  Recommendation:
  Provide clarity that federal requirements apply only to the project phases (planning, design, right-of-way, and construction) for which federal funds are used, for the identifiable segment length (project limits) of the project and only until completion of the phase receiving federal funds or when the federal and local match funding is expended.

Discussion:
When federal funds are used for construction of a sidewalk or traffic signal improvements along a portion of a local roadway, it is unclear if future locally funded projects along the entire length of the roadway must also follow federal requirements and how many years the federal requirements apply.

- **Barrier to Accelerated Project Delivery:**
  State and local governments are not allowed to utilize existing general engineering consultant contracts (where design and Construction Engineering and Inspection (CEI) consultants have been selected through a Qualification Based Selection (QBS) process, similar to the federal Brooks Act) to provide professional engineering services on federally funded project phases, and are required to conduct a separate and distinct selection process for the specific federally funded project phase. This action generally requires four to six months additional time to engage a consultant.

  Recommendation:
  Allow state and local governments (including Metropolitan Planning Organizations (MPOs)) to utilize general engineering consulting contracts for provision of professional engineering services on federally funded projects, when the consultant selection has been performed in accordance with state law or local ordinance or rule similar to the federal Brooks Act.

- **Barrier to Accelerated Project Delivery:**
  Many local governments are not knowledgeable in applying for federal funding for local projects and implementing federally funded projects.

  Recommendation:
  Require all State Transportation Agencies to have dedicated offices and staff for the sole purposes of preparing guidelines, training, and assisting local governments in applying for federal and state funding and implementing federal and state funded projects.

- **Barrier to Accelerated Project Delivery:**
  Federal permitting agencies do not have a required response time for commenting on permit applications or issuing permits.

  Recommendation:
  Require all federal permitting agencies to identify additional required information, advise that no permit is required, or issue a permit within 60 calendar days of a permit application for transportation projects.

  Discussion:
  State of Florida permitting agencies are required by state statute to identify additional required information, comment on or issue a permit within 30 calendar days of receipt of the application. Federal permitting agencies have no legislated response time requirements.

- **Barrier to Accelerated Project Delivery:**
  Conflicts between federal, state and local Disadvantaged Business Enterprise (DBE) regulations and requirements can create significant obstacles for project execution.

  Recommendation:
  Allow local agencies to comply with their US Department of Transportation (USDOT) agency approved DBE goals in lieu of a STA's DBE program, provided the local agency elects to do so by advising the granting agency of its election in writing.

  Discussion:
  These variants in requirements can complicate an agency's ability to comply. In the case of DBE requirements, this can hinder an agency's ability to accelerate project delivery while attempting to encourage and facilitate opportunities to disadvantaged businesses.

  Example:
  The Jacksonville Transportation Authority (JTA), Jacksonville, Florida, has an FTA approved agency DBE race conscious (required) goal of 12.5 percent, which is used on FTA funded projects. But, when JTA receives federal funding from FHWA through the Florida Department of Transportation (FDOT), it is required to comply with FDOT's DBE race neutral (non-required) goal of 8.18 percent. Needless to say, contractors most often do not propose DBE participation meeting the non-required goal of 8.18 percent.

- **Barrier to Accelerated Project Delivery:**
  Requiring the person in Responsible Charge of a federally funded local project must be an employee of the local agency.

  Recommendation:
  Provide that the person in Responsible Charge of a federally funded local project may be an employee <u>or an agent engaged</u> by the local agency.

  Discussion:
  Many local agencies are so small they do not have the staff to have a person trained to be in Responsible Charge of a federally funded project. However, small communities could engage the services of another local agency or a consultant with trained personnel to assist them with managing the project.

  Examples
  The Nebraska Division, FHWA has mandated that persons in Responsible Charge of federally funded projects must complete four days of training to become qualified. To require a community of 500 to have a trained person in Responsible Charge for one "Safe Routes to School" or similar federal project every ten years, without an alternative of engaging a trained person, is unreasonable.

- **Barrier to Accelerated Project Delivery:**
  Conflicts in federal agency interpretations of federal requirements.

  Recommendation:
  Designate a lead federal agency for all transportation projects, which has the responsibility and authority to interpret and monitor all federal regulations for the specified type of transportation project, e.g., designate FHWA as the lead federal agency to interpret all federal regulations regarding highways and bridges.

  Example:
  The City of Huntsville, Alabama has been stalled on preliminary design of a roadway project to serve traffic entering an Army base since March 2009, due to the U.S. Army contending that preliminary engineering performed during the environmental phase of the project could not include geotechnical exploration, which FHWA has ruled is permissible under preliminary engineering during the environmental phase.

- **Barrier to Accelerated Project Delivery:**
  Small local projects, such as sidewalks, require both state and federal oversight, adding unnecessary time and expense.

  Recommendation:
  Consider a model similar to the US Department of Housing and Urban Development's (HUD) Community Development Block Grant program, where federal funds are granted directly to the local governments. Compliance with federal requirements is necessary and subject to audit, but the local agencies are trusted to carry out the program effectively.

  Incentivize states to propose and implement processes that facilitate expedited project delivery at the local level.

  Discussion:
  There does not appear to be significant value added from the state **and** federal oversight of smaller projects that can be administered at the local level.

  The current process of duplicative oversight, especially on small projects, inhibits creativity, as STAs are typically focused on making doubly sure that federal requirements are met. The STAs are NOT focused on getting these projects constructed. In fact, many of these smaller projects take time and other resources away from the STA, when they should be focused on more complex projects with a higher level of investment.

  Local agencies can be certified to conduct federally funded projects, yet extensive oversight is still required. If local agencies can demonstrate their competence, they should be trusted to administer federally funded projects. These agencies have a vested interest in delivering a quality project efficiently in their communities and are

incentivized to comply with the rules to remain eligible for future funding opportunities.

