COMMENTS OF THE ATTORNEYS GENERAL OF NEW YORK, DELAWARE, THE DISTRICT OF COLUMBIA, GUAM, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, VERMONT, WASHINGTON, AND WISCONSIN, THE CORPORATION COUNSEL OF THE CITY OF NEW YORK, AND THE COUNTY ATTORNEY OF HARRIS COUNTY, TEXAS

December 23, 2020

Via Regulations.Gov

April Marchese
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Re: Notice of Proposed Rulemaking "Procedures for Considering Environmental Impacts," 85 Fed. Reg. 74640 (Nov. 23, 2020)
Docket ID No. DOT-OST-2020-0229

Dear Director Marchese and Ms. Bednarczyk:

The Attorneys General of New York, Delaware, the District of Columbia, Guam, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Vermont, Washington, and Wisconsin, the Corporation Counsel of the City of New York, and the County Attorney of Harris County, Texas (collectively, "States") respectfully submit these comments on the U.S. Department of Transportation's (DOT) notice of proposed rulemaking (Proposed Rule) regarding proposed revisions to DOT Order 5610.1C establishing the responsibilities and procedures for complying with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347.[1] For the reasons stated below, the States oppose the Proposed Rule and request that it be withdrawn.

I. INTRODUCTION

DOT's Proposed Rule implements the Council on Environmental Quality's (CEQ) 2020 NEPA regulations, which became effective September 14, 2020 (CEQ Regulations).[2] During the comment period on CEQ's rulemaking, many of the undersigned States submitted detailed comments in opposition to the new regulations, which are attached to and hereby incorporated

[1] The notice of proposed rulemaking is titled "Procedures for Considering Environmental Impacts," 85 Fed. Reg. 74640 (Nov. 23, 2020), Docket ID No. DOT-OST-2020-0229.

[2] *See* 85 Fed. Reg. 43,304 (Jul. 16, 2020) (effective Sept. 14, 2020).

into this letter as Attachment A. The States' comments objected to the CEQ Regulations based on their significant narrowing of the environmental review process for federal projects in violation of NEPA and the Administrative Procedure Act (APA). The States' comments detailed how the CEQ Regulations substantially undermine NEPA by (1) shifting the purpose of the regulations from ensuring detailed, "action-forcing" environmental review of agency actions to a paperwork exercise; (2) reducing the number of federal projects to which NEPA applies; (3) limiting the scope of alternatives considered in environmental reviews; (4) limiting the scope of impacts considered; (5) limiting public involvement; and (6) attempting to constrain judicial review. The Proposed Rule adopts or implements many of the significant flaws of the CEQ Regulations detailed in the States' CEQ comments. *See* Attachment A.

In addition to implementing the unlawful CEQ Regulations, the Proposed Rule would introduce other significant changes to DOT's internal procedures that prioritize expedience over reasoned decision making and environmental protection.

DOT proposes to:

- remove specific substantive language from DOT's procedures that implement NEPA's core direction and purposes;

- limit the time for preparation of and scoping for Environmental Assessments (EA) and Environmental Impact Statements (EIS);

- drastically increase the number of categorical exclusions applied to exclude operational activities from NEPA review;

- allow the Operating Administrations from one DOT sub-agency to apply the categorical exclusion of another sub-agency, increasing the number of actions excluded from NEPA review without adequate analysis of potential impacts;

- exclude "research activities" from all NEPA review with no justification or application of any categorical exclusion; and

- dispense with the recommendation to hold public hearings as a condition to federal approval of a proposed action.

These proposed changes: (1) substantially undermine NEPA's direction and purpose; (2) violate the APA and NEPA; (3) are inappropriate while the CEQ Regulations are being challenged in multiple federal courts by numerous States, Territories, local governments, and non-governmental organizations; and (4) have the additional effect of further marginalizing environmental justice communities. Furthermore, the Proposed Rule will adversely impact the interests of the States by exposing our residents and natural resources to significant environmental harms, including increased greenhouse gas emissions. In sum, the Proposed Rule is unlawful, arbitrary and capricious, and should be withdrawn.