Examples:
The City of Palm Bay, Florida has a sidewalk and landscaping project along US-1, which includes federal grant funding administered by the state. The City went through an extensive (almost two years) permitting process with the Florida Department of Transportation (FDOT) (as they have jurisdiction on US-1), then City staff resubmitted the same plans to FDOT for review relative to federal requirements. Months have elapsed while the additional review is underway, and the local agency cannot bid the project until they have received state and federal authorization to release the federal funding. These plans are signed and sealed by a licensed engineer and have been permitted by FDOT. Additional oversight will not likely add any value to the project, only additional time and cost.

- **Barrier to Accelerated Project Delivery:**
  State and local governments are not allowed to use state or local funded work efforts, performed prior to award of federal funding, as a match for federal funding.

Recommendation:
Allow state and local government funded work efforts for project planning, environmental review, design and right-of-way, performed prior to award of federal funding, to be used as match for federal funding on the project.

Discussion:
Many small local governments do not have the financial capability to fund project development to adequate detail to apply for federal funding and also fund the required local match for federal funding. Therefore, they are precluded from the opportunity of applying for and receiving federal funding for transportation projects. Additionally, it is only fair that any state or local funding expended on required project activities, prior to award of federal funding, be eligible as local match for that project.

Chairman Duncan and members of the Subcommittee, thank you for holding this hearing and taking our testimony. We look forward to working with you as you complete work on a multi-year surface transportation authorization that reforms the project delivery process to save money and accelerate the delivery of transportation projects. We are ready to offer our assistance, experience and expertise.

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Statement of

The American Society of Civil Engineers

"Accelerating the Project Delivery Process"

United States House of Representatives

Transportation and Infrastructure Subcommittee on Highways and Transit

February 15, 2011

February 15, 2011

The American Society of Civil Engineers (ASCE)[1] would like to commend the Transportation and Infrastructure Subcommittee on Highways and Transit for holding a hearing today on how infrastructure investment can be expedited through reforming the project planning and delivery processes. The Society is pleased to present to the Committee our views on how these processes can best be reformed.

ASCE is concerned with the increasing deterioration of America's infrastructure, reduced investment for the preservation and enhancement of our quality of life, and with the threatened decline of U.S. competitiveness in the global marketplace. In response, ASCE has not only issued multiple *Report Cards* on the condition of infrastructure, but has sought to advance solutions that provide for a clean and safe quality of life, as well as fuel economic growth.

ASCE's *2009 Report Card for America's Infrastructure* graded the nation's infrastructure a "D" based on 15 categories (the same overall grade as ASCE's 2005 Report Card), and stated that the nation needs to invest approximately $2.2 trillion from 2009 – 2014 to maintain the national infrastructure in a state of good repair. In the *Report Card,* the nation's surface transportation system included roads receiving a grade of "D-", bridges receiving a grade of "C", and transit receiving a grade of "D". With nearly one-third of roads in poor or mediocre condition, a quarter of the nation's bridges either structurally deficient or functionally obsolete, and transit use increasing to its highest levels in 50 years, it is not hard to see why the nation's surface transportation system is in a state of critical decline. Additionally, to bring just these three surface transportation categories up to an acceptable condition would require a five year investment of $1.2 trillion, according to ASCE estimates. If the nation continues to under invest in infrastructure and ignores this backlog until systems fail, we will incur even greater costs.

As Congress begins the process of developing a comprehensive multi-year surface transportation authorization bill, and as President Obama discusses the administration's hope to invest billions on the nation's infrastructure, our roads, bridges, and transit systems continue on in a state of decline. In order to rectify the current infrastructure crisis ASCE urges increased federal leadership in infrastructure investment and urges the creation of strategies to expedite the regulatory process for infrastructure projects at the federal, state and local levels. The goal must be to allow critical infrastructure projects to proceed in a timely manner in order to achieve their intended outcomes, so the nation's long-term economic vitality and quality of life will not be maintained.

ASCE supports a review of existing surface transportation programs to determine how reforms could be implemented to create a smaller, more efficient number of programs to expedite project decision making and delivery. Inefficient regulatory approval processes delay implementation of needed infrastructure improvements. Delays and changes in project scopes increase costs and adversely affects the safety and economic benefits of a project. Federal, state and local regulations that are intended to achieve beneficial individual goals may, significantly delay

[1] ASCE was founded in 1852 and is the country's oldest national civil engineering organization. It represents more than 140,000 civil engineers individually in private practice, government, industry, and academia who are dedicated to the advancement of the science and profession of civil engineering. ASCE is a non-profit educational and professional society organized under Part 1.501(c) (3) of the Internal Revenue Code.

approval due to conflicting stakeholder objectives and have a negative impact on the development and renewal of the nation's infrastructure. Stakeholder expectations and acceptable outcomes need to be identified early in the regulatory process and integrated into the project effectively.

To accelerate the process through which surface transportation projects are examined for their viability and appropriateness, several issues could be addressed through legislation. ASCE recommends the following strategies to streamline the regulatory process for infrastructure development:

- Revamp and simplify the regulatory regime affecting infrastructure funding, planning and implementation to eliminate modal "silos," to be less prescriptive and confining and to be more performance-based and flexible.
- Reform the rules to be more concise, outcome oriented, plainly written, common sense oriented, and supplemented by best practice models that encourage continuous improvement.
- Require only the application of relevant Federal guidelines to specific projects. Though other Federal guidelines may exist, if they are extraneous and would only slow the project decision making process, they should not be utilized.

Additionally, ASCE supports mandating concurrent reviews and the designation of a single administrative processing/permitting agency to shorten and improve the approval process.

Furthermore, State and Metropolitan Planning Organization (MPO) transportation planning requirements need to be reconciled with the National Environmental Policy Act (NEPA) process to eliminate redundancy and streamline the decision making process. This should be combined with better coordination of federal agencies in the NEPA process. While, NEPA seeks to improve environmental outcomes by enforcing comprehensive disclosure or expected consequences of infrastructure projects, transportation projects often run into problems during the process, creating delays along the way.

While the development and implementation of transportation infrastructure projects in an efficient and environmentally sound manner is crucial to the nation, expedited environmental reviews of high-priority projects must be considered on a more frequent basis. The Environmental Stewardship and Transportation Infrastructure Project Reviews executive order, put in place in September 2002, has proven itself to be an effective program in expediting projects, while taking the proper environmental factors into account.

The executive order requires the Secretary of Transportation to designate high-priority transportation infrastructure projects to undergo expedited environmental review in order to accelerate their reviews for permits and other approvals. Since the inception of the program the Secretary has selected 19 projects to undergo expedited environmental reviews. These priority projects consist of 15 highway or bridge projects, 3 airport projects, and 1 transit project.

Finally, in order to expedite project delivery of surface transportation projects, once the decision making process is through, ASCE is in support of the following recommendations put forward by the *National Surface Transportation Policy Revenue Study Commission*:

- Revise Council of Environmental Quality regulations to allow additional factors to narrow the number of alternatives considered as "reasonable alternatives", such as alternatives that reflect funding realities and community values.
- Handle impact identification and mitigation issues early by considering them in an integrated fashion, looking at overall resources rather than in a sequential, project-by-project basis. This might involve addressing issues at the programmatic level earlier in the planning process.
- Standardize the "risk design" approach under federal regulations so that project sponsors can proceed with design activities for any project during the environmental impact statement (EIS) process.
- Require greater coordination among Federal agencies reviewing transportation project permits, including setting time limits for review and using federal transportation funds to pay for regulatory staff to speed reviews.

While streamlining provisions under SAFETEA-LU have begun to expedite project decision making and delivery, the next surface transportation authorization can reinvent the processes in a way that retains and builds upon vitally important and successful principles and practices. ASCE looks forward to working with the Congress as it develops surface transportation authorization legislation.

TESTIMONY OF

THE HONORABLE GARY RIDLEY

SECRETARY OF TRANSPORTATION
STATE OF OKLAHOMA

REGARDING

"ACCELERATING THE PROJECT DELIVERY PROCESS: ELIMINATING BUREAUCRATIC RED TAPE AND MAKING EVERY DOLLAR COUNT"

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 15, 2011

Mr. Chairman and Members of the Committee, my name is Gary Ridley. I am Secretary of Transportation in Oklahoma. I am here today to testify on behalf of the Oklahoma Department of Transportation.

First, we want to thank you, Mr. Chairman, for your leadership and your interest in identifying ways to increase the efficiency of investing transportation funding and to accelerate project and program delivery. We appreciate that you and the Members of your Committee recognize the important contribution of the transportation system in improving the Nation's economic viability and sustaining our quality of life.

Today, I want to emphasize three points –

- The backlog of transportation infrastructure needs in Oklahoma is substantial and requires a continuing, consistent, long-term federal transportation investment strategy.

The conditional deficiencies of a long underfunded national transportation system cannot be resolved by the States alone.

- With consistent and flexible federal funding, State departments of transportation can operate more efficiently thereby ensuring that more transportation dollars support our core infrastructures as intended.

Unfunded federal mandates, federal regulation and federal bureaucracy stifles efficiencies, redirects transportation dollars to other fringe or completely unrelated initiatives and unnecessarily delays critically needed transportation improvements.

- The streamlined delivery of transportation improvements can result in immediate cost savings and a significant, long term reduction in the cost of travel and commerce.

The costs of implementing transportation system improvements can be significantly reduced through the thoughtful consideration of these measures, thereby allowing for more transportation generated dollars to find their way to the Nation's core infrastructures.

TESTIMONY

The conditional deficiencies of a long underfunded national transportation system cannot be resolved by the States alone.

The Oklahoma Perspective

Governor Mary Fallin along with our Legislature and the general public are working hand in hand to make the improvement of the transportation system a priority of the state. However, much work remains to be done to a state and national system in disrepair.

For example, we must sustain a bridge replacement / rehabilitation rate of more than eighty bridges a year far into the future to keep pace with the aging and deterioration of the state's existing bridges. Even now with 650 bridge replacements or major rehabilitations encompassed by our

eight-year Construction Work Plan, the Department recognizes 345 narrow or deficient bridges that are currently unfunded. Also, Oklahoma has many large bridge structures on the National Highway System that are at or nearing the end of their life cycle that represent extremely expensive improvements with no current solution.

The recognized work needed on Oklahoma's highway pavements is no exception. More than 2,500 miles of our 12,268 mile long system are in need of immediate attention and have no planned or viable options due to financial limitations. In addition, hundreds of millions of dollars of needed improvements are now past due on Oklahoma's high volume arterial interstates and freeways in order to keep local, state and national traffic flowing freely.

Long term, consistent funding is critically important to the development and delivery of transportation improvement projects. States must understand and be able to project the availability of resources in order to properly plan, design and construct projects. We constantly inspect our facilities and collect and analyze a wide variety of data in order to assess the operational and conditional status of our highways. Decisions related to the care, preventative maintenance, reconstruction and expansion of the transportation system are predicated on the critical needs of the system and our understanding of the long term resource availability.