II. DOT'S PROPOSED RULE WILL ADVERSELY IMPACT THE INTERESTS OF THE STATES

The States and their residents have a strong interest in, and reliance upon, a complete NEPA review process with significant opportunities for public participation to protect our residents, property, and natural resources. NEPA reviews provide an important tool for state, territorial, and municipal agencies to participate in and shape federal decisions that impact local resources, especially in the context of infrastructure projects overseen by DOT. For example, for issues such as transporting liquefied natural gas (LNG) by rail through densely populated areas, it is critical for DOT to consider the public safety hazards and upstream and downstream emissions from those operations. Similarly, the construction of interstate highways demands consideration of numerous factors, from the cumulative pollution impacts of traffic on environmental justice communities to habitat degradation impacts on local wildlife.

The Proposed Rule also ignores the critical importance of addressing the impacts of climate change by eliminating the requirement to consider cumulative impacts and removing reference to indirect effects.[3] For many federal transportation proposals, the impacts from greenhouse gas emissions are among the most severe and pose the greatest concern for human health and the environment; but the upstream and downstream emissions from these projects are often considered "indirect."[4] Thus, where environmental review takes place almost entirely through NEPA, the Proposed Rule's narrowing of cumulative and indirect effects and expedited review process would expose the States and our resources to significant environmental impacts.[5]

III. DOT'S PROPOSED RULE SUBSTANTIALLY UNDERMINES NEPA'S DIRECTION AND PURPOSE

NEPA was established over 50 years ago as a comprehensive policy for ensuring detailed environmental review of federal actions.[6] In passing NEPA, Congress recognized the "critical importance of restoring and maintaining environmental quality to the overall welfare and development of man" and encouraged the use of "all practicable means … to create and maintain conditions under which man and nature can exist in productive harmony."[7]

To achieve this important policy, NEPA emphasizes the cooperation of federal agencies with state and local governments, concerned citizens, and private organizations to ensure federal accountability in its consideration of the environment and public health. NEPA requires agencies to prepare an EIS for "major Federal actions significantly affecting the quality of the human

[3] *See, e.g. Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172,* 1216 (9th Cir. 2008) ("The impact of GHG emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.").

[4] *See, e.g.*, U.S. Global Change Research Program, *Fourth National Climate Assessment* (2018).

[5] *See Attachment A,* at 70-73.

[6] *See* 42 U.S.C. § 4321; National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

[7] 42 U.S.C. § 4331(a).

environment."[8] An EIS must consider and evaluate proposed actions and alternatives and adequately assess the environmental impacts of such actions and alternatives.[9] States and the public are entitled to participate in this process, including through identifying alternatives that improve a proposed action or reduce its environmental impacts and identifying information that the agency may not have known existed.[10]

CEQ's prior regulations and guidance prioritized public participation and emphasized that "[t]wo major purposes of the environmental review process are better informed decisions and citizen involvement, both of which should lead to implementation of NEPA's policies."[11] In contrast, the new CEQ Regulations hinder public involvement and informed decision making by significantly reducing opportunities for public input and the substance and depth of NEPA's environmental review requirements in exchange for purported efficiency. The CEQ Regulations, upon which the Proposed Rule heavily relies, shift NEPA's focus from detailed, action-forcing consideration of environmental impacts to a box-checking exercise.

DOT's Proposed Rule thus exacerbates the damage already caused by the CEQ Regulations by further undermining the purpose and direction of NEPA. DOT claims the Proposed Rule would "enhance and modernize" the Department's environmental review processes[12] but the changes in the Proposed Rule ignore the critical importance of NEPA in ensuring that impacts on public health and the environment are identified and fully considered before DOT and its sub-agencies take action.