When considering the currently projected state and federal resource availability, the recognized needs of Oklahoma's transportation system are significant. As such, we can easily plan our preventative maintenance activities over the coming four years and our major construction activities over an eight year time period. We have found that when our data driven investment priorities are coupled with sound engineering judgment, we do not experience significant changes during these windows of time. If determined necessary, any adjustments to projects can be readily managed through our annual Asset Preservation Plan and Construction Work Plan review and balancing process. This strategy affords us with an encompassing transportation improvement program that is fiscally constrained, tangible, explainable and extremely easy to discuss with transportation professionals, elected officials and the public.

The Federal Perspective

It is important to note that the Highway Trust Fund has been on the verge of insolvency several times in recent history. It can be reasonably anticipated that the current gas and diesel tax deposits to the fund will once again be outstripped by expenditures in the near future. Congress must be prepared to address these deficiencies and identify new, non-traditional transportation revenue streams that can provide consistent and increasing funding levels for transportation infrastructure. In addition, we must eliminate unnecessary federal mandates and untimely regulatory actions that redirect transportation dollars and strangle the efficient investment in the core transportation infrastructure that keeps this Nation on the move.

It is imperative that states be afforded the opportunity to quickly implement improvements and direct federal funding in a manner that is consistent with a national transportation strategy and that is supported by our resident stakeholders in state policy and law. The new national transportation strategy and associated federal policy should provide a framework that empowers states to direct federal transportation funding to the interstate and national highway system as required to address their unique needs.

A bold, new vision will be necessary to meet the increasing transportation challenges ahead and states should not be left to bear the financial burden of a national transportation system in decline alone. The resolution of our national transportation funding crisis and the crafting of new, more effective project and program delivery protocols must be jointly developed in a renewed State and Federal partnership.

Unfunded federal mandates, federal regulation and federal bureaucracy stifles efficiencies, redirects transportation dollars to other fringe or completely unrelated initiatives and unnecessarily delays critically needed transportation improvements.

For practical purposes, there are only two external influences that have significantly impacted the delivery of the improvements included in these plans in recent history. One is the consistency and availability of federal funding and the other influencing factor can be attributed to federal regulatory actions. Optimistically we will assume that the Congress will make every effort to at least fund transportation at the historic levels. Therefore, if we are to realize any transportation investment increases in the near term, we must do so by reducing or eliminating transportation funding diversions and increasing the efficiency of project delivery.

Federal Transportation Funding Reallocations

The Oklahoma Department of Transportation does not discount the importance of the programs that are discussed in this section of our testimony. However, when the core transportation infrastructure of this Nation has an enormous backlog of unaddressed deficiencies, we simply question the merit of mandating transportation funding for peripheral projects and programs.

Programs that mandate the commitment of dedicated transportation funding to recreational and fringe activities such as bicycle and pedestrian trails, landscaping and historic preservation should be vigorously reviewed. Much of the popularity of such programs can be attributed to the recreational or cultural nature of the facilities and the fact that little or no other significant funding sources exist for such activities. If the Congress believes that community livability projects and other similar programs are important, other funding mechanisms should be identified and the programs should be funded separately from core transportation infrastructure.

For example, each year the mandated transportation enhancement set aside under the current law diverts an estimated $12 million of Oklahoma gasoline and diesel tax dollars to such projects. This diversion may seem insignificant in the context of a $40 billion federal transportation program, but when every deficient bridge replacement and the repair of every mile of inadequate pavement is critical, $12 million can be a difference maker. Each state should have the latitude to decide if the eligible activities warrant the commitment of scarce resources above all other transportation needs. The future funding of this program should be left to the discretion of the states alone and the currently mandated set aside should be eliminated.

Much the same as the Enhancement Program, the Safe Routes to Schools program seeks to encourage bicycling and walking as alternate transportation modes for students to get to school. The concept is admirable at face value, but can be somewhat disheartening if you consider that fully loaded school buses are traveling over structurally deficient bridges and are being damaged

by poor pavement surfaces. Again, if this program is determined to be important at the national level, the decision to implement it should then be left to the full discretion of the states.

Unfunded Mandates

The Americans with Disabilities Act represents a significant unfunded mandate for states and local governments. Everyone should recognize that we must do more to accommodate individuals that are physically challenged. However, when considering accessibility in public rights of way, it is difficult to accept that the Act was intended to be so broadly interpreted as to prohibit the surface maintenance of highways and streets unless the adjacent pedestrian facilities are brought into ADA compliance.

Rarely do small or even medium sized communities possess the resources to bring their community sidewalks into ADA compliance. The unintended consequence is often marked by a noticeable reduction in the local highway pavement surface quality beginning at the corporate city limits. Like the communities, the Department does not possess the resources to bring all of the local sidewalks adjacent to the highway into compliance. Often the costs of the mandated sidewalk improvements can be many times the cost of the badly needed simple asphalt overlay and may also require the complete reconstruction of the highway. Therefore, in most cases we are effectively prohibited from performing routine pavement maintenance activities inside the city limits. However, if the highway is in need of complete reconstruction, ADA compliant adjacent sidewalks are incorporated into the reconstruction project.

In addition, the Act represents another opportunity for other erroneous interpretations. Often, a federal interpretation to construct accessible curb ramps at intersections and other locations is invoked in the name of ADA where no connecting sidewalk exists. Such a wholesale directive can result in curb ramps that terminate in an adjacent vacant lot or worse yet, a ditch bottom, embankment or signal or light pole base. The serious nature of the ADA and everyone's desire to do the right thing and make sure we are in compliance sometimes leaves no room for exercising common sense.

ADA compliance within the public rights of way is important. However, the Act should not force a state department of transportation to assume an enforcement role on behalf of the Federal Highway Administration or the Department of Justice. Nor should it dictate a state's ability to maintain the highway system within a community or delegate all related decision making authority to a particular federal agency. Again, a dedicated, non-transportation related funding source should be identified for community based ADA compliance efforts and initiatives and highway system compliance activities should be limited to projects that clearly constitute reconstruction.

The Environment and System Users

The Nation has made great strides in the last 20 years in improving air and water quality as well as preserving resources. In the case of environmental regulatory issues, we certainly recognize the need to exercise care in protecting the environment. However, we must consider the need to deliver transportation improvements in a manner that enhances the function of the system and the safety of the traveling public as quickly and cost effectively as possible. Regulatory restrictions, bureaucratic actions and mandates that drive up costs, increase delivery times and divert

transportation system dedicated resources should be carefully scrutinized and limited or eliminated. In addition, regulatory policy that invokes other unrelated regulatory policies and introduces bureaucratic redundancies should also be minimized to the extent possible.

National Environmental Policy Act (NEPA)

The Federal Highway Administration's policies for implementing the National Environmental Policy Act are important as related to the major transportation improvement projects. NEPA was adopted in 1969 primarily as a result of the construction of the thousands of miles of interstate highway system on virgin alignments. With the focus on state of good repair improvements, a majority of transportation improvements occur within existing transportation rights of way.

When such projects encompass or require the acquisition of new right of way to support the implementation of the proposed improvements, a reasonable consideration of potential social, environmental and cultural impacts is warranted. Therefore, if it is determined that private property is to be acquired for a permanent, public transportation use, it is always prudent to fully vet and carefully document the investigation, analysis and decision making process.

However, if a transportation improvement project is being developed entirely within an existing or previously reserved transportation corridor, it should be reasonable to expect that the improvements will be of a nature that does not require federal regulation or oversight. Any responsibly executed activity required to construct, reconstruct or maintain that facility as determined necessary by the state Department of Transportation should not be subject to the added expense, delay and potential double jeopardy of further federal oversight, review or regulation. Such state of good repair and operational improvement projects should be allowed to progress from conception to construction unimpeded in order to effect the necessary improvements to the facility. When transportation improvements require additional right of way, all existing federal regulations would apply to the new property proposed to be acquired.

Therefore, legislative provisions should be crafted that provide a full NEPA exemption and minimize or eliminate the impact of other non-transportation related federal regulations when transportation improvements are being implemented within existing transportation rights of way. A few examples of such cross cutting federal mandates include the Clean Water Act, the National Historic Preservation Act, the Endangered Species Act, the Migratory Bird Treaty Act, and so forth.

The benefits of such action are broad and far reaching. First, departments of transportation will be inherently encouraged to work within existing transportation facility footprints which will minimize additional impacts to private property or the environment. Second, the preparation efforts and time saved to deliver projects that meet defined criteria will translate as a cost savings to the agency and a direct "user benefit" to commerce and the traveling public through an expedited improvement delivery. Also, the state and federal regulatory, resource and lead agencies will have the opportunity to focus more of their internal resources on progressing other larger scale proposed transportation improvements in a more timely and effective manner.

Section 4(f)

The Department of Transportation Act (DOT Act) of 1966 introduced Section 4(f), which stipulated that the Federal Highway Administration (FHWA) and other DOT agencies cannot approve the use of land from publicly owned parks, recreational areas, wildlife and waterfowl refuges, or public and private historical sites unless there is no feasible and prudent alternative to the use of land and the action includes all possible planning to minimize harm to the property resulting from use.

Section 4(f) is a redundant, duplicative and time consuming regulation in the broad context of the preparation of environmental documents under NEPA. The issues related to public lands and historical sites referenced in 4(f) are consistently addressed under NEPA as applicable to federal-aid transportation improvement projects. As such, in August 2005, Section 6009(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) made the first substantive and positive revision that simplified the process and approval of projects that have only de minimis impacts on lands impacted by Section 4(f).

The need and applicability of Section 4(f) should again be carefully scrutinized and evaluated in order to further understand the effectiveness of the regulation. If it can reasonably be determined that the regulation adds no value other than the reinforcement of redundancies already commonly addressed under NEPA, it should be eliminated.

Air Quality

Undoubtedly, the Environmental Protection Agency (EPA) has been a force in improving air quality in the United States under the Clean Air Act. Air quality has progressively improved to the point that the attainment of former air quality targets that once seemed unachievable are now common place. As such, the EPA has continually ratcheted down air quality targets and associated measuring requirements to the point that today a common dust storm at an inopportune time can result in non-attainment.

Currently Oklahoma has no areas that are classified as non-attainment. Oklahoma has spent significant Congestion, Mitigation and Air Quality (CMAQ) funds in proactive program development to stay in attainment and protect the health of our citizens. However, several areas of the state including both the Tulsa and Oklahoma City metropolitan areas teeter on the verge of non-attainment under the lower targets and more restrictive interpretations and measuring requirements. The impacts and costs of non-attainment are significant to both private industry and the transportation system. Non-attainment seriously restricts a state's ability to manage transportation improvements within the designated areas, requires a substantial investment in planning studies and analysis before implementing most transportation system improvements or capacity expansions and embattles the private sector against the government.

Air quality targets and guidelines must be established that are determined to be reasonable by state governments and by the private sector and that do not restrict the economic growth, competitiveness and development of our Nation. Oklahoma companies are developing clean energy sources to include wind turbines, biodiesel fuels and compressed natural gas to assist with

air quality improvements. Air quality targets should also fully anticipate the future improvements that will be realized through the greatly expanding utilization of clean energy sources and the stewardship being exercised by both the government and the private sectors.

Clean Water Act - Proposed Effluent Limitations Guidelines (ELG) and New Source Performance Standards to Control the Discharge of Pollutants from Construction Sites

The Department acknowledges that the EPA desires to reduce the impact of construction activities on the nation's receiving waters and do not disagree with the concept in principle. However, we have substantial concerns with the general approach taken by EPA, and in particular, its potential far reaching impact on linear transportation improvement projects.