IV. DOT'S PROPOSED RULE VIOLATES THE APA AND NEPA

If finalized, DOT's Proposed Rule would violate the APA and NEPA. Pursuant to the APA, a reviewing court "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[13] An agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[14] Where an agency rule departs from longstanding policies, the agency must show that "there are good reasons" for the changes, and demonstrate that its new rule is "permissible under the statute."[15]

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[8] *Id.* § 4332(2)(C).

[9] *Id.*

[10] *See, e.g.*, *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989).

[11] CEQ, A CITIZEN'S GUIDE TO THE NEPA: HAVING YOUR VOICE HEARD, at 2 (Dec. 2007), https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf (last visited December 21, 2020).

[12] 85 Fed. Reg. at 74641.

[13] 5 U.S.C. § 706(2)(A), (D).

[14] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation omitted) [hereinafter *State Farm*].

[15] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *See also Am. Wild Horse Pres. Campaign v. Perdue,* 873 F.3d 914, 927 (D.C. Cir. 2017).

As discussed below, DOT provides little data or analysis to justify these significant changes to its internal procedures, further compounding the harms from CEQ's drastic and comprehensive revisions to its entire body of NEPA regulations. DOT's Proposed Rule is arbitrary and capricious and unlawful because it: (A) improperly limits the scope of NEPA's application; (B) improperly limits public participation; and (C) improperly seeks to limit judicial review.

A. The Proposed Rule Improperly Limits NEPA's Application

DOT's Proposed Rule attempts to unlawfully and unreasonably narrow NEPA's application in significant ways.

First, the Proposed Rule removes specific references in DOT's former procedures to a variety of environmental concerns, including "the preservation of the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites; preservation, restoration, and improvement of wetlands; improvement of the urban physical, social, and economic environment; and provision of opportunities for disadvantaged persons."[16] It also removes language from the former procedures stating that "the EIS, FONSI, and determination that a proposed action is categorically excluded serve as the record of compliance with the Department's environmental review policy, NEPA procedures, and other environmental statutes and Executive orders."[17] Excluding this language undermines essential aspects of NEPA, including the critical importance of restoring and maintaining environmental quality and the requirement that agencies consider impacts significantly affecting the quality of the human environment.[18]

Second, the Proposed Rule reduces the quality and comprehensiveness of EAs and EISs by establishing unreasonable and unworkable time and page limits.[19] Specifically, the Proposed Rule adopts a presumptive one-year time limit for an EA, a two-year limit for an EIS, and a 150-page limit for an EIS. While DOT's proposed time limits follow those set forth in the CEQ Regulations, they similarly fail to recognize that process timelines can be affected by a range of factors—many outside of agency control—including "the potential for environmental harm; the size of the proposed action; other time limits imposed on the action by other statutes, regulations, or Executive Orders; the degree of public need for the proposed action and the consequences of delay; and the need for a reasonable opportunity for public review."[20] Moreover, requiring agencies to create a page-limited EIS may in fact be more difficult and time consuming than allowing agencies to develop a longer document. DOT offers no explanation or assessment of

[16] 85 Fed. Reg. at 74645.

[17] *Id*.

[18] *See* 42 U.S.C. §§ 4331(a) and 4332(2)(C).

[19] 85 Fed. Reg. at 74641-3.

[20] *See* Attachment A, at 62 (citing CEQ, MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES ON IMPROVING THE PROCESS FOR PREPARING EFFICIENT AND TIMELY ENVIRONMENTAL REVIEWS UNDER NEPA, at 14 (Mar. 6, 2012), https://ceq.doe.gov/docs/ceq-regulations-and- guidance/Improving_NEPA_Efficiencies_06Mar2012.pdf.

how these arbitrary limits would affect the quality of environmental review conducted.[21] They accordingly create a risk of inadequate and unlawful NEPA reviews with no discernable benefit.

Third, the Proposed Rule seeks to drastically reduce the number of actions subject to NEPA review, by significantly increasing the Department's reliance on categorical exclusions. The Proposed Rule adds eleven new categorical exclusions, increasing the number of recognized categorical exclusions by more than 200%.[22] It also creates a process by which one sub-agency can apply the categorical exclusions of another.[23] Furthermore, DOT indicates its intention to use other agencies' categorical exclusions, further increasing their overall use and reducing the number of actions that receive NEPA review.[24] Each of these changes could lead to overlooked environmental impacts.