The rule itself is ill-conceived when considering linear transportation system improvement and utility construction sites in the subcategory of Heavy Construction. The Proposed ELG includes many provisions that are technologically and/or economically unachievable. It will not be possible to meet the suggested water quality numeric limits in some cases because it is not always feasible to capture, detain and treat all runoff from all transportation improvement projects.

We anticipate that the conventional passive sediment and erosion controls commonly used today will not achieve the turbidity levels mandated in the proposed rule and more intensive, invasive and extremely expensive measures will surely be necessary. Some projects would likely require the Department to acquire additional right of way and displace residences and businesses in the attempt control runoff and comply with the proposed ELG. Many required provisions are likely to increase ground disturbances and construction impacts in the vicinity of discharge points (e.g. water bodies), which would invariably increase impacts to environmental resources that are associated with water bodies.

Much the same as air quality, we should recognize that by federal law, the EPA is obligated to establish effluent limitation guidelines. Nevertheless, it appears that the EPA has drastically underestimated the number of transportation projects that would be subject to the proposed ELG. Also, the ELG fails to recognize the complexity of the treatment systems that would be required on linear transportation projects that often span many miles, the implementation costs to state departments of transportation, and the impact the actions will have on the nation's ability to maintain its infrastructure.

The costs of implementing transportation system improvements can be significantly reduced through the thoughtful consideration of these measures, thereby allowing for more transportation generated dollars to find their way to the Nation's core infrastructures.

As we consider the full magnitude of the current inadequacies of our national transportation system, we must recognize that it will be extremely difficult for the Congress to increase transportation funding and quite challenging to even sustain the current SAFETEA-LU federal transportation funding levels. Therefore, more of the available resources must be directed to our core infrastructures without set asides or diversions. In addition, we must work together to style the project delivery process to be more efficient and free from unnecessary bureaucracy, laws, rules, directives or redundant regulations.

We know efficiencies can be realized because the Federal government and DOTs have a long and storied success working together to quickly deliver complex and extensive transportation projects during emergency conditions. Just a few more recent examples include the work done on the I-35 Bridge over the Mississippi River in Minnesota, I-10 in Louisiana and Mississippi, the MacArthur Maze tanker truck fire in California, the I-40 Bridge over the Arkansas River in Oklahoma and the Port Isabella Bridge in Texas. We have often discussed the benefits of mainstreaming the lessons learned to establish such practices as the rule rather than the exception.

Time is money when you are addressing a less than adequate transportation system. The impact of diverted transportation funding and the cost of regulatory compliance are significant and can be quantified in dollars to some extent. The costs of layered federal bureaucracy and delays in transportation improvement project delivery are less tangible but have a far greater impact on the economy, commerce and the safety of the traveling public.

DRAFT

TESTIMONY

"Accelerating the Project Delivery Process: Eliminating Bureaucratic Red Tape and Making Every Dollar Count"

Testimony before the
House Transportation and Infrastructure Committee
Subcommittee on Highways and Transit

February 15, 10 a.m.
2167 Rayburn House Office Building

House Transportation and Infrastructure Committee
Subcommittee on Highways and Transit

I. Introduction

The environmental review process for transportation projects is complex and each project must go through a very detailed, time consuming process. Often times, this process involves a large amount of duplicity and inefficient systems. This testimony will provide: an overview of the environmental process, existing and ongoing initiatives, and recommendations.

II. Overview of Environmental Process

Beginning in the mid-1960s, a number of federal and state environmental laws were created. One of these laws, The National Environmental Policy Act, commonly called "NEPA", requires federal agencies to conduct an environmental review prior to taking a "major federal action" (such as approving use of federal funds for constructing a highway). The rules of the federal Council on Environmental Quality, and of the Federal Highway Administration (FHWA), require that a written report be produced describing, for example, the analysis of project alternatives, and direct and indirect effects of the project. An opportunity for public participation is required, as is coordination with federal, state, and local governmental entities that have jurisdiction or subject matter expertise related to the project. The environmental review, public involvement and coordination must be completed before the project can be approved.

A project's design and location is affected by the environmental review and public involvement processes. Environmental review includes distinct tasks such as scoping, field work, technical analysis and report development, compiling documentation, developing plans for mitigating impacts, agency coordination, public involvement, obtaining permits, and final approval of the environmental document. The studies that are part of the environmental document may investigate impacts to wetlands, water quality, trees, plants, animals, flood plains, air quality, farmlands, parks, open spaces, endangered species, hazardous materials, cultural resources, historical properties, community issues, environmental justice communities, habitat, storm water pollution, and traffic noise.

The environmental documents will show how the project complies with numerous laws, rules, regulations and agreements, and how it does or will comply with specific permitting requirements. TxDOT must satisfy the requirements of, and coordinate with, a number of state and federal agencies, including those listed below. The coordination with each agency has a separate timeline to follow.

Federal Agencies

- U.S. Army Corps of Engineers
- U.S. Fish and Wildlife Services
- U.S. Coast Guard
- U.S. Environmental Protection Agency
- National Marine Fisheries Service
- Federal Highway Administration

State Agencies

- Texas Commission on Environmental Quality
- Texas Parks and Wildlife Department
- Texas Historical Commission and State Historical Preservation Officer
- Texas General Land Office
- Coastal Coordination Council

Types of Environmental Documents

Early investigations and related technical reports relative to the associated natural and human environment in the project area are used to prepare the environmental document for a project and to determine the level of environmental assessment required for the project according to the significance of the anticipated impacts. Routine projects that are not anticipated to have significant impacts are assessed as a "categorical exclusion." If the significance of the impacts is unknown, TxDOT will prepare a more detailed "environmental assessment." If it is anticipated the project will have significant impacts, TxDOT will prepare an "environmental impact statement."

The least complex project type is a Programmatic Categorical Exclusion (PCE). This project type only applies to projects requiring FHWA approval. However, FHWA entered into an agreement with TxDOT that allows TxDOT to certify projects that meet the criteria outlined in this agreement. TxDOT's Regional Environmental Coordinators are responsible for certification of PCEs, the most numerous and least complex of environmental documents.

The second least complex project type is a Categorical Exclusion (CE). Depending on whether the project has federal aspects, these projects are approved by either FHWA or TxDOT. Between 2005 and 2009 the average time to process CE documents after their initial submittal was 14 months.

The second most complex project type is an Environmental Assessment (EA). Depending on whether the project has federal aspects, these projects are approved by either FHWA or TxDOT. Between 2005 and 2009 the average time to process EA documents after their initial submittal was 30 months.

The most complex project type is an Environmental Impact Statement (EIS). Depending on whether the project has federal aspects, these projects are approved by either FHWA or TxDOT. Between 2005 and 2009 the average time to process EIS documents after their initial submittal was 39months. Changes to the proposed project or new issues that arise related to the project may require a supplemental EIS. The time required is dependent on the scope, intensity and context of any impacts. An average minimum amount of time to complete a supplemental EIS is 12 months after submission, plus any additional time required to complete the assessment of specific applicable variables.

TxDOT may be required to prepare a re-evaluation of the environmental document for any type of review. A re-evaluation addresses new requirements, design changes or changes in the project area and can occur prior to construction or during construction. The time required is dependent on the scope, intensity and context of any impacts. An average minimum amount of time to complete a re-evaluation is 60 days for the most simple of changes to 180 days for complex changes, plus additional time required to complete the assessment of specific applicable variables.

Timeline for processing an Environmental Document

To provide an idea of the variables referenced above for processing an environmental document, provided below is a list of the possible specific tasks (and time requirements):

- Scoping: 9 months
- Public Meeting(s): 41 days for each
- Meeting with Affected Property Owners: 20 Days
- Section 4(f) Evaluation (De Minimis) (applies to publicly owned parks and recreational areas, wildlife and waterfowl refuges, public and private historic sites): 30 Days
- Section 4(f) Evaluation (Non-De Minimis) (applies to publicly owned parks and recreational areas, wildlife and waterfowl refuges, public and private historic sites): 18 months including Chapter 26 public hearing
- Individual Section 404 Permit (jurisdictional waters of the US): 24 months
- 404 Nationwide Permit Preconstruction Notice (jurisdictional waters of the US): 45 days – 6 months
- Jurisdictional determination for isolated wetlands: approx 120 days
- Consultation USFWS (Austin Field Office): Informal Consultation 123 days -9 months; Formal Consultation, 207-319 weeks (Legal review period is 135 days for Formal Consultation, but clock does not start until USFWS determines they have sufficient documentation)
- Consultation USFWS (Non-Austin Field Office): Informal, 90-135 days; Formal Consultation 175-220 weeks (Legal review period is 135 days for Formal Consultation, but clock does not start until USFWS determines they have sufficient documentation)

- Section 106 Coordination (Archeology): approx 6 months (increase to 1 year if data recovery is necessary)
- Section 106 Coordination (Historic Structures): approx 6 months
- Section 106 Public Involvement: 60 days
- Historic Cemeteries: approx 6 months (increase to 1 year if relocations necessary)
- TCEQ consultation: 30 days
- TPWD consultation: 45 days
- Notice of an opportunity for a hearing: 31 days
- Public hearing: 60 days
- FHWA review: 30 days for each
- FHWA legal sufficiency review: 2 months for each
- Publish Section 139(1) notice under the Safe, Accountable, Flexible, Efficient, Transportation Act (SAFETEA-LU), and end of period to file suit concerning the project: 180 days

III. Existing and Ongoing Initiatives

TxDOT faces many challenges in ensuring that we are complying with federal and state law, such as:

- Many different project types, ranging in scope from small to very large;
- Many different environmental settings crossed by these projects with distinctive issues to be addressed;
- Varied public support or opposition to projects;
- Project scope changes;
- Design changes;
- Changing priorities;
- Changing requirements;
- Limited resources (staff and funding);
- Competing priorities; and
- Coordination with other agencies involved in the review of projects.

TxDOT has implemented, and continues to implement several initiatives targeted at making the environmental process more efficient. The Primavera 6 scheduling tool recently adopted by TxDOT to capture all tasks required to complete the design and environmental process is one such initiative. This will enable us to more efficiently assign all field work for data gathering and analysis in technical reports to specific individuals with fixed times and durations for completing these tasks. The tool is also flexible and can be modified as needed to capture any changes in project scope, design or environmental requirements.

Some of the initiatives specific to the environmental process are described below.

Standards of Uniformity (SOU)

Standards of Uniformity (SOU) establish uniform standards for deliverables associated with our environmental documents. TxDOT staff developed SOUs for all of the activities associated with our PCE projects, and are working to develop SOUs for the activities associated with the more complex CE, EA and EIS projects. These SOUs are being developed in partnership with TxDOT's staff, contractors, and state and federal resource agency partners. The goal is to eliminate or minimize the number of revisions required during the review process, and as a result reduce the time required for environmental clearance.

Project development Compliance Action Plan (CAP)

The environmental Compliance Action Plan (CAP) is a plan to resolve identified and unidentified Environmental Permits, Issues, and Commitments (EPICs). EPICs are the permits and other commitments identified in an environmental document that must be completed as part of the project. The CAP includes the assignment of persons, resources, and schedules to resolve environmental compliance tasks in regards to identified and unidentified EPICs. Currently, TxDOT is formalizing the utilization of a CAP as a planning tool to ensure our project schedules are accurate and transparent. A project development CAP will identify and manage environmental risk to help: eliminate over-programming of resources at the District and Division level, eliminate unnecessary environmental studies, eliminate the need to re-do environmental studies, significantly reduce the number of revisions to NEPA documents, significantly improve environmental compliance performance, significantly improve the timely resolution of environmental clearances, and significantly improve the timely obtaining of required permits.