Fourth, the Proposed Rule improperly limits consideration of alternatives in EAs to only the proposed action and no-action alternatives, plainly undermining the purpose of this analysis to consider a range of reasonable alternatives.[25] The alternatives analysis, which has been described by courts as the "heart" of an EIS, promotes informed decision making by "sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public."[26] The Proposed Rule also unlawfully attempts to create a presumption that any Final EIS certified by a decisionmaker properly considered all of the alternatives, information, analyses, and objections submitted.[27]

Fifth, the Proposed Rule improperly limits the scope of impacts DOT must consider by eliminating the requirement to consider "cumulative effects" and removing any reference to "indirect effects." This change is a significant departure from NEPA's statutory requirements because the cumulative effects analysis is "essential to effectively managing the consequences of

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[21] *State Farm.*, 463 U.S. at 43 ("the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (internal quotations omitted).

[22] 85 Fed. Reg. at 74648.

[23] *Id*.

[24] *Id*. at 74647.

[25] Agencies such as DOT must "give full and meaningful consideration to all reasonable alternatives" in an EA, and the "existence of a viable but unexamined alternative renders an EA inadequate," *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (holding BLM's EA analysis of four alternatives was inadequate where all resulted in the same intensity of grazing impacts). Although the discussion of alternatives may be more limited in an EA than in an EIS, "[t]his alternatives provision applies whether an agency is preparing an [EIS] or an [EA], and requires the agency to give full and meaningful consideration to all reasonable alternatives." *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp*., 545 F.3d 1147, 1153 (9th Cir. 2008) (internal quotations omitted) (emphasis added); *see also* 42 U.S.C. 4332(2)(C); *see also* Former 40 C.F.R. § 1508.9(b) (1978) (former CEQ regulations requiring discussion of reasonable alternatives).

[26] *Wildearth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1226 (10th Cir. 2017) (citing Former 40 C.F.R. § 1502.14 (1978)); *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1054 (9th Cir. 2007) (same).

[27] 85 Fed. Reg. at 74650.

human activities on the environment," including those related to climate change.[28] Instead, the Proposed Rule follows CEQ's unlawful approach, which requires consideration only of effects that are "reasonably foreseeable" and have a "reasonably close causal relationship to the proposed action."[29]

Finally, the Proposed Rule eliminates NEPA review for rulemaking, including this one[30] and for "research activities."[31] The Proposed Rule also suggests, without further explanation, that "[l]oans, loan guarantees, or other forms of financial assistance may be actions subject to NEPA when the [Operating Administration] exercises sufficient control and responsibility over the effects of such assistance."[32] Thus, the Proposed Rule establishes a subjective new test for determining whether NEPA will apply, making it unclear which types of actions are likely to be excluded going forward. Furthermore, these revisions contradict NEPA's clear mandate that federal agencies conduct environmental review for every major federal action significantly affecting the environment.[33]

B. The Public Process for the Proposed Rule is Deficient

The APA requires agencies to provide the public with sufficient notice of a proposed rulemaking and a meaningful opportunity to comment on the proposed rule's substantive content.[34] But by providing only 30 days to comment—including issuing the Proposed Rule immediately before Thanksgiving—and no opportunity for public hearings, DOT has made this process woefully deficient. DOT has failed to follow its own administrative policy stating that the comment period for significant rules should be at least 45 days,[35] and the agency has denied multiple petitions to extend the comment period.[36]

The current comment period length and timing is insufficient for States and the public to thoroughly review and respond to the Proposed Rule and will undermine public participation. The States and DOT frequently work together on NEPA actions. For example, Washington's Department of Transportation and the Federal Highway Association jointly worked on the NEPA process to replace the State Route 99 Alaskan Way viaduct in Seattle, Washington, where rigorous environmental review and meaningful public engagement led to a selected alternative that worked for state and federal agencies, local governments, tribes, and the public, including minority and low-income communities. Thus, the rushed timeline for this rulemaking, for which

[28] CEQ, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Jan. 1997), https://ceq.doe.gov/publications/cumulative_effects.html.