USFWS agreement initiative

On April 30, 2010, TxDOT submitted a draft programmatic agreement to FHWA and the United States Fish and Wildlife Service (USFWS) for review and comment. The agreement focuses on the environmental services that would be provided by the USFWS. These services would include assisting TxDOT and FHWA in transportation planning, early project assistance, project consultation, training and the development of programmatic approaches to identifying and evaluating environmental issues. We believe the agreement would assist with delivering transportation improvements more efficiently and effectively.

IV. Recommendations

Binding Arbitration

The long, drawn out legal battles that occur in many of the major projects cause a significant delay in moving these projects forward. Federal law should contain provisions which expedite resolution of environmental disputes and allow all records of decisions

for projects to be processed within a specific time frame. For example, a new law should be enacted that would reduce the time authorized for the filing of lawsuits on environmental documents to sixty days and provide for binding arbitration to be invoked at the option of any party to the dispute.

Arbitration is a form of alternative dispute resolution in which a dispute is decided outside the court system by an impartial, third-party arbitrator. Arbitration can be either binding or non-binding. In a binding arbitration, the arbitrator's decision is final and a party's ability to appeal is limited. Thus, requiring environmental claims (including NEPA claims) associated with transportation projects to be decided by binding arbitration would remove these disputes from the court system.

In order to show how lawsuits increase the total project cost, below are two real-time examples of projects held up due to constant lawsuits and the costs associated with those delays.

US 281- San Antonio Texas

TxDOT originally planned to expand US 281 north of Loop 1604 in San Antonia Texas in 2005 In September 2005 the project's Low Bid was for $83,653,101. The project then had to be terminated due to a law suit by local interest groups. The cost for terminating this project to the state was **$7,078,317.**

If we were able to take bids on the exact same scope of work today (which we are not due to the continuing law suits on this project) even with the extraordinarily low prices we are realizing on our bids today, the low bid would be estimated to be **$86,240,691.**

So, in conclusion, the state of Texas has paid and additional **$7,078,317** on this project to date (not including any costs for the litigation) and expect to see an increase in the project cost of **$2,587,590**. Combined, this is an increase of **$9,665,907**, which is more than **11%** and increasing.

SH 45 SE- Austin Texas

In July 2004 the project's construction cost was $137,399,780. The project then had to be terminated due to a challenge by a local interest group over the need for a cumulative and indirect impact analysis. The cost for terminating this project to the state was **$1,623,442.** We then spent an additional **$297,414** to perform the cumulative and indirect impact analysis that the FHWA then reviewed to reach the same conclusion they had previously. Of course this allowed the project to once again proceed.

While this analysis was being conducted the project was delayed. This caused the ROW costs on the project (which originally was being done as a design-build project) to escalate by approximately **$5,250,000.** We also

had to pay for the engineering plans to be completed and converted into a design-bid-build approach which cost the state an additional **$950,010.** When the design work and right of way were completed we bid the project and the low bid was for **$139,698,706 which is an increase of $2,298,926.**

Beyond these increases on the project itself, this impact also caused a delay on the completion of the SH 130 project. We settled the impacts on this project with the SH 130 developer for a cost of **$15,421,491.** We also had to pay our attorneys a fee of **$68,705** to address this matter.

When you add all of these costs up it equates to **$25,909,988, which is more than 18% increase to the state of Texas.**

Funding Resource Agencies

A potential means to expedite environmental review times would be allow states to use state funds to provide funds to a federal agency for the purposes of assigning specific staff for the review of transportation projects. The shortage of staff at these agencies is often cited as a reason for delays in the project review process. These other entities also review other non-DOT projects and are working on other agency tasks. This initiative, if enacted, would be a great benefit to TxDOT by expediting the environmental review process.

How much time could be saved by this agreement?

There are 2 types of consultation with USFWS under the Endangered Species Act: formal and informal. Which type of consultation is required is determined by the likelihood of a project to affect an Endangered Species. Eighty-six percent of the projects that required USFWS consultation from FY 2005 – FY 2010 were handled by informal consultation. There is no specified timeframe in statute or regulation for completing informal consultation. **Thirty days** for informal coordination is the proposed performance measure in the draft agreement between TxDOT and USFWS. In FY 2010 the average time for informal consultations that extend beyond 30 was 321 days.

What would be the cost savings?

Cost information was obtained for projects coordinated informally with USFWS in fiscal year 2010. This information was compared to the total cost of funding a position at USFWS. This analysis showed that only 0.47% of total project review time needed to be saved for a dedicated person to pay for themselves, in terms of benefit to the Texas economy.

Project data from FY 2010 was used to estimate the potential cost savings of the agreement associated with informal consultations for one year. In

FY 2010, 24 TxDOT projects included informal consultation with USFWS. The total project cost of these projects ranged from $72,193 to $44,954,717. Actual review times were compared to the performance measures in the draft agreement to calculate a time savings for each project. **Based on the anticipated time savings, the cost of the project, and a 4% annual inflation rate, it was calculated that if the agreement had been in place in FY 2010, the net potential cost savings to the state may have been $5,561,554.**

V. Conclusion

TxDOT appreciates the opportunity to submit written testimony to the committee on the department's activities to improve the efficiency and timeliness of developing the environmental documents for the state's many highway improvement projects. TxDOT is committed to working with our federal partners to streamline these processes while ensuring we comply with all applicable state and federal environmental laws, rules and regulations. The agency looks forward to continue to work with the committee.

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