[29] 85 Fed. Reg. at 74657.

[30] *Id*. at 74648.

[31] *Id*. at 74644.

[32] *Id*. at 74653.

[33] 42 U.S.C. § 4332.

[34] 5 U.S.C. § 553(b)–(c).

[35] 49 CFR § 5.13(i)(3).

[36] 85 Fed. Reg. 83881 (Dec. 23, 2020).

DOT failed to offer any rational explanation, limits meaningful input from the States with which DOT frequently partners.

C. The Proposed Rule Improperly Seeks to Limit Judicial Review

The Proposed Rule incorporates CEQ's burdensome exhaustion requirement that "public comments be solicited as early in the process as possible, that they be specific, and that [Operating Administrations] provide notice that comments not submitted shall be forfeited as unexhausted."[37] Because this process requires a level of knowledge about NEPA that many members of the public do not have, it threatens to exclude a significant percentage of the public from meaningful participation, in turn diminishing the NEPA comment process. In addition, the Proposed Rule attempts to further limit judicial review by stating that an EIS is not final agency action. [38] DOT's Proposed Rule thus improperly seeks to limit judicial review of defective NEPA reviews.

V. THE TIMING FOR DOT'S PROPOSED RULE IS INAPPROPRIATE

The Proposed Rule's timing is premature, while CEQ's NEPA Regulations are being challenged in multiple federal courts across the country, including by many of the States.[39] Even if CEQ's Regulations survive litigation, agencies have until September 14, 2021 to promulgate regulations implementing NEPA; yet DOT is pursuing a rulemaking with a truncated comment period immediately prior to a change in presidential administration.[40] It is improper for DOT to propose, much less finalize, these significant new regulations at this time.

VI. LIMITING NEPA REVIEW OF DOT PROJECTS MAY HAVE THE ADDITIONAL EFFECT OF FURTHER MARGINALIZING ENVIRONMENTAL JUSTICE COMMUNITIES

Eliminating the cumulative effects analysis also undermines analysis of impacts on environmental justice. Executive Order 12898 instructed federal agencies to "make achieving environmental justice part of their mission" – "to the greatest extent practicable and permitted by law."[41] NEPA is one of the primary tools through which concerns over the equitable impacts of a project's burdens are voiced and addressed.[42] By arbitrarily limiting the range of projects subject to NEPA review, the scope of impacts considered during such review, and the public's ability to meaningfully participate in the documentation of environmental concerns and development of alternatives, the Proposed Rule will further suppress the voices of these marginalized

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[37] 85 Fed. Reg. at 74647.

[38] *Id*. at 74645.

[39] *See California v. Council on Envtl. Quality*, No. 3:20-cv-06057-RS (N.D. Cal. Filed Aug. 28, 2020); *Envtl. Justice Health All. v. Council on Envtl. Quality* Case 1:20-cv-06143 (S.D.N.Y Filed Aug. 6, 2020); *Wild Virginia v. Council on Envtl. Quality*, No. 3:20-cv-00045-JPJ-PMS (W.D. Va. Filed July 29, 2020).

[40] 85 Fed. Reg. at 74641.

[41] Exec. Order 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

[42] *See* FHWA Guidance on Environmental Justice and NEPA, Dec. 16, 2011, https://www.environment.fhwa.dot.gov/env_topics/ej/guidance_ejustice-nepa.aspx

communities. The burdens of federal transportation projects have historically fallen on communities of color, and robust NEPA review offers one of the few processes for assuring that that pattern does not continue into the future.

VI. CONCLUSION

For the reasons stated above, the States urge DOT to withdraw its Proposed Rule.

Respectfully submitted,

